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FIELD SERVICE MANUAL

Indian Infantry Battalion

1926



CALCUTTA GOVERNMENT OF INDIA
CENTRE LICATION BRANCH

This Manual is published by order of the Government of India.

E. BURDON,

Secretary to the Government of India

DELHI;

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FIELD SERVICE MANUAL.

INDIAN INFANTRY BATTALION AND GURKHA RIFLE BATTALION.

SECTION I—GENERAL NOTES.

1. Authority of Field Service Manual.—This manual is issued in supersession of all previous Field Service Manuals and War Equipment Tables for an Indian Infantry Battalion or a Gurkha Rifle Battalion.

Section VII of the manual will henceforth constitute the sole authority for the issue, on or after mobilization, of items (i) to (iv) below, while Sections IV-S and V of the Manual will respectively constitute the sole authority for items (v) and (vi) below —

- (i) Arms, Ammunition.
- (ii) Personal equipment.
- (iii) Clothing and necessaries.
- (iv) Unit equipment, including medical and veterinary equipment.
- (v) Books, forms and stationery.
- (vi) Rations and forage.

2. Scope of Field Service Manual.—This manual is intended to furnish the unit and sub-unit commanders concerned with all information in a compendious form regarding war establishments, war outfit, rations, forage and transport loads required by them on mobilization and in the field and the authority for indenting for the same.

3. Mobilization.—(a) Instructions regarding the action to be taken on receipt of orders to mobilize are contained in Mobilization Regulations (India).

(b) Details not accompanying the unit in the field:—

- (i) The 2nd Echelon clerk shown in the war establishment, will mobilize with the battalion and be sent direct to G. H. Q., 2nd Echelon on the battalion leaving its peace station. For an overseas campaign this clerk will accompany the battalion to the overseas base.
- () The first reinforcement shown in the war establishment will normally be mobilized by the depot, if existing in peace and despatched direct to the appropriate reinforcement camp. For an campaign, however, the first reinforcement will mobilize battalion and accompany it to the overseas base. Bns for which no depot exists in peace will in all their own first reinforcements and despatch them above.

4 Basis of establishment and outfit—The tables contained in this manual are drawn up on the basis of a campaign on or beyond the North West frontier of India.

For a campaign under different conditions certain modifications may become necessary and will be notified by Army Headquarters, India.

5 Private servants—Each mounted officer is allowed one syce (groom) per authorized charger.

No other private servants are allotted to individual officers but a pool of servants is allowed for officers and for the officers mess. The nature of employment of these latter will be decided by the officer commanding.

6 Animals—Procedure with regard to animals on mobilization is laid down in Mobilization Regulations (India).

The disposal of animal casualties in the field is detailed in Field Service Regulations Vol. I.

When an animal is transferred to another unit including veterinary and remount units its head collar head rope rug body roller and pad, nose bag, beel rope shackle and picketting pegs will be transferred with it.

7 Reinforcements—For information regarding reinforcements see Mobilization Regulations (India).

8 War outfit—War outfit is the material of all kinds required by a unit in the field.

In the field indents to replace articles of war outfit are submitted direct to the representative of the service concerned at the headquarters of the formation or area to which the indenting unit is allotted.

9 Blankets and Greatcoats—Arrangements for conveyances are as follows—

(i) In summer first line transport is allotted for the carriage of greatcoats while the train transport allows for the accommodation of one blanket per man.

(ii) In winter, each man carries his greatcoat on the person. The first line transport thus set free is available for the carriage of a second blanket per man.

10 Rations forage and baggage—The scales of rations forage and baggage for which transport is provided in the field are shown in Sections IV and V of this manual.

11 Transport—(a) The War Establishment of an Indian Infantry battalion gives details of a normal and an alternative scale of transport. Orders initiating mobilization will specify which of these scales is to be employed.

(b) The transport of a battalion is composed of—

(i) Regimental pack mules which form part of the peace establishment of the battalion.

(ii) Attached transport, which including animals vehicles and drivers, will be provided by the Indian Army Service Corps. In the War Establishment this transport is shown in italics.

SECTION II.—PEACE ESTABLISHMENT

(c) Active Indian, Infantry Battalion

1	Remarks	PERSONNEL														ANIMALS			
		INDIAN														Riding horses	Saddling ponies	Pack mules	TOTAL
		FOLLOWERS																	
		INDIAN																	
		ARTISANS																	
2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	
	British officers	Officers	Headmen	Headmen	Headmen	Headmen	Headmen	Headmen	Headmen	Headmen	Headmen	Headmen	Headmen	Headmen	Headmen	Headmen	Headmen	Headmen	Headmen

(i) Summary

[illegible]

COMPOSITION IN DETAIL.

(iii) Personnel etc.

[illegible]

[illegible]

(b) Active Indian Language—could

PERSONNEL.										ANIMALS	
FIGHTING MEN										FOL- LOWERS.	
Infantry											
Artillery											
Cavalry											
Engineers											
Medical Officers.											
Total											
1										1	20
2										1	20
3										1	20
4										1	20
5										1	20
6										1	20
7										1	20
8										1	20
9										1	20
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97										1	20
98										1	20
99										1	20
100										1	20

**Drivers for mules for
Lewis gun small Arm**

Talent

your market

Checks for Indian reserve

Water carriers
disinfectants

2017年12月

— 1912 —

Total No. of Lines

... GROSSWERT (ELCH)

YOUR COMPANY (continued)

Community Development

Company name: _____
(A company number)

Company officer has

Company
MAIL

Company qua Corpn

1000

**They have their
own match**

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circled

Full rank

Adjusted for age

Value chain
positioning

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Department of
Population and
Development

(a) ACTIVE INDIAN INFANTRY BATTALION—contd.

5

Details.	PERSONNEL																	ANIMALS				
	FIGHTING MEN																	Total	Riding ponies	Riding horses	Total	
	Infantry																					
	Artillery																					
	Officers	Headquarters	Headquarters	Headquarters	Headquarters	Headquarters	Headquarters	Headquarters	Headquarters	Headquarters	Headquarters	Headquarters	Headquarters	Headquarters	Headquarters	Headquarters	Headquarters					
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21		
Four sections (all up- and Four sections— 1. Signalling section 2. Signalling section					1	1						23	0					1	1			
Total platoon		1	1			1					1	30	30					1	1			
Total four platoons		4	4		8	4					4	120	144					4	4			
Total company	2	4	7		9	4					4	103	151	11		1		4	5			
Total up on transport	8	10	13		35	10					10	49	101	40		4		10	20			

NOTES.

GENERAL.

(1) The above establishment will include trained signallers and machine gun officers. Selected officers will be detailed in peace to train the signallers of No. 1 Group and the personnel of No. 2 Group of the Headquarters Wing.

(13) The ranks of Indian Officers are —

1 Subadar Major 11 Jemadars
8 Subadars 1 Jemadar Clerk

(14) Religious teachers will be attached on the scale authorised

(15) The ranks of individuals holding certain appointments as shown in the above table will be adhered to as closely as possible. When however in exceptional circumstances it is deemed advisable to withhold promotion in its final rank of his appointment another man may be promoted in his place, provided that the total authorised number of paid ranks is not exceeded. Lance ranks shown in the above table will be paid as such. O C unit is permitted to appoint unpaid lance ranks at his discretion.

(16) A battalion employed with the Covering Force will maintain 2 ponies for the use of the Jemadar Quartermaster and Transport Lance Haridar, respectively.

(17) The 17th Rajput Regiment (Q V O Light Infantry) has 1 additional Jemadar and 1 less sepoy.

9

COMPOSITION IN DETAIL

(18) No British or Indian officers are shown in peace establishment as commanding groups of the Headquarter Wing. Where necessary, officers to command groups will be selected by O C Battalion from the existing establishment.

(19) The headquarters of the provost, water and sanitary establishment are detailed in No 3 Group of the Headquarter Wing. Remaining personnel will be detailed, as required from companies.

[illegible]

[illegible]

PERSONNEL

REGIMENTAL

COMPANY

Data 4

REMARK

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21

FOUR PLATOONS (NACE)---
FOUR PLATOONS1. Rifle gun section
2. Rifle section (including recruits)

Total platoon

Total four platoons

Total company

Total four companies

In addition to the above the establishment includes 15 recruit boys

[illegible]

(i) The above establishment will include trained signallers and machine gun officers. Selected officer in peace to train the signallers of No 1 Group and the personnel of No 2 Group of the Headquarters

(ii) The ranks of Gurkha Officers are:—

1 Subadar Major 12 Jemadars

9 Subadars 1 Jemadar Clerk

(iii) Religious teachers will be attached on the scale authorised

(iv) The ranks of individuals holding certain appointments as shown in the above table will be adhered to as closely as possible. When, however, in exceptional circumstances it is deemed advisable to withhold from any individual the rank of his appointment another man may be promoted in his place provided that the total authorised number of paid ranks is not exceeded. Lance ranks shown in the above table will be paid as such. O C must be permitted to appoint unpaid Lance ranks at his discretion.

(v) A battalion employed with the Covering Force will maintain 2 ponies for the use of the Jemadar Quartermaster and Transport Lanco Havildar, respectively.

(vi) The 1 and 2nd K. E. O. Gurkha Rifles has 1 additional Jemadar and 1 less Rifleman

COMPOSITION IN DETAIL

(i) No British or Gurkha officers are shown in peace establishment as commanding groups of the Headquarters Wing. Where necessary, officers to command groups will be selected by O C Battalion from the existing establishment.

(ii) The headquarters of the provost, water and sanitary establishments are detailed in No 3 Group of the Headquarters Wing. Remaining personnel will be detailed, as required from companies.

(iii) In peace time officer commanding battalion will arrange for the frequent interchange of personnel other than recruits and followers between the training company and the remainder of the battalion.

TRAINING COMPANY

(i) The Training Company will include among its instructors 2 specialists in Physical Training

(ii) The Training Company will include 2 bandmen and 2 buglers under training in its establishment of Riflemen and Recruits

TABLE SHOWING HOW AN INDIAN INFANTRY BATTALION PASSES FROM PLACE TO WAR ESTABLISHMENT

Details	PERSONNEL										ANIMALS				REMARKS				
	FIGHTING MEN										Hiding Horses	Hiding ponies	Pack mules	TOTAL					
	Indian.																		
	Artificers.																		
	British Officers	Officers.	Havildars.	Lance-Havildars.	Yalaks	Lance Yalaks	Havildars.	Yalaks.	Lance-Yalaks	Depots						Bullocks	Depots	Total.	Class I	Private
12	21	40	3	45	25	1		2	17	618	723	50		(a) 23	8	1	36	44	2
2										24	28			(c) 23	2	5		5	4
14	3	4		20	43						45				1				
11	21	44	3	45	49	1		2	17	637	932	50	23	23	10	3	38	49	2
All British Officers and other personnel etc. reported on would be sent as detailed in column of which is enclosed with this report.																			

TABLE SHOWING HOW AN INDIAN INFANTRY BATTALION PASSES FROM PEACE TO WAR ESTABLISHMENT—continued

Detail.	PERSONNEL.												ANIMALS				REMARKS		
	FIGHTING MEN												FOLLOWERS						
	Indians.												Private						
	British Officers	Officers.	Headquarters.	Lance-Headquarters.	Headquarters.	Lance-Headquarters.	Headquarters.	Lance-Headquarters.	Headquarters.	Lance-Headquarters.	Headquarters.	Lance-Headquarters.	Class I	Private	Riding horses	Mildred ponies		Trick mules	Total	Bicycles.
Deduct ranks and personnel from which promotions or with drawbacks are to be made on mobilization.	14	24	43	1	47	37	1	1	1	1	1	1	50	23	10	5	36	49	6
Total (with reductions)	1	8	4	8	8	8	8	8	8	8	8	8	787	812	10	10	49	49	6
Personnel to join T. H. on mobilization (excluding sick and unable to be mobilized at 46)	1	8	4	8	8	8	8	8	8	8	8	8	787	812	10	10	49	49	6
TOTAL WAR ESTABLISHMENT	15	21	41	1	59	57	1	1	1	1	1	1	50	23	10	5	36	49	6
			(c)										50	23	10	5	36	49	(d) 6

(d) if detailed for covering force or Field Army 4 if allotted to Internal Security (e) includes clerks attached to G II Q, 2nd Lohiston

(d) If detailed for covering force or Field Army & if allotted to Internal Security
 (e) Includes clerk attached to G. H. Q., 2nd Lieuten

- (i) As shown in the above table, the following additions to establish unit will be required on mobilization —
- 2 British Officers
 - 24 Sepoys (Excluding replacement of sick and undies, estimated at 46)
 - 23 Private Followers
 - 2 Riding Horses.
 - 2 Riding Poles.
 - 4 Bicycles (for Covering Troop and Field Army Unit 2 for Internal Security Unit)
- (ii) The following promotions will be made on mobilization —
- | | |
|---|---|
| <ul style="list-style-type: none"> 3 Havildars to Jemadars 8 Lance-Havildars and Naiks to Havildars 10 Lance-Naiks to Naik 24 Sepoys to (paid) Lance-Naik | }
See Mobilization Regulations (in file) |
|---|---|
- (iii) Personnel to join T. B. on mobilization are as follows —
- (a) *Living Personnel* — To be despatched to T. B. as soon as possible after receipt of mobilization orders —
- | | |
|---|---|
| <ul style="list-style-type: none"> 1 N. O. 1 Sahadar 1 Jemadar 1 Band Havildar 1 Hinde Major 2 Havildar Instructors 2 Naik Instructors | } To include 1 Signalling Naik and specialists in bombing machine gun and Lewis gun |
|---|---|
- (b) *Non-living Personnel* — To be despatched to T. B. after mobilization is complete and to be distributed in the Record Office and accounts section, and to the affiliated training company, as required —
- 1 Jemadar Clerk.
 - 1 Havildar Clerk.
 - 1 Naik Clerk
 - 2 Sepoy Clerks
 - 4 Pay Naiks
 - 1 Assistant Armourer
- (c) *Sick and Undies* — Estimated at 46, to be despatched to T. B. as soon as possible after receipt of mobilization orders.

TABLE SHOWING HOW A GUARDS RIFLE BATTALION PASSES FROM PEACE TO WAR ESTABLISHMENT

Detail	PERSONNEL												ANIMALS				REMARKS			
	Cavalry				Fighting Vn				Followers				Private	Riding horses	Riding ponies	Pack mules		Bicycles		
	British officers	Officers	Heavydare	Lightdare	Heavydare	Lightdare	Heavydare	Lightdare	Heavydare	Lightdare	Class I	Class II							Total	
Peace Establishment	10	23	19	3	15	27	1					9	50	63	9	36	4	2	a Provided by officers b For Signalling officer and M G Officer c For Quartermaster d Includes Scout Jeopardar and Transport In rider e Includes clerk attached to G H Q 2nd Fch elon f If detailed for covering force or Field Army g If allotted to Internal Security	
All extra British officers etc required and ranks to which promotions are to be made on mobilization	2	3	7	8	22							4	2	40	2	6	5	4		
Total	15	26	26	11	37	27	1					13	50	103	11	36	50	6		
Defect ranks and personnel from which promotions or withdrawals are to be made on mobilization														22						
Total (with promotions)	15	26	26	11	37	27	1						50	103	11	36	50	6		
Personnel to join Group centre on mobilization	2	3	11	12	1							10		1						
Total War Establishment	13	21	11	13	37	1								103	20	23	10	36	40	6

NOTES

(i) As shown in the above table, the following additions to existing establishment will be required on mobilization:-

- 2 British Officers
- 2 Riding Horses
- 3 Riding Ponies
- 2 Class II Followers
- 23 Private followers
- 4 Bicycles (for Covering Troop and Field Army Unit 2 for Internal Security Unit)

(ii) The following promotions will be made on mobilization:-

- 1 Havildar to Jemadar
- 7 Lance-Havildars and Naicks to Havildar
- 6 Lance-Naicks to Naicks
- 23 Riflemen to (old) Lance-Naick

} See Mobilization Regulations (India)

(iii) Personnel to join Group Centre on Mobilization are as under. They will be despatched as soon as possible after receipt of mobilization orders and will be distributed to the cadre record office according to its section and affiliation. Training company as required:-

- 2 British Officers
- 2 Subedars
- 2 Jemadars
- 1 Jemadar Clerk
- 1 Company Havildar Major
- 1 Company Quartermaster Havildar
- 1 Havildar Clerk
- 1 Educational Havildar
- 1 Band Havildar
- 6 *Havildar Instructors* } To include 1 Signalling Naick and 1 specialist in bombing machine guns
- 7 Naick Instructors
- 4 Pay Naicks
- 1 Naick Clerk
- 4 Lance-Naicks
- 2 Deputy Clerks
- 1 Assistant Armorer
- 1 Anglo Major
- 170 Riflemen and recruits
- 10 Class II Followers

} Specially appointed on mobilization

INDIAN INFANTRY BATTALION AND GURKHA RIFLE BATTALION—contd.

Details	PERSONNEL										ANIMALS				REMARKS																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																
	FIGHTING MEN							FOLLOWING			TOTAL	Bred 12 mules	1 each 1 mule	Riding 1 horse		Riding 4 ponies	1 each 1 mule																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																														
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INDIAN INFANTRY BATTALION AND GURKHA RIFLE BATTALION—*contd*

Details	PERSONNEL							ANIMALS			REMARKS					
	FIGHTING MEN							HORSES	MULES	TOTAL						
	Infantry															
	1st Lt	2nd Lt	3rd Lt	4th Lt	5th Lt	6th Lt	7th Lt									
Company quartermaster																
1st Lt																
2nd Lt																
3rd Lt																
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100th Lt																

FOUR PLATOONS (EACH)

How signified—
 1st son command for
 2nd son command for
 3rd son command for
 4th son command for

WAR ESTABLISHMENT.

(m) Transport

(a) Normal scale

Details	Regimental pack mules (l)	ATTACHED (b)				REMARKS
		Vehicles	Drivers	Pack mules	Draught mules	
1st LINE.						
<i>Battalion headquarters and headquarter wing—</i>						
Pack mules for—						(l) Sepoy drivers.
Vickers guns	16		..		..
S A A reserve	(m) 4		6	16	..	(m) Carrying 32 drums each for Lewis guns.
Signalling equipment			2	6		
Water			..	(n) 3	..	(n) 1 to be at disposal of M. O for sick, etc.
A T carts for—						
Medical panniers and stretchers		1	1	.	2	
S A A reserve grenades and Very lights		5	5	.	10	
Cooking pots and great coats		2	2	.	4	
Officers' mess		1	1	..	2	
<i>Four companies—</i>						
Pack mules for—						
Lewis guns	16		..		..
Entrenching tools	..		} 4	{ 8	..	
Water	..			{ 8	..	
A T carts for—						
Cooking pots and great coats.	..	8	8	..	16	
TRAIN						
A T. carts for—						
Baggage and stores—						
Headquarters and headquarter wing	..	5	5	..	10	
Four companies	..	12	12	..	24	
Supplies	..	7	7	..	14	
TOTAL	36	41	55	41	82	
<i>Adi—</i>						
A T carts for tents	..	12	12	..	24	

WAR ESTABLISHMENT—*contd.*

(b) Alternative scale.

Details.	Regimental pack mules (d)	ATTACHED TRANSPORT (b)			REMARKS.
		Drivers	Pack mules	Camels.	
1ST LINE					
<i>Battalion headquarters and headquarter wing—</i>					
Pack mules for—					
Vickers guns	16	..	..	..
S. A. A. reserve	(m) 4	12	37	..	
Grenades and Very lights . . . . .	..	2	6	..	
Signalling equipment . . . . .	..	2	6	..	
Water . . . . .	..	1	(n) 3	..	
Medical panniers and stretchers . . . . .	..	2	5	..	
Cooking pots and great coats . . . . .	..	2	5	..	
Officers' mess . . . . .	..	1	5	..	
<i>Four companies—</i>					
Pack mules for—					
Lewis guns	16	..	..	..
Entrenching tools . . . . .	..	16 {	8	..	
Water . . . . .	..		8	..	
Cooking pots and great coats . . . . .	..		25	..	
TRAIN.					
Camels for—					
Baggage and stores—					
Headquarters and headquarter wing . . . . .	..	3	..	9	
Four companies . . . . .	..	8	..	20	
Supplies . . . . .	..	3	..	14	
Total transport	36	52	114	43	
<i>Add—</i>					
Camels for tents . . . . .	..	5	..	24	

SECTION IV — WAR OUTFIT

1. AMMUNITION

(1) *Scale of ammunition carried in the field and total amount to be carried*

	455 ISSN		303 ISSN					
Intalls	For each piece	Total required for the following — 13 British Officers 21 Indian Officers 1 Bn. Hav. Major 40 Nankers, 1 and 2 of Vickers and Lewis gun teams 1 Range taker 1 Medical officer (attached) Total 77	For each rifle	Total required for 746 (a) other rifles less 42 carrying pistols Total 704	For each Lewis Gun	Total required for the sixteen Lewis guns with a battalion Total 16	For each Vickers Gun	Total required for 12 & four Vickers guns with a battalion. Total 4
On the man or with the gun.	36	2,772	100	70,400	(b) 816	16,836	2,000	20,000
In regimental reserve	12	(c) 10,012	75	(d) 52,800	(e) 576	(d) 14,016	3,000	12,000
Total in 1 battalion each 6	48	3,584	175	1,23,200	1,392	27,652	8,000	32,000
(Grand Total		3,584				1,392,712		

(a) Each soldier takes 100 rounds in A with him

(b) In 15 boxes each holding 47 rounds

(c) 26 rounds in 8 drums and rounds in boxes

(d) Only 6,012 are carried in regimental reserve

(e) Small arms

(f) Small arms

(g) Exclusive of M. O (attached)

This accounts for the discrepancy between (a) and (b) and (c) of this scale. Small arms ammunition is packed in boxes containing 200 rounds (Mark 11) or 100 rounds (Mark 12) each weighing approximately 12 lbs.

(2) Detail of contents and remarks

31

Detail	NORMAL SCALE				ALTERNATIVE SCALE			
	ON TRANSPORT		ON TRANSPORT		ON TRANSPORT		ON TRANSPORT	
	On men	Regimental pack in box	Attached pack in box	A. T. carts	On men	Regimental pack in box	Attached pack in box	On men
Pistol ammunition	rls	rls	rls	rls	rls	rls	rls	rls
	408				468			
	776				750			
	30				30			
	883				888			
114 go taker	1150				1116			
1 Attached Medical officer	30				30			
1 boxes (Regimental reserve)	30				30			
at Pistol Ammunition	2770			(a) 900	2772			(a) 900
GRAND TOTAL	3 070				3 072			

shown are if Mark II is issued. If Mark IV is carried the 3 boxes will all be 050 rounds.

1 AMMUNITION—(contd)

(1) *Price based on current market prices*

Details	NORMAL SCALE			ALTERNATIVE SCALE		
	On men	Re- mental pall mules	Attended by pall mules	A T cars	On men	Re- mental pall mules
As per ammunition order files and per line guns	~0 400	~0 000 13 36 (b) 6 016	(c) 3* 000	(111 000	0 100	~0 000 13 36 (b) 6 016
01 In line of Turkish ranks 4 V Lewis guns 16 Lewis guns Perennial reserve	~0 400	39 3 2	32 000	41 000	0 400	39 3 2
TOTAL		1 829 2				1 829 2
GRAND TOTAL						

(b) In magazines
(c) Lewis guns
Vickers guns
It files

8 000
1 000
53 000

TOTAL

73 000

2 GRENADES AND SIGNAL CARTRIDGES

Detail	Scale per battalion	DISTRIBUTION ON TRANSPORT			
		NORMAL SCALE		TOTAL	ALTERNATIVE SCALE
		Pack mules	A T Carts		Pack mules
<i>Grenades (a)</i>					
Grenades No 36 with detonators, special cartridges, 1440 plug key and gas checks	384	(b) 192	192	384	(c) 384
<i>Signal Cartridges</i>					
10 inch illuminating	800	800		800	800
One inch signal green	80	80		80	80
One inch signal red	80	80		80	80

23
23

- (a) Packed in boxes containing 12 grenades and accessories. Each box filled weighs approximately 29 lbs. If packed in Small Arm Ammunition boxes, contents are 24 grenades and accessories weighing 59 lbs.
- (b) Distributed amongst the 16 pack mules for the carriage of Small Arm Ammunition reserve, grenades can thus be sent to within reach of companies.
- (c) 192 will be distributed amongst the pack mules allotted for the carriage of Small Arm Ammunition reserve, the remainder will be on the transport specifically allotted for the carriage of grenades.

3 SIGNALING EQUIPMENT

34

No.	Article.	Total No	On hand.	ON MULLS						REMARKS	
				Loose No 1 (HEADQUARTERS)		Loose Nos 2 AND 3 EACH (CAMP EQUIPMENT)		Loose Nos 4 5 AND 6 EACH (VISUAL EQUIPMENT)			
				No	Weight lbs oz	No	Weight lbs oz	No	Weight lbs oz		
20-A	At least 8 Aerial Signaling--	1									
20-B	Labels T	12		1	10 0					(b) Only 3 at present same	
20-C	Labels T	3		1	7 8					(c) Only 1 at present same	
20-D	Labels T	3		1	2 0					(d) Only 1 at present same	
20-E	Labels T	3		1	1 0					(e) Only 1 at present same	
20-F	Labels T	3		1	1 0					(f) Only 1 at present same	
20-G	Labels T	3		1	1 0					(g) Only 1 at present same	
20-H	Labels T	3		1	1 0					(h) Only 1 at present same	
20-I	Labels T	3		1	1 0					(i) Only 1 at present same	
20-J	Labels T	3		1	1 0					(j) Only 1 at present same	
20-K	Labels T	3		1	1 0					(k) Only 1 at present same	
20-L	Labels T	3		1	1 0					(l) Only 1 at present same	
20-M	Labels T	3		1	1 0					(m) Only 1 at present same	
20-N	Labels T	3		1	1 0					(n) Only 1 at present same	
20-O	Labels T	3		1	1 0					(o) Only 1 at present same	
20-P	Labels T	3		1	1 0					(p) Only 1 at present same	
20-Q	Labels T	3		1	1 0					(q) Only 1 at present same	
20-R	Labels T	3		1	1 0					(r) Only 1 at present same	
20-S	Labels T	3		1	1 0					(s) Only 1 at present same	
20-T	Labels T	3		1	1 0					(t) Only 1 at present same	
20-U	Labels T	3		1	1 0					(u) Only 1 at present same	
20-V	Labels T	3		1	1 0					(v) Only 1 at present same	
20-W	Labels T	3		1	1 0					(w) Only 1 at present same	
20-X	Labels T	3		1	1 0					(x) Only 1 at present same	
20-Y	Labels T	3		1	1 0					(y) Only 1 at present same	
20-Z	Labels T	3		1	1 0					(z) Only 1 at present same	

[illegible]

3 SIGNALING EQUIPMENT

Serial No.	Article.	Total No	On Hand	ON MULTS						REMARKS
				Loans No 1 (HEADQUARTERS)		Loans Nos 2 AND 3 EACH (CABLE EQUIPMENT)		Loans Nos 4 5 AND 6 EACH (VISUAL EQUIPMENT)		
				No	Weight	No	Weight	No	Weight	
					lbs oz		lbs oz		lbs oz	
AC	Apparatus Aerial Signalling--									(b) Only 3 at present, none stored
100	Hand T	1		1	10 0					(c) Only 2 at present, none stored
101	Signal T	12		1	7 8					(d) Not at present, none stored
102	Signal T	3		1	0 0	1	0			(e) Only 4 at present, none stored
103	Signal T	3		1	1 0	1	1 0			(f) None in hand, others have and the tier - are at present
104	Signal T	3		1	1 0	1	1 0			(g) Will be replaced by a small pattern can will flip
105	Signal T	3		1	0 4	1	0 4			(h) Carried round unless needed
106	Signal T	3		1	0 4	1	0 4			
107	Signal T	3		1	0 4	1	0 4			
108	Signal T	3		1	0 4	1	0 4			
109	Signal T	3		1	0 4	1	0 4			
110	Signal T	3		1	0 4	1	0 4			
111	Signal T	3		1	0 4	1	0 4			
112	Signal T	3		1	0 4	1	0 4			
113	Signal T	3		1	0 4	1	0 4			
114	Signal T	3		1	0 4	1	0 4			
115	Signal T	3		1	0 4	1	0 4			
116	Signal T	3		1	0 4	1	0 4			
117	Signal T	3		1	0 4	1	0 4			
118	Signal T	3		1	0 4	1	0 4			
119	Signal T	3		1	0 4	1	0 4			
120	Signal T	3		1	0 4	1	0 4			
121	Signal T	3		1	0 4	1	0 4			
122	Signal T	3		1	0 4	1	0 4			
123	Signal T	3		1	0 4	1	0 4			
124	Signal T	3		1	0 4	1	0 4			
125	Signal T	3		1	0 4	1	0 4			
126	Signal T	3		1	0 4	1	0 4			
127	Signal T	3		1	0 4	1	0 4			
128	Signal T	3		1	0 4	1	0 4			
129	Signal T	3		1	0 4	1	0 4			
130	Signal T	3		1	0 4	1	0 4			
131	Signal T	3		1	0 4	1	0 4			
132	Signal T	3		1	0 4	1	0 4			
133	Signal T	3		1	0 4	1	0 4			
134	Signal T	3		1	0 4	1	0 4			
135	Signal T	3		1	0 4	1	0 4			
136	Signal T	3		1	0 4	1	0 4			
137	Signal T	3		1	0 4	1	0 4			
138	Signal T	3		1	0 4	1	0 4			
139	Signal T	3		1	0 4	1	0 4			
140	Signal T	3		1	0 4	1	0 4			
141	Signal T	3		1	0 4	1	0 4			
142	Signal T	3		1	0 4	1	0 4			
143	Signal T	3		1	0 4	1	0 4			
144	Signal T	3		1	0 4	1	0 4			
145	Signal T	3		1	0 4	1	0 4			
146	Signal T	3		1	0 4	1	0 4			
147	Signal T	3		1	0 4	1	0 4			
148	Signal T	3		1	0 4	1	0 4			
149	Signal T	3		1	0 4	1	0 4			
150	Signal T	3		1	0 4	1	0 4			
151	Signal T	3		1	0 4	1	0 4			
152	Signal T	3		1	0 4	1	0 4			
153	Signal T	3		1	0 4	1	0 4			
154	Signal T	3		1	0 4	1	0 4			
155	Signal T	3		1	0 4	1	0 4			
156	Signal T	3		1	0 4	1	0 4			
157	Signal T	3		1	0 4	1	0 4			
158	Signal T	3		1	0 4	1	0 4			
159	Signal T	3		1	0 4	1	0 4			
160	Signal T	3		1	0 4	1	0 4			
161	Signal T	3		1	0 4	1	0 4			
162	Signal T	3		1	0 4	1	0 4			
163	Signal T	3		1	0 4	1	0 4			
164	Signal T	3		1	0 4	1	0 4			
165	Signal T	3		1	0 4	1	0 4			
166	Signal T	3		1	0 4	1	0 4			
167	Signal T	3		1	0 4	1	0 4			
168	Signal T	3		1	0 4	1	0 4			
169	Signal T	3		1	0 4	1	0 4			
170	Signal T	3		1	0 4	1	0 4			
171	Signal T	3		1	0 4	1	0 4			
172	Signal T	3		1	0 4	1	0 4			
173	Signal T	3		1	0 4	1	0 4			
174	Signal T	3		1	0 4	1	0 4			
175	Signal T	3		1	0 4	1	0 4			
176	Signal T	3		1	0 4	1	0 4			
177	Signal T	3		1	0 4	1	0 4			
178	Signal T	3		1	0 4	1	0 4			
179	Signal T	3		1	0 4	1	0 4			
180	Signal T	3		1	0 4	1	0 4			
181	Signal T	3		1	0 4	1	0 4			
182	Signal T	3		1	0 4	1	0 4			
183	Signal T	3		1	0 4	1	0 4			
184	Signal T	3		1	0 4	1	0 4			
185	Signal T	3		1	0 4	1	0 4			
186	Signal T	3		1	0 4	1	0 4			
187	Signal T	3		1	0 4	1	0 4			
188	Signal T	3		1	0 4	1	0 4			
189	Signal T	3		1	0 4	1	0 4			
190	Signal T	3		1	0 4	1	0 4			
191	Signal T	3		1	0 4	1	0 4			
192	Signal T	3		1	0 4	1	0 4			
193	Signal T	3		1	0 4	1	0 4			
194	Signal T	3		1	0 4	1	0 4			
195	Signal T	3		1	0 4	1	0 4			
196	Signal T	3		1	0 4	1	0 4			
197	Signal T	3		1	0 4	1	0 4			
198	Signal T	3		1	0 4	1	0 4			
199	Signal T	3		1	0 4	1	0 4			
200	Signal T	3		1	0 4	1	0 4			

[illegible]

4 MACHINE GUN EQUIPMENT

(1) *Vickers guns*

The following tables give a list of the war equipment of the Vickers gun platoons of an Infantry battalion. It includes the pack saddlery and line gear for the sixteen mules who carry this equipment and also load tables for the gun and ammunition mules.

Section	Detail	Number	REMARKS
5 B	<i>Packsaddlery and carrying equipment for machine gun</i>		
	Packsaddlery G S —		
	Breechings	16	
	Collars breast	16	
	Cruppers	16	
	Girths	32	
	Blankets	16	
	Straps girth	64	
	Packsaddlery G S I P —		
	Bts bridoon (a)	16	
	Collars head (a)	16	
	Heads bridoon (a)	16	
	Reins bridoon (a)	16	
	Ropes baggage	4	
	Packsaddlery M G 303 —		
	Bands belly	4	
	straps long	4	
	short	4	
	supporting	8	
	Bottles water leather	8	
	Carriers 1 necebr	4	
	Hangers gun sling	4	
	tripod sling	4	
	Racks belt box I P —		
	near	10	
	Off	10	
	Saddles I P	16	
	Securera tripod I P	4	
	Straps deta halie—		
	Pick and belve } top load {	8	
	Shovel } top load {	8	

(a) Replaces packsaddlery G S.— Bts bridoon Collars head Mark
Reins bridoon, when existing stock stated.

4 MACHINE GUN EQUIPMENT—*cont'd**Equipment other than carrying equipment and filled spare parts boxes and cases*

Sect on	Detail	Number	REMARKS.
<i>Miscellaneous</i>			
2 B	Axes pick heads 6½ lbs (or 4½ lbs)	8	
15 B	Cases No 2 infantry range finder	1	
15 B	Covers No 2 infantry range finder	1	
10 B	waterproof 6½ x 6½	16	
13 C	Flannelette yds	30	
15 B	Frogs stand No 2 infantry range finder	1	
2 B	Helves manl 3½" (or 36" ferruled helves)	8	
26	Lut ng ozs	24	
15 B	Range finder infantry No 2	1	
2 B	Shovels G S	8	
15 B	Stands No 2 infantry range finder	1	
8 D	Watches stop 1/4th second	1	
<i>Ammunition</i>			
27 A	Cartridges S A ball 303"—		
	In belt boxes	90 000	
	In boxes with regimental reserve	12 000	
<i>Guns and equipment</i>			
16 B	Adapters condenser steam	4	
16 B	Bags armourers M C filled	1	
16 B	Barrels spare (b)	4	
16 B	Belts ammunition 303 "M O rounds	80	
16 B	Boxes belt ammunition M G Nos. 1 and 2	80	
16 B	Boxes spare parts and tools (filled)	2	
16 B	Cans 1 pint	4	
16 B	1 M C	4	
14	Lubricatin No 9	4	
16 B	Cases cans 3 3" M G	3	
16 B	spare parts and tools filled	4	
16 B	spare barrel and cleaning rol	4	
16 B	Carriers ammunition belt box	4	
15 B	Chronometers 3 1/2" Vickers M C	2	
16-B	Condensers steam	4	
16 L	Cups muzzle attachment	6	

(b) On mobilization the worn out barrel of the gun will be replaced by one of spare barrels held on mobilization charge and the worn barrel returned to

4 MACHINE GUN EQUIPMENT—contd

Equipment other than carry ing equipment and filled spare parts boxes and cases—contd

Section	Detail	Number	REMARKS
<i>Guns and equipment—contd</i>			
16 B	Fore sights bar deflection	4	
16 B	Guns machine Vickers 303"	4	
16 B	Handguards, barrel casing	4	
16 B	Lamps aiming M C	2	
16 B	Mountings tripod 303"	4	
16 B	pins joint crosshead (spare)	4	
16 B	elevating gear	4	
	(spare)		
16 B	Pins firing	8	
16 B	Postes fore sights bar deflection	4	
16 B	Posts aiming zero M G	4	
16 B	Protractors M G No 3	2	
16 B	Plugs belt	2	
16 B	Rods cleaning 303 M G	4	
16 B	Rules slide M G	3	
16 B	Screws clamp checker traverse	1	
16 B	Sights night fore Vickers 303" M G	4	
16 B	back	4	
16 B	fore -015	4	
16 B	03"	4	
<i>Line gear</i>			
A	Base nose pattern 1918	16	
5 A	Brushes harness hard	16	
5 A	horse	16	
5 A	Buckets water canvas I P	4	
5 A	Blankets I P 6 x 8	16	
5 A	Combs curry	16	
13 C	Dusters	32	
12 A	Hammers peckettine P	2	
12 A	Hooks bull switching	2	
12 A	Nets forage	6	
5 A	Pads, roller C S	16	
5 A	Peckettine I P No. 1	32	
2 A	Popes heel 101	16	
5 A	Rollers, G S	16	
2 A	Prs, horse (c)	16	
5 A	Scissors trimming	2	prs
5 A	Shackles P A forefoot	16	
5 A	I P No 1	16	
5 A	Sponges	16	

() Only carried when spec

ort is allotted.

4 MACHINE GUN EQUIPMENT—contd

Detail and weight of pack-saddlery carried by gun and ammunition mules

Detail	Weight	REMARKS
	lb oz	
<i>Items common to both gun and ammunition set</i>		
Packsaddlery G S —		
Breeching	1 8½	
Collars breast	1 11½	
Carriers	0 10½	
Girths (1 pair)	1 11	
Panniers (1 pair)	13 0	
Straps girth (2 pairs)	1 5	
Packsaddlery G S I P —		
Bite hindoon	0 14½	
Collars hind	2 0½	
Heads hindoon	0 7	
Heads bridon	0 12½	
Packsaddlery M G 303 —		
Saddle 1 P	14 4	
Straps saddle	0 5½	
TOTAL		39 13
<i>Articles of linegear carried on both gun and ammunition mules</i>		
Blankets 1 P, 6 0 (a)	5 0	
Pegs, pin buttons, 1 P (b)	4 0	
Shackles, P. A forefoot (c)	0 8	
<i>Items peculiar to gun mule</i>		
Packsaddlery, M G 303 —		
Panda belly	1 2	
" " straps long and short (10 each)	0 15½	
" " straps supporting	0 2½	
TOTAL		2 4½

(a) Carry 1 under saddle.

(b) Carried in leather pocket fitted on each pannier.

(c) Carried on mule's neck.

Load Table Gun Mule

No article	No	Wt in lbs	Name	No	Wt in lbs	(Total)	N	Wt in lbs
Heavy tripod stand	1	9	Bottle water filled	1	19	Hand cranked	1	7
Tripod with dial	1	2	Saddlery common to all mules	1	44	Gun tripod with tripod	1	45
Tripsod source	1	2	Saddlery specific to acts gun mule	1	2	Gun tripod	1	6
In packing		7	For a picketing No 1			Gun tripod	1	1
			For a picketing and chain on mule and neck	1	21	Carriage mule	1	7
Total in article		70	Total		114	Total off side		64
			Total weight gun mule	299 lbs				

Load Table, 1st Ammunition mule

Back	1	13	Square post box (filled)	1	12	Back	1	13
and 1 in 1 tall box	4	45	Saddle	1	44	Drum filled in metal	4	65
			For a picketing No 1	2	4	For a picketing	7	7
and 1 in 1 2	1	6	Box lamp along mule	1	14	For a picketing	2	2
			For a picketing and chain on mule and neck	1	21	Total		114
		107	Total weight 1st Ammunition mule		70 lbs	Total Table		114

Load Table and Annotation rule.

[illegible]

Task	1	13	2 (kilo) end and before		Back	1	10
Left side, in metal boxes	4	88	side of G 3		Left side in metal boxes	4	88
			side of 1000				
			Left side of box				
			Side of 1000	1			
			Left side of 1000	-			
			Left side of 1000	1			
			Total		Total		
Total available		101	Total left side in metal boxes		Total available		101

Load Table
(5) Gun mule

Variable	No	Wt in lbs	Top load	N	Wt in lbs	Of all	N	Wt in lbs
Maps, log, file	11	64	Cases w/h spare barrel	1	11	w/h carting go (ore)	1	7
2 pouches	4	12	Cases, 300 yds w/h	1		straight carrying go (ore)	1	51
15 lbs carrier magazine	2	13	110 yds and 110 yds			Magazine (110 yds)	4	1
Packs for carrier magazine	1		and cylinder gas			Boxes	22	4
Jack (line) (a)	1	2	15 yds w/h feed (b)	1	7	Boxes spare parts and tools w/h 1st aid kit	1	9
Total		101	Total		18	Line w/h (a) sets	1	8
						1 acetylene carrier magazine	1	13
						1 acetylene gas (a)	1	2
						1 acetylene gas (a)	1	101

(a) 1 acetylene gas (a) 101 lbs (b) 1 acetylene gas (a) 101 lbs

(b) 1 acetylene gas (a) 101 lbs (c) 1 acetylene gas (a) 101 lbs

(c) 1 acetylene gas (a) 101 lbs (d) 1 acetylene gas (a) 101 lbs

Packed load 101 lbs

Variable	No	Wt in lbs	Top load	N	Wt in lbs	Of all	N	Wt in lbs
Maps, log, file	11	64	Cases w/h spare barrel	1	11	w/h carting go (ore)	1	7
2 pouches	4	12	Cases, 300 yds w/h	1		straight carrying go (ore)	1	51
15 lbs carrier magazine	2	13	110 yds and 110 yds			Magazine (110 yds)	4	1
Packs for carrier magazine	1		and cylinder gas			Boxes	22	4
Jack (line) (a)	1	2	15 yds w/h feed (b)	1	7	Boxes spare parts and tools w/h 1st aid kit	1	9
Total		101	Total		18	Line w/h (a) sets	1	8
						1 acetylene carrier magazine	1	13
						1 acetylene gas (a)	1	2
						1 acetylene gas (a)	1	101

(a) Excluding 10 lbs baggage, 3 lbs.

(3) Ammunition Mulo.

...the same as in the case of the L_1 norm, the L_2 norm is also used as a loss function.

Sample	No	Weight lb	Time	No	Weight lb	Notes	W. L. H.
Carriers and walls	-	200				Carriers and walls	100
Marble slab	10	500				Marble slab	100
Two pieces of wood 1000 lb	1	4				Two pieces of wood 1000 lb	1
Car, rock (1000)	1	2				Car, rock (1000)	1
							1000

[illegible]

- If connecting to a printer, connect the printer to the top extension box.
- If connecting to a storage device, connect the storage device to the bottom extension box.

[illegible]

Detail.	Total per battalion	APPROXIMATE WEIGHT EACH		NUMBER AND WEIGHT ON 8 FIRST LINE PACK MULES (EACH)		
		lbs	Oz.	Number	lbs	Oz
<i>On first line transport.</i>						
Pan for trenching tools with girth and strap standing	8	20	.	1	20	
Axes, folding, curved blades	16	5	11	2	11	0
Axes, pick, heads 4½ lbs. (a)	72 (d)	5		8	40	
Helms, war, 76 inch (a)	96	2	1	12	24	12
Crowbars, 3 feet 6 inch	16	12		2	24	
Shovels, G. S. (a) (b)	128	4		16	64	.
Shovels, Q. S., helms, spade (b) . . .	32	1	1	4	4	4
Dicks, in scabbards (c)	32	2	..	4	8	0

(a) Exclusive of those with the Vickers gun and Lewis gun equipment.

(b) Articles for the repair of G. S. shovels are carried with the quarter masters store.

(c) Not for Gurkhas.

(d) Extra for Vickers Guns.

G FIELD KIT

(i) Summary of weights allowed

Details	WEIGHT ALLOWED		REMARKS
	On 1st line transport	On train transport	
Commanding Officer (a)	15	15 (a)	
Other British officers mounted (b)		15 (a)	
British officers dismounted	15 (d)	60	
Indian officers	6 (b)	20	
Indian other ranks	6 (d)	10	
Followers class I and private (c)	1	10	

(a) Includes 15 lbs. for line gear for class I.

(b) In both summer and winter mounted officers carry their greatcoats on their chargers.

(c) Followers are not equipped with coats warm in summer; they carry on the person in winter.

(d) This allowance is for greatcoats in summer. In winter the coat carried on the person and a quilted set free is available of a second blanket.

(3) British Officers

It is to be recorded as a guide only

Detail	WILLIAMS AND SONS LIMITED										REMARKS
	MINTS OFFICERS					LIMB AND SONS OFFICERS					
	in the year	in the house	in the year	in the year	in the year	in the year	in the year	in the year	in the year	in the year	
Arms and Ammunition											
Arms and Ammunition	1	1	1	1	1	1	1	1	1	1	(a) Not taken Government Arms and Ammunition is not given to the VI
Arms and Ammunition	1	1	1	1	1	1	1	1	1	1	(b) Not given to the VI
Arms and Ammunition	1	1	1	1	1	1	1	1	1	1	(c) Not given to the VI
Arms and Ammunition	1	1	1	1	1	1	1	1	1	1	(d) Not given to the VI
Arms and Ammunition	1	1	1	1	1	1	1	1	1	1	(e) Not given to the VI
Arms and Ammunition	1	1	1	1	1	1	1	1	1	1	(f) Not given to the VI
Arms and Ammunition	1	1	1	1	1	1	1	1	1	1	(g) Not given to the VI
Arms and Ammunition	1	1	1	1	1	1	1	1	1	1	(h) Not given to the VI
Arms and Ammunition	1	1	1	1	1	1	1	1	1	1	(i) Not given to the VI
Arms and Ammunition	1	1	1	1	1	1	1	1	1	1	(j) Not given to the VI
Arms and Ammunition	1	1	1	1	1	1	1	1	1	1	(k) Not given to the VI
Arms and Ammunition	1	1	1	1	1	1	1	1	1	1	(l) Not given to the VI
Arms and Ammunition	1	1	1	1	1	1	1	1	1	1	(m) Not given to the VI
Arms and Ammunition	1	1	1	1	1	1	1	1	1	1	(n) Not given to the VI
Arms and Ammunition	1	1	1	1	1	1	1	1	1	1	(o) Not given to the VI
Arms and Ammunition	1	1	1	1	1	1	1	1	1	1	(p) Not given to the VI
Arms and Ammunition	1	1	1	1	1	1	1	1	1	1	(q) Not given to the VI
Arms and Ammunition	1	1	1	1	1	1	1	1	1	1	(r) Not given to the VI
Arms and Ammunition	1	1	1	1	1	1	1	1	1	1	(s) Not given to the VI
Arms and Ammunition	1	1	1	1	1	1	1	1	1	1	(t) Not given to the VI
Arms and Ammunition	1	1	1	1	1	1	1	1	1	1	(u) Not given to the VI
Arms and Ammunition	1	1	1	1	1	1	1	1	1	1	(v) Not given to the VI
Arms and Ammunition	1	1	1	1	1	1	1	1	1	1	(w) Not given to the VI
Arms and Ammunition	1	1	1	1	1	1	1	1	1	1	(x) Not given to the VI
Arms and Ammunition	1	1	1	1	1	1	1	1	1	1	(y) Not given to the VI
Arms and Ammunition	1	1	1	1	1	1	1	1	1	1	(z) Not given to the VI

Part	No	WEIGHT AND HOW CARRIED						MARKS	
		M. 1000 GROSS WT.		M. 1000 GROSS WT.			In Train Trans port		
		(1) the person	(2) the person	In 1000 gross wt	In 1000 gross wt	In 1000 gross wt	In 1000 gross wt		
Forward									
1. 1000 gross wt kit	1								
2. 1000 gross wt kit	2								
3. 1000 gross wt kit	3								
4. 1000 gross wt kit	4								
5. 1000 gross wt kit	5								
6. 1000 gross wt kit	6								
7. 1000 gross wt kit	7								
8. 1000 gross wt kit	8								
9. 1000 gross wt kit	9								
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92. 1000 gross wt kit	92								
93. 1000 gross wt kit	93								
94. 1000 gross wt kit	94								
95. 1000 gross wt kit	95								
96. 1000 gross wt kit	96								
97. 1000 gross wt kit	97								
98. 1000 gross wt kit	98								
99. 1000 gross wt kit	99								
100. 1000 gross wt kit	100								

6 FIELD KITS—*contd*(111) *Indian Officers and other Ranks*

Detail	No	WEIGHT AND HOW CARRIED		
		On the person	In 1st line transport	In train transport
<i>Arms and Ammunition—</i>		lbs oz	lbs oz	lbs oz
Ammunition (a)	100	6 4		
Rifle with sling oil bottle and pullthrough (a)	1	2 12		
Sword bayonet with scabbard (a)	1	1 10		
<i>Accessories—</i>				
Set of web equipment complete with filled water bottle pack and haversack containing mess tin 3l 5 and tin ration 2	1	13 14		
<i>Clothing and necessities—</i>				
Blanket barrack	1			5 1
Boots ankle	1	4 4		
Frock D K with shoulder title	1	1 0 1/2		
Dress identity with cord	2	0 0 1/2		
Gaiters with shoulder title	1		6 0	
Housewife	1	0 1		
Kullah or pag or cap (b)	1	0 4		
Laces leather spare	1	0 0 1/2		
Pungri, khaki (b)	1	1 8 1/2		
Putties khaki	1	0 0 1/2		
Shirts tunnel	2	0 15		0 15
Socks worsted	2	0 0		
Towel hand	1	0 10		
Carried over		41 5 1/2	6 0	5 0

(a) Exclusive of those armed with pistols who do not carry rifles

(b) For Gurkhas Garhwals and Kumaonis and units recruited in Burma (except Kachins) substitute —

Hat felt 1 12 ozs

Braces pr 1 4 ozs

(In Summer) Trousers D K. pr 1 1 lb 3 ozs

(In Winter) Trousers serge drab mixt pr 1 1 lb 14 ozs

Kachins wear trousers with braces in lieu of knickerbockers

Gurkha Garhwals and Kumaonis receive helmets khaki with chinstrap in lieu of hats felt

not worn in hot climates

C FIELD KITS—contd

Detail	No	WEIGHT AND HOW CARRIED		
		On the person	In st line transport	In train transport
		Lbs oz	Lbs oz	Lbs oz
Prompt forward		41 5½	6 0	6 0
Other articles—				
Dubbing	lines	1 0 4		
Field dressin	1	0 2		
Line generation	1	2 0		
Ground sheet cape pattern	1	4 0		
Line belting	1			0 4
1 sp (r)	1	0 0		
Note book (c)	1	0 2		
Par book	1	0 1		
Soap	1	0 3		
Additional Summer Art cles—				
Knickers drawers D E (b)	prs	1 1½		13
Net mosquito	1			
Additional winter articles—				
Blanket barrack	1		5 1	
Cap comforter or 2 winter woollen	1	0 5		
(1) or worsted	1	0 2½		
Jersey	1	1 1½		
Knickers drawers serge drab mix (b)	prs			
TOTAL SUMMER SCALE		49 5	6 0	9 1
TOTAL WINTER SCALE		57 11(d)	5 1½	6 4

(c) Indian officers and a proportion of Indian other ranks

(d) The apparent difference in these weights is due to the greatcoat from 1st line being transferred to the man and being replaced by a second blanket.

NOTE I—When specially authorised the following additional articles may be issued to each man within a field force—

		Lbs oz
1a. 1st universal	1	1 11
1a. 2nd universal	2	10 2
Cap comforter or comforter woollen	1	0 5
Drawers flannel	prs	2 0
Cloves worsted	1	0 3
Greatcoat (in lieu of coat warm)	1	5 0
Housewife	(e)	0 1
Jerkin leather	(e)	1 10½
Blinds flannel	1	1 1½
Books worsted	pr	0 4½
Toothsticks	As required	
Towel hand	1	0 12
Vest flannel	1	1 0
Foots & c	(f)	3 14
Great coats flannel lined	(g)	2 1

1a. Issued up to 10 per cent of strength

(b) Issued up to 5 per cent of strength

8 BOOKS, FORMS, STATIONERY AND OFFICE EQUIPMENT REQUIRED ON MOBILIZATION AND IN THE FIELD

Serial No	Number (in the case of forms)	Items	Source of Supply	Quantities (a) Except Gurkha Battalions, (b) Gurkha Battalions only
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(i) Books and forms required for action on Mobilization

(To be kept prepared in the case as laid down in Mobilization Regulations)

1	A B 64 M	Indian Soldier's Pay Book	Deputy Controller (Forms) Calcutta	950
2	A F B 12 ^a M	Indian Field Conduct Sheet (books of 100)	Ditto	900
3	A F D. 199 A	Officers' Record of Service	Ditto	20
4	I A F F 941	Envelope for recalling Indian reservists from the front and back	Ditto	325 (a) 35 (b)
5	I A F F 95 ^a B	Inventory of Kit (1) (for insertion in A B 64 M)	Ditto	850
6	I A F F 957 C	Inventory of Kit (2) (Howers) (for insertion in A B 64 M or I A 1 E 115 ^a)	Ditto	80
	A F F 9	Service and Casualty Form (Indian Troops and Followers)	Ditto	900
7	I A F F 999	Application for Family Allowment in India	Ditto	10
8	I A F F 1000 (large)	List of Family Allowment in India	Ditto	70
9	I A 1 157	Temporary Followers Service Book	Ditto	35
10	I F A Y 1954 A.	Notice for recalling Indian reservists	Ditto	150 (b)
11	I A F Y 1955	List of addresses of Indian reservists to whom notices have been sent (I O Receipt)	Ditto	10 (b)
12	I A F Y 1956.	Reservists envelope I A	Ditto	150 (b)

**B. BOOKS, FORMS, STATIONERY AND OFFICE EQUIPMENT REQUIRED ON MOBILIZATION
AND IN THE FIELD—*contd.***

Serial (No)	Number (in the case of forms)	Items	Source of Supply	Numbers (a) Except Gurkha Battalions. (b) Gurkha Battalions only
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(B) Regulations, Manuals and other Books

(Day/Date) lists of all these in peace use are to be kept up as laid down in Mobilization Regulations)

14		Animal Management	Manager, G of I Central Publica- tion Branch.	1
15	--	P and A Regulations Parts I and II	Ditto	1
16		Regulations for the Army in India	Ditto	1
7		Bible	Ditto	1
18	--	P A Manual (of unit) 1925	Ditto	5
19	--	P A Pocket Book	Ditto	1
20	--	P A Regulations Vols I and II and P A B, Vol I, with a title for India	Ditto	1
21	--	Infantry Training Vols I and II	Ditto	1
22	--	King's Regulations	Ditto	1
23	--	Manual of Field Works (all arms)	Ditto	1
24	--	Manual of Indian Military Law	Ditto	1
25	--	Manual of Map Reading and Field Sketching 1921	Ditto	1
26	--	Manual of Military Law	Ditto	1
27	--	Manual of Movement (War) 1923	Ditto	1
28	--	Machine Gun Training	Ditto	1
29	--	Militarism Regulations India 1924	Ditto	1
30	--	Notes on the organization and em- ployment of aircraft in co-operation with the Army	Ditto	1
31	--	Signal Training, Parts I, II VI and VII	Ditto	1
32	--	Small Arms Training	Ditto	1

8 BOOKS FORMS STATIONERY AND OFFICE EQUIPMENT REQUIRED ON MOBILIZATION AND IN THE FIELD—contd

Serial No	Number (in the case of forms)	Items	Source of supply	Numbers. (a) Except Gurkha Battalions. (b) Gurkha Battalions only
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(iii) Army Books Army Forms and Indian Army Forms

(To be kept intact and not used in peace time)

33	A. B. 8	Guard Book for A. F. N. 1513 and A. F. N. 1531 A	Deputy Controller (Forms) Calcutta	5
		Covers		"
34	A. B. 119	scribbling Books—Refills	Ditto	6
35	A. B. 152	F. S. Correspondence Books	Ditto	24
		Covers		60
36	A. B. 153	Field Message Books—Refills	Ditto	70
37	A. B. 428 M	Post Orderly's receipt book for registered letters and registered parcels	Ditto	1
38	A. F. B. 116	Application for Court Martial	Ditto	6
39	A. F. B. 151	Notification of casualty to an officer	Ditto	50
40	A. F. B. 158	Nominal roll of officers	Ditto	6
41	A. F. B. 213	Field Return	Ditto	40
42	A. F. B. 231	Field State (pads of 50)	Ditto	1
43	A. F. B. 256	Morning sick Report	Ditto	100
44	A. F. B. 2069	Crime and offence Report F. S. (pads of 50)	Ditto	1
45	A. F. C. 214	F. S. Envelope	Ditto	600
46	A. F. C. 2118	War Diary (pads of 50)	Ditto	240
		Covers		70
47	A. F. C. 2119	Message Form "A" (white)	Ditto	60
		Pads		60
		Covers		8
47 A	A. F. C. 2130	Message Form "C" (pink)	Ditto	40
		Pads		40
48	A. F. G. 994 M	Indent Form (books of 100)	Ditto	4

8 BOOKS FORMS STAT QUERT AND OFFICE EQUIPMENT REQUIRED ON MOBILIZATION
AND IN THE FIELD—*contd*

Serial No	Number to the case of forms	Items	Source of Supply	Numbers (a) Except Gurkha Battalions (b) Gurkha Battalions only
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III *Army Books Army Forms and Indian Army Forms—contd*

49	A F N 1513	Aquitance roll (all arms) Large (pads of 50)	Deputy Controller (Forms), Cakotta.	10
50	A F N 1531 A	Cash accounts of Company Commanders (books of 24)	Ditto	5
51	A F W 3042	Label for wounded man's kit	Ditto	60
52	A F W 3043	Label for deceased man's kit	Ditto	20
53	A F W 3101	Recommendations for honours and rewards	Ditto	6
54	A F W 3120	Personal Effects Certificate	Ditto	100
55	A F W 3300	Wounded Officer's kit label . . .	Ditto	10
56	A F W 3301	Deceased Officer's kit label . . .	Ditto	10
57	I A F D 903	Crime Report	Ditto	150
58	I A F D 904	Proceedings of a S. C. M. under the I. A. Act.	Ditto	5
59	I A F D 905	Declaration of Military Expenses under the M. I. or I. A. A. Rules	Ditto	2
60	I A F F 909	Register of communications received and despatched (books of 100)	Ditto	2
61	I A F F 1024	Indent for ration (books of 50)	Ditto	2
61 A	A F S 1571	Register of Messages . . .	Ditto	15
62	I A F L 2073	Note or Order book . . .	Ditto	7
63	I A F L 2154	Receipt book form (books of 50)	Ditto	
64	Not yet introduced	1 part 1 of 1 of a Cheque book	Ditto	
65	Do.	Officers Personal Effects book	Ditto	
66	A F	File box	Ditto	

8 BOOKS FORMS, STATIONERY AND OFFICE EQUIPMENT REQUIRED ON MOBILIZATION AND IN THE FIELD—*contd*

Serial No	Number (in the case of forms)	Items	Source of Supply	Numbers. (a) Except Gurkha Battalions (b) Gurkha Battalions only
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(iv) Stationery and Office equipment

(All expendable stores to be kept intact in peace)

(a) Paper and Envelopes

67	--	Paper blotting dummy quires	Deputy Controller, Stationery and Stamps Calcutta	2
68	--	Paper foolscap quires	Ditto	4
69	--	Paper, typewriting dummy (foolscap size) quires	Ditto	1
70	--	Paper carbon typewriting quires	Ditto	1
70-A	--	Paper carbon quires	Ditto	1
71	--	Envelopes official small, country yellow gummed 14" x 5"	Ditto	5
72	--	Envelopes official large clothlined gummed 11" x 16"	Ditto	1 0
73	--	Envelopes official 5" x 4"	Ditto	150

(b) Stores and Office equipment

74	--	Clips paper brass assorted gross	Ditto	1
75	--	Erasers ink and pencil	Ditto	6
76	--	Erasers typewriting	Ditto	1
77	--	Gum Arabic	Ditto	4
78	--	Gum bottle, with screw top and brush	Ditto	1
79	--	Ink pots screw top	Ditto	4
80-A	--	Ink powder fine-black (1 pkt makes 1 pint) 1 kts	Ditto	2
80-B	--	Ink powder red pkt.	Ditto	1
81 A	--	Pen fin ballpoint	Ditto	3
81 B	--	Pencils blacklead H	Ditto	4
	--	Pencils blue and red combined	Ditto	6

8 BOOKS FORMS STATIONERY AND OFFICE EQUIPMENT REQUIRED ON MOBILIZATION AND IN THE FIELD—*concl'd*

Serial No	Number in the case of forms).	Items	Source of Supply	Numbers. (a) Except Gurkha Battalions (b) Gurkha Battalions only
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(v) Stationery and Office equipment—*concl'd*.

80		Penholders	Dep ty Controller Stationery and Stamps Calcutta.	6
83		Pen nibs assorted doz.	Ditto	4
84		Desk knives	Ditto	13
85		Pins one inch pkts	Ditto	6
86		Pins drawing dos	Ditto	2
87		Rulers round 18"	Ditto	1
88		Sealing wax imported sticks	Ditto	2
89		Rubber office stamps with pads and ink sets	Ditto	1
90		Coloured twine, balls	Ditto	1
91		Typewriter complete with accessories in case (a)	Ditto	1
92		Typewriter ribbons spare	Ditto	2
93		Zinc or tin plate	Purchased locally and cost recovered on contingent bill.	2
94		Yakdians office complete with locking bar and padlock.	Ditto	1

(a) In units for which a typewriter is not authorized in peace this will be provided from office allowances under unit arrangements

SECTION V—SCALES OF RATIONS AND FORAGE

INTRODUCTORY

1 The normal supply situation on any given day (A day) will be as in the following table —

NOTE— A day = to day
 B day = tomorrow
 C day — day after tomorrow
 D day — three days hence

Detail	At 0500 hours before march	At 1200 hours after march	At 1800 hours after march
With unit	A day rations On man and 1st line transport	A day rations On man and 1st line transport	B day rations Delivered at unit transport lines
Individual train	B day rations Loaded in train ready to march or waiting to refill	B day rations In train marching	C day rations Delivered at S R P or loaded in train or ready to be loaded
In M T Company or at railhead or en route to rail head.	C day rations	C day rations	D day rations

The above is exclusive of one emergency ration carried on the man

2. The scales of rations to be issued in the field are laid down in the tables following

3. The various scales are —

- (a) *Field service scale*, which is ordinarily issued to men and animals in the field.
- (b) *Intermediate operation scale for men and operation scale for animals* which are based on the minimum quantities of food necessary to conserve the energy of men and animals during a period of active operations extending up to 30 days. Rations on these scales will be issued at the discretion of the general officer commanding the force concerned and only when sufficient transport for the carriage of the field service scale is not available
- (c) *Operation scale for men*, which is issued on special occasions, when operations are likely to be of short duration and when it is necessary to reduce transport to a minimum

4. The transport allowed for supplies in this manual has been calculated on the intermediate scale of rations for men and operation scale for animals

5. For the purpose of the issue of articles described as winter issues, the winter season is normally considered to be from November 1st to March 31st

6. Articles of field service rations, which do not form part of the peace ration, will not be obtainable in the initial stages of mobilization.

7. Equivalents will only be issued in so far as they can be made available in stock, and when available they may be issued to units other than hospitals either at the choice of units, or on the authority of the divisional or lower independent commander

8. Surplus stocks of articles of winter issue which remain on hand after the 31st March and which are likely to deteriorate may, on the authority of the divisional or lower independent commander, be issued after that date in lieu of the summer equivalents until such stocks are exhausted.

Table I—Scales of rations in the field for British troops

Detail.	SCALE			REMARKS
	Field service	Intermediate operation	Operation	
Daily issues				
Bacon	3 ozs	3 ozs	3 ozs	(a) Winter only
Cheese (a)	3	3	2	(b) Summer only
Jam	2	3		(c) Meat fresh will be issued when available in lieu of meat tinned
Soup concentrated (a)	2	"		
Bread	1 lb	8		
Biscuits ration		6	1 ⁰ ozs	
Fruit dried	2 ozs	4		
Meat fresh (c)	1 lb	1 lb	1 lb (b)	(d) Ham is never issued except by order of the divisional or lower independent command. Such an order is normally the result of a medical recommendation to meet special fatigue or bad weather conditions
Meat or				
Meat tinned (c)	1 ⁰ ozs	12 ozs	1 ⁰ ozs	
Milk tinned liquid evaporated	2		1 ⁰ (a) 1 (b)	
Oil cooking	1	1		
Onions	6	4		
Potatoes	10	8	6 ozs	
Salt ration	$\frac{1}{2}$	$\frac{1}{2}$	$\frac{1}{2}$	
Sugar	3	3	"	
Tea ration	$\frac{1}{2}$	$\frac{1}{2}$	$\frac{1}{2}$	
Vegetables fresh (other than potatoes and onions)	6	6		
Pepper				
Lemon juice		$\frac{1}{2}$ fl oz	1 ⁰ ozs	
Lum (f)	4 fl ozs	2 $\frac{1}{2}$		
Firewood ration split	7 lb	2 lb	12 ozs	
Charcoal		4 ozs		
Weekly issues				
Cigarettes B T or	40	40		(g) Whenever an outbreak of beriberi is suspected and then only when special is recommended by the local medical officer
Tobacco B T or	2 ozs	2 ozs		
Sweets B T	4	4		
Mustard safety	" boxes	" boxes		
Mustard country	$\frac{1}{2}$ oz	$\frac{1}{2}$ oz		
Pepper	$\frac{1}{2}$	$\frac{1}{2}$		
Twice weekly issues				
Marmalade (c)	$\frac{1}{2}$ oz	oz	$\frac{1}{2}$ oz	
Three weekly issues				
Butter (a)	2 ozs	2 ozs		
Oatmeal	3			
Powder, curry		$\frac{1}{2}$ oz		
Lemon juice	$\frac{1}{2}$ fl oz			
Milk tinned liquid evaporated	1 oz			
Rice ration	2 ozs	2 ozs		

NOTE.—For scale of equivalents see Table VI

Table III—Scales of emergency rations in the field

Detail	British troops	Indian troops and followers	REMARKS
Meat tinned	1 lb nominal		
Biscuits	1 lb		
Tea	1 oz	1 oz	
Sugar	"	"	
Chemical rations (packed)		1 1/2 lbs	
Atta		1 1/2	
Biscuits		1 1/2	

NOTE 1.—British troops, emergency ration.—The tea and sugar are packed in grease proof paper envelopes and carried in a ration tin. The biscuits are packed in grease proof paper in small packets. The whole ration is carried in a ration bag.

NOTE 2.—Indian troops, emergency ration.—Units will draw these rations in bulk and will have the option of substituting chemical rations for a proportion of two of more of these articles.

Table IV—Scales of rations in the field of animals.

Class	Data 1	FIXED SERVICE SCALE			OPERATION SCALE		
		Grain	Dry Grass	Salt	Grain	Dry Grass	Salt
A	Heavy draught horses	14 lbs	15 lbs	1 ozs	12 lbs	15 lbs	$\frac{1}{2}$
B	(i) Light draught riding and pack horses of British mounted units (ii) Officers' chargers sterile and mounted units	1*	12	1	10	10	$\frac{1}{2}$
C	(i) Riding and pack horses of Indian mounted units (ii) Officers' chargers, dismounted units (iii) Light draught mules	10	10	1	9	10	$\frac{1}{2}$
D	(i) Mounted infantry ponies pack artillery ponies and other riding ponies for British and Indian ranks (i) Pack Artillery Mules	8	10	$\frac{1}{2}$	7	8	$\frac{1}{2}$
E	(i) Equipment mules class I and II (ii) Army transport draught mules and ponies (iii) Army transport pack mules and ponies	7	9	$\frac{1}{2}$	6	8	$\frac{1}{2}$
F	(i) Siege train bullocks (ii) Camels (see note below)	8	18,	2	8	18	1
G	Other draught bullocks	6	18	1	6	18	1
H	Pack bullocks	4	11	$\frac{1}{2}$	4	11	$\frac{1}{2}$
I	Donkeys	4	6	$\frac{1}{2}$	3	5	$\frac{1}{2}$

NOTE 1—In the case of camels 18 lbs of bhuss will be issued of instead dry grass, unless bhuss being supplied as far as practicable

NOTE 2—An extra ration of 1 lb of gur may be issued to camels on the authority of the head quarters of the army concerned. No special transport will be allowed for carriage of gur for camels. A suitable number of rations as required by the General Officer Commanding (say six issues for each camel) will be stocked at the base and issued as found necessary

NOTE 3—Substitutes for grain and dry grass as laid down in Table VI will be issued without special authority when the stock in hand permits

NOTE 4—In order to keep slaughter cattle, sheep and goats in condition in severe weather when grazing is scanty 4 lbs of grain per head per diem in the case of cattle and 4 lb grain per head per diem in the case of sheep or goats may on the authority of the headquarters of the army concerned, such as it renewed monthly as long as may be necessary. Similarly a daily be authorised when necessary at a scale of 14 lbs. per head in the cattle and 1 lbs. per head in the case of sheep or goats.

Table V — Weight of rations required for one day including attached (Indian Infantry Battalion or Gurkha Rifle Battalion)

() Numbers for whom rations are required

Detail	Battalion Head Quarters	Head Quarters wing	4 Companies
(i) British Banks	3	4	
(ii) Indian Banks	16	17	65
(iii) Riding horses	3	4	4
(iv) Riding ponies	1	2	
(v) Pack mules (a)		20	16
(vi) Draught mules (a) (b)		16 (c)	16

(a) Normal scales

(b) Draught mules for Train etc. clear not included

(c) Includes draught mules for Battalion Head Quarters

() Weight

Detail	BATTALION HEAD QUARTERS			HEAD QUARTERS WING			4 COMPANIES		
	F S	I O S	O S	I S	I O S	O S	I S	I O S	O S
	lbs	lbs	lbs	lbs	lbs	lbs	lbs	lbs	lbs
(1) British Banks	23	24	24	38	22	16	60	56	29
(2) Indian Banks	126	100	45	122	1012	410	430	326	160
(3) Riding horses	31	28	28	41	37	37	41	37	37
(4) Riding ponies	8	7	7	16	14	14			
(5) Pack mules (a)				145	125	125	116	100	100
(6) Draught mules (a) (b)				131 (c)	113 (c)	113 (c)	116	100	100
TOTAL	193 or 200 mule	159 or 155 mule	90 or 1 mule	1203 or 1211 mule	1333 or 1611 mule	763 or 921 mule	4673 or 611 mule	4019 or 561 mule	1885 or 211 mule
F S Scale				I O S Scale			O S Scale		
6671 lbs or 211 mule				5511 lbs or 60 mule			272 lbs or 1 mule		

Table VI.—Scale of equivalents

Item No	Article short issued	Article substituted	REMARKS.
1	Bacon . . 1 lb	Butter . . 1 lb or Cheese . . 1 .. or Meat tinned . . 1 .. plus Pickles . . 4 ozs	
2	Bread . . 1 ..	Liscuita ration . . 1 lb or Flour (or atta) . . 1 .. plus Firewood ration . . 1 Ghi . . 1 oz .. Baking powder . . 1 oz	
3	Butter . . 1 ..	Bacon . . 1 lb or Cheese . . 1 ..	
4	Cheese . . 1 ..	Bacon . . 1 .. or Butter . . 1 ..	
5	Dal . . 1 ..	Peas dried . . 1 ..	
6	Firewood, ration . . 1 ..	Coal steam . . 1 ..	
7	Fruit dried . . 1 ..	Fruit, fresh . . 2 .. or Fruit tinned other (than crystallized) . . 1 ..	
8	Ghi . . 1 ..	Oil cooking . . 1 ..	
9	Jam . . 1 ..	Syrup, golden . . 1 ..	
10	Lemon juice . . 1 oz.	Fruit, fresh . . 4 ozs. or Dal whole for 1 oz minating	
11	Meat fresh . . 1 lb.	Atta . . 3 ozs plus Ghi . . 2 ozs or Meat tinned . . 1 lb plus Chutney . . 1 oz (a)	(a) Or plus 1/2 lbs oz.
12	Milk tinned 5 ozs. liquid evaporated	Milk, fresh . . 10 ozs.	

Table VI—Scale of equivalents—contd

Item No	Article short issued	Article substituted	REMARKS
13	Onions 1½ lbs	Fruit dried 1 lb or Fruit fresh 2 lbs or Potatoes 1 lb Vegetables fresh 2 lbs (other than potatoes or onions)	
14	Potatoes 1 lb	Fruit dried 1 lb or Fruit fresh 2 lbs or Onions 1½ or Vegetables fresh 2 (other than potatoes or onions)	
15	Rum (25 C.I.) 16 cans	Tea ration 40 cans plus sugar 4 cans	
16	Soup condensed 4 cans	Cocoa 4 oz	
17	Tea ration 1 oz	Chocolate ration 2 oz	(b) Issues should be used only when fresh vegetables are unavailable
18	Tobacco 2000	Cigarettes 40 or Pipes 400	
19	Vegetables fresh other than potatoes or onions 1 lb	Sugar for I T 4 lbs Potatoes 1 lb or Onions 1½ or Fruit dried 1 or Fruit fresh 2 or Bak unsifted (b) 1½ or Haricot beans (b) 1½ or Peas (b) 1	
20	Chilies 4 oz	Tamarind (c) 4 oz	(c) Tamarind may be issued to Mal. Tamil personnel at equivalent rates in lieu of chili + garlic, ginger or turmeric
21	Garlic "	Tamarind (c) 1½	
22	Ginger 1	Tamarind (c) 1½	
23	Turmeric "	Tamarind (c) 1	
24	Grass 1 lb	Fresh 1½ lbs or Dry grass 2 lbs	
25	Dry grass 1	Elephant 1 lb or Green grass 3 lbs	

NOTE.—Where there are alternative substitutes the cheaper, if available should be selected. Also the health and efficiency of the troops require consideration.

Table VII—Summary of approximate gross weights of various scales of rations and forage

Detail	Field service scale	Intermediate operations scale	Operations scale
	Lbs	Lbs	Lbs
British troops	9½	8	4
Indian troops and followers	7	5½	2½

NOTE—1 These weights are approximate only. In each case the greatest weight which might have to be carried has been shown, e.g. the summer or winter scale of 12 lb, whichever is higher has been given. All figures have been rounded off to the nearest ½ lb.

2 For approximate nett weight of rations for animals see Table 4. In calculating gross weights of rations for animals an average allowance of ½ lb per ration should be added to the nett grain and salt ration. But no addition to the gross fat ration is necessary since the weight of the packing material of this ration is negligible.

(11) TRAIN

Detail	Weight in maunds exclusive of pack saddlery and line-car	HOW CARRIED		REMARKS
		NORMAL	ALTER NATIVE	
		A T Carts	Camels	
<i>Headquarters and Headquarters Wing (including attached)</i>				
1 Comm and Insp Officer	150 = 70	32	—	
6 British Officers	60 = 360			
5 Indian or Gurkha Officers	90 = 100			
130 Indian or Gurkha Other Ranks	10 = 1300			
30 Followers	10 = 300			
10 Horses	15 = 150			
TOTAL	70			
<i>Stores</i>				
30 pairs Lamps	3	14	5	9
Armourers Tools	1			
Oiled Mallets	4			
Leather etc for repairs	1			
Materials for repairs of G S Shovels	1			
U N C	1			(b) Included — Latrine flags and poles, flags, bannocks and poles, nets for storage and miscel- laneous articles for repairs to machine gun carrying equip- ment
Surgery Tent	1			
Incinerator (1 grids)	1			
Miscellaneous Stores (b)	1			
TOTAL	14	48	5	9
<i>Four Companies (each) Baggage</i>				
2 British Officers	60 = 120	22½	3	5
4 Indian or Gurkha Officers	90 = 60			
147 Indian or Gurkha Other Ranks	10 = 1470			
130 Followers	10 = 130			
Horse	15 = 15			
TOTAL	177½	3	5	
<i>Supplies</i>				
Wheeled Battalions	69	7	14	

(b) Includes —
Litter, flags
and poles, flags,
banneroles and
poles, nets for
age and miscel-
laneous articles
for repairs to
machine gun
carrying equip-
ment

(ii) SUMMARY OF TRANSPORT LOADS

Detail	Refer to page	HOW CARRIED							Altitude	Remarks
		NORMAL			ALTY NATIVE					
		Head wind load in tons	Actual pack weight in tons	Actual pack weight in tons	Actual pack weight in tons	Actual pack weight in tons	Actual pack weight in tons	Actual pack weight in tons		
First Line Headquarters and Headquarters Company		101 1/2	20	25	0	20	70			
		120	10	15	8	10	44			
		201 (a)	30	41	17	30	114	(a) 114 tons		
Second Line Headquarters and Headquarters Company		48			5			9		
		90			12			20		
		69			7			14		
TOTAL TOTAL		200 (b)			34			43	(b) 73 tons	
		103 (c)			12			24	(c) 37 tons	



SECTION VII.

INDIAN INFANTRY

(EXCEPT PROVINCES.)

NOTES—1 (Table 1).—The attached L. H. C. details will join the battalion on mobilization with complete personal equipment on peace scales.

2 (Table 2).—Columns 3, 5 and 7 show only that portion of the peace equipment of the battalion which forms part of the war equipment. Columns 4, 6 and 8 show the items of mobilization equipment which will be held in battalion charge in peace except where otherwise noted herein. Column 9 gives the complete normal war equipment for the battalion.

3 The details for attachment to G. H. Q., 2nd Echelon, will leave the battalion with complete personal equipment on the scales shown in Table 1, where applicable.

SECTION VII

TABLE I—PERSONAL EQUIPMENT

NOTE.—Items marked * are mobilization equipment. All others are peace equipment

Item No.	Description of Stores	Indian Officers	Rm. Hav. Major Rangtaker and Nos. 1 and 2 of Lewis and Vickers guns	Rm. Q. M. Havildar Q. M. Major, Q. M. Havildar havildars make serpoys and 1st class	Class I followers	REMARKS
1	2	3	4	5	6	-
Section I A						
SCALE PER MAN						
Belts—						
1	Shoulder sword brown Brown	Sam (a) 2				
2	Waist brown, O. S.				1*	
3	Waist sword, brown Browne	Sam (a) 1				(a) On payment except to Indian officers commissioned from the ranks after 21 2* who get a free issue
4	Bottles water enamelled	(b) 1	1	1	1*	(b) On payment.
5	Carriers water bottle I T	(b) 1			1*	
6	Cases pistol, Webley brown— With leather loop 1 1 With brass hooks 1 1	1	1			
7	Covers— Breech rifle No 2				1*	Field army and covering troops only
8	Frons brown kookerie No 1 or "		1	1		Gurkhas and Garhwals only
9	Haversacks— Followers				1*	
10	Indian troops	(b) 1				
11	Landards pistol	1	1			
12	Pouches brown ammunition pistol Webley— With brass hooks 1 1 With leather loop 1 1		2			

TABLE I—PERSONAL EQUIPMENT—contd

Item No	Description of Stores	Indian Officers	In Hav Mahr & Hatcher taker and Nos 1 and 2 of Lewis and Victoria guns	In Q. M. Hatcher & Hatcher Mahr & Hatcher Hatcher & Hatcher Hatcher & Hatcher Hatcher & Hatcher	Class I & Hatcher.	REMARKS
1		2	4	5	6	7
SCALE FOR Mahr & Hatcher						
Section 1 A—contd						
15	Blindside web G S			1		For mounted ranks only
16	Straps mess tin M S 1 T			1		
17	Tins— Mess mounted services			1	1	
18	Medium					
19	Large	1	1	1	1	
20	Small	1	1	1	1	
21	Web equipment pattern 1908—					
22	Attachments brace			2		
23	Belt waist				1	
24	Belt waist special			1		
25	Belt waist buckle			2		
26	Cartridges, cartridge 75-nds—					
27	Left				1	
28	Right				1	
29	Carriers water-bottle			1		
30	Frog				1	
31	Haversacks			1		
32	Packs			1		
33	Straps supporting			2		
Section 2 A						
1	Line bedding	1	1	1	1	
2	Sheet, ground	1	1	1	1	
3	Tents, 1 P— Tape cotton 1" yds		1	1		For dismounted ranks only
Section 2 B						
1	Cartridges S & ball— 3 1/2 in. " rds					100 rounds per rifle and all rounds per rifle carried the day ended
2	Revolver 435" " "					

TABLE I—PERSONAL EQUIPMENT—*concl'd**Articles to be held by the battalion in pence for personnel attached on mobilization*

Item No.	Description of Stores	Orderly (Nursing Section I H C)	REMARKS
<i>Scale per man.</i>			
<i>Section 1 A</i>			
<i>Tins ration—</i>			
18	Large	1	
19	Small	1	
<i>Section 2 A</i>			
1	Line bedding	1	
2	Sheets ground	1	
<i>Clothing Sections</i>			
1	Clothing and blankets as laid down for mobilization.		See table 3 personal clothing and housewifery Tables drawn from estimate on mobilization
<i>M S D Supplies</i>			
1	First field dressing packets	1	Also with 1st Aid for Medical Officer and private 1st Aid draws 1000 each for use on mobilization

TABLE 2.—UNIT EQUIPMENT

Item No.	Description of Stores	By Итого.		Higher Вид.		4 Com Ранга		Total battalion war equipment	ИЗДАНИЕ
		Peace equipmt	Mob equipmt	Peace equipmt	Mob equipmt	Peace equipmt	Mob equipmt		
1	2	2	4	5	6	7	8	9	10
Section I A									
1	Infantry							3	
2	Infantry							96	
3	Infantry							1	
4	Infantry							1	
5	Infantry							100	
6	Infantry							100	
7	Infantry							100	
8	Infantry							100	
9	Infantry							100	
10	Infantry							100	
11	Infantry							100	
12	Infantry							100	
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25	26	27	Tanks I P. No 1 No 2 Tape cotton 14		3 da.	Section 2 I		1		2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	32	33	34	35	36	37	38	39	40	41	42	43	44	45	46	47	48	49	50	51	52	53	54	55	56	57	58	59	60	61	62	63	64	65	66	67	68	69	70	71	72	73	74	75	76	77	78	79	80	81	82	83	84	85	86	87	88	89	90	91	92	93	94	95	96	97	98	99	100																																																																																																																																																																																																																									
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No 1 No 2 Tape cotton 14		Tanks I P. No 1 No 2 Tape cotton 14	

TABLE 2--UNIT EQUIPMENT--cont'd

Item No	Description of item	IN REQ'S		MILES		TABLES		Tentation war equipment	REMARKS
		Peace equip	Mob equip	Peace equip	Mob equip	Peace equip	Mob equip		
1		2	4	5	6	7	8	9	10
Section 6 J--cont'd									
7	Tring a lowland cotton I I	3	1	1	2	4		11	1st class r and
8	Headstalls G S	3	1	1	3	4		11	by
9	Lada roller G S (5)	3	1	21	3	4		20	for male clerks
10	Lickets hoof I P	3	1	2	6	7		18	and 1st class
11	11 Wers G S (5)	3	1	21	4	3		20	by at 1st class
12	4. isore (1) m'ing	3	1	21	4	3		20	for 1st class
13	Spion # 7 dra 1 s	3	1	17	4	3		4	and 1st class
14	Packaddery G S	3	1	17	4	3		30	for V G 1st class
15	1st class	3	1	17	4	3		30	for V G 1st class
16	1st class	3	1	17	4	3		30	for V G 1st class
17	1st class	3	1	17	4	3		30	for V G 1st class
18	1st class	3	1	17	4	3		30	for V G 1st class
19	1st class	3	1	17	4	3		30	for V G 1st class
20	1st class	3	1	17	4	3		30	for V G 1st class
21	1st class	3	1	17	4	3		30	for V G 1st class
22	1st class	3	1	17	4	3		30	for V G 1st class
23	1st class	3	1	17	4	3		30	for V G 1st class
24	1st class	3	1	17	4	3		30	for V G 1st class

TABLE 2.—UNIT EQUIPMENT—contd.

00

Item No.	Description of Stores	BY HQS		HQR WING		4 COM PANIES		Total battalion war equipment	REMARKS
		Peace equip.	Mob equip.	Peace equip.	Mob equip.	Peace equip.	Mob equip.		
1	"	4	4	5	6	7	8	8	10
23	Section B—could Tackled in M C S S—could Carriers in gear I P Barracks—			4				4	for Vickers gun mules
29	Gun shop			4				4	
30	Tripod			4				4	
41	Backs belt I P—			10				10	
42	Year			10				10	
43	Off								
44	Lunda bells— Buckling belt Point								
45	Surge stay securing boxes— Belling piece								
46	Point								
47	Saddles I P								
48	Securer tripod I P Square data table— Pick and Hel. 4 (S)			15				15	for upkeep of Vickers gun carry bag equipment.
49	Stovel (C) top load I P			4				4	
50	Saddles I P— Bars added— Year			8				8	for Vickers gun mules
51	Off								
52	Off								
53	Off								
54	Off								
55	Off								
56	Off								
57	Off								
58	Off								
59	Off								
60	Off								

Section 6-1

1	Small Fry Offsets—	3	1	3	11
2	1 to 1/2 ft. x 1/2 in. x 1/2 in. (1 or 2)	4	4	4	11
3	Case for the above—	2	2	2	11
4	Wear	2	2	2	11
5	1/2 in. x 1/2 in. (1 or 2)	2	2	2	11
6	1/2 in. x 1/2 in. (1 or 2)	2	2	2	11
7	Leather, stirrup	2	2	2	11
8	Leather—	2	2	2	11
9	Leather, mouth bit	2	2	2	11
10	Leather, 1/2 in. x 1/2 in. (1 or 2)	2	2	2	11
11	Leather, 1/2 in. x 1/2 in. (1 or 2)	2	2	2	11
12	Leather, 1/2 in. x 1/2 in. (1 or 2)	2	2	2	11
13	Leather, 1/2 in. x 1/2 in. (1 or 2)	2	2	2	11
14	Leather, 1/2 in. x 1/2 in. (1 or 2)	2	2	2	11
15	Small Fry Universal—	3	1	3	11
16	1/2 in. x 1/2 in. (1 or 2)	4	4	4	11
17	Blankets 1 1/2 in. x 1/2 in. (1 or 2)	2	2	2	11
18	Case for shoe-saddlery 1 1/2 in. x 1/2 in. (1 or 2)	2	2	2	11
19	Leather, head (1 or 2)	2	2	2	11
20	Leather, head (1 or 2)	2	2	2	11
21	Leather, stirrup (long or short)	2	2	2	11
22	Leather, stirrup (long or short)	2	2	2	11
23	Leather, stirrup (long or short)	2	2	2	11
24	Leather, stirrup (long or short)	2	2	2	11
25	Leather, stirrup (long or short)	2	2	2	11
26	Leather, stirrup (long or short)	2	2	2	11
27	Leather, stirrup (long or short)	2	2	2	11
28	Leather, stirrup (long or short)	2	2	2	11
29	Leather, stirrup (long or short)	2	2	2	11
30	Leather, stirrup (long or short)	2	2	2	11
31	Leather, stirrup (long or short)	2	2	2	11
32	Leather, stirrup (long or short)	2	2	2	11
33	Leather, stirrup (long or short)	2	2	2	11
34	Leather, stirrup (long or short)	2	2	2	11
35	Leather, stirrup (long or short)	2	2	2	11
36	Leather, stirrup (long or short)	2	2	2	11
37	Leather, stirrup (long or short)	2	2	2	11
38	Leather, stirrup (long or short)	2	2	2	11
39	Leather, stirrup (long or short)	2	2	2	11
40	Leather, stirrup (long or short)	2	2	2	11
41	Leather, stirrup (long or short)	2	2	2	11
42	Leather, stirrup (long or short)	2	2	2	11
43	Leather, stirrup (long or short)	2	2	2	11
44	Leather, stirrup (long or short)	2	2	2	11
45	Leather, stirrup (long or short)	2	2	2	11
46	Leather, stirrup (long or short)	2	2	2	11
47	Leather, stirrup (long or short)	2	2	2	11
48	Leather, stirrup (long or short)	2	2	2	11
49	Leather, stirrup (long or short)	2	2	2	11
50	Leather, stirrup (long or short)	2	2	2	11
51	Leather, stirrup (long or short)	2	2	2	11
52	Leather, stirrup (long or short)	2	2	2	11
53	Leather, stirrup (long or short)	2	2	2	11
54	Leather, stirrup (long or short)	2	2	2	11
55	Leather, stirrup (long or short)	2	2	2	11
56	Leather, stirrup (long or short)	2	2	2	11
57	Leather, stirrup (long or short)	2	2	2	11
58	Leather, stirrup (long or short)	2	2	2	11
59	Leather, stirrup (long or short)	2	2	2	11
60	Leather, stirrup (long or short)	2	2	2	11
61	Leather, stirrup (long or short)	2	2	2	11
62	Leather, stirrup (long or short)	2	2	2	11
63	Leather, stirrup (long or short)	2	2	2	11
64	Leather, stirrup (long or short)	2	2	2	11
65	Leather, stirrup (long or short)	2	2	2	11
66	Leather, stirrup (long or short)	2	2	2	11
67	Leather, stirrup (long or short)	2	2	2	11
68	Leather, stirrup (long or short)	2	2	2	11
69	Leather, stirrup (long or short)	2	2	2	11
70	Leather, stirrup (long or short)	2	2	2	11
71	Leather, stirrup (long or short)	2	2	2	11
72	Leather, stirrup (long or short)	2	2	2	11
73	Leather, stirrup (long or short)	2	2	2	11
74	Leather, stirrup (long or short)	2	2	2	11
75	Leather, stirrup (long or short)	2	2	2	11
76	Leather, stirrup (long or short)	2	2	2	11
77	Leather, stirrup (long or short)	2	2	2	11
78	Leather, stirrup (long or short)	2	2	2	11
79	Leather, stirrup (long or short)	2	2	2	11
80	Leather, stirrup (long or short)	2	2	2	11
81	Leather, stirrup (long or short)	2	2	2	11
82	Leather, stirrup (long or short)	2	2	2	11
83	Leather, stirrup (long or short)	2	2	2	11
84	Leather, stirrup (long or short)	2	2	2	11
85	Leather, stirrup (long or short)	2	2	2	11
86	Leather, stirrup (long or short)	2	2	2	11
87	Leather, stirrup (long or short)	2	2	2	11
88	Leather, stirrup (long or short)	2	2	2	11
89	Leather, stirrup (long or short)	2	2	2	11
90	Leather, stirrup (long or short)	2	2	2	11
91	Leather, stirrup (long or short)	2	2	2	11
92	Leather, stirrup (long or short)	2	2	2	11
93	Leather, stirrup (long or short)	2	2	2	11
94	Leather, stirrup (long or short)	2	2	2	11
95	Leather, stirrup (long or short)	2	2	2	11
96	Leather, stirrup (long or short)	2	2	2	11
97	Leather, stirrup (long or short)	2	2	2	11
98	Leather, stirrup (long or short)	2	2	2	11
99	Leather, stirrup (long or short)	2	2	2	11
100	Leather, stirrup (long or short)	2	2	2	11

(a) Believes 1 1/2 in. x 1/2 in. 30.3" strain securing tool, entrenching when stock is exhausted

TABLE 2—UNIT EQUIPMENT—contd.

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Item No	Description of Stores.	BN HQS		HQR WING		4 COM PANIES		REMARKS
		Fence equipt	Mob equipt	Fence equipt	Mob equipt	Fence equipt	Mob equipt	
1	2	3	4	5	6	7	8	Total battalion war equipment
2	3	4	5	6	7	8	9	10
<i>Enits 1 & D</i>								
1	Buckles, brass roller—							
2	Double 11"							
3	Single 11"							
4	Buckles iron, single—							
5	11" low leg							
6	11" low leg							
7	Buckles iron, lined—							
8	Double 11"							
9	Roller single—							
10	11" low leg							
11	11" low leg							
12	11" low leg							
13	11" low leg							
14	11" low leg							
15	11" low leg							
16	11" low leg							
17	11" low leg							
18	11" low leg							
19	11" low leg							
20	11" low leg							
21	11" low leg							
22	11" low leg							
23	11" low leg							
24	11" low leg							
25	11" low leg							
26	11" low leg							
27	11" low leg							
28	11" low leg							
29	11" low leg							
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31	11" low leg							
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96	11" low leg							
97	11" low leg							
98	11" low leg							
99	11" low leg							
100	11" low leg							

for repair of 1 armor
saddleryfor repairs 1 for
Vickers and 14 for
Lewis gun carrying
equipment 1

[illegible]

TABLE 2 - U. S. EQUIPMENT—contd.

Item No.	Description of items	Hq Hqs		Hq Wigs		4 Cox Famirs		Total installed, war equipment	REMARKS
		Recp equipt	Mob equipt	Peace equipt	Mob equipt	Peace equipt	Mob equipt		
1	2	3	4	5	6	7	8	9	10
Hammers—contd Section 7—contd									
21	Hiveting— 1000.								Line telegraphy equipment
22	8-00						1	2	1 Lewis gun equipment
23	Hardies file small								1 for repair of G R. shovels
24	Holtz tool saddlers canvas						1	1	for repair of G R. shovels
25	Iron roller thinners								1 Lewis gun equipment
	Knives—							2	Line telegraphy equipment
26	Braving farriers								Shooting tools
27	Half iron								1 Lewis gun equipment
28	Searcher farriers								Shooting tools
29	Trimming								
30	Lamps brazing 1 pint								1 Lewis gun equipment
31	Marline spikes steel 9"								1 weighing equipment
32	Nail rollers								

Section 8 D.									
1	Compasses— Magnetic, pocket . . . . .	.	.	.	.	.	.	10	4 Visual telegraphy equipment for reconnaissance for army and covering troops only.
2	Napier's . . . . .	.	.	.	.	.	.	1	Visual telegraphy equipment, Vickers machine gun equipment
3	Prismatic . . . . .	.	.	.	.	.	.	2	
4	Watches— U. S. . . . .	.	.	.	.	.	.	2	
5	Stop, one with seconds . . . . .	.	.	.	.	.	.	1	
Section 3 A.									
1	Beeswax . . . . .	.	.	.	.	.	.	0 2	for upkeep of Vickers gun carrying equipment
2	Dubbing . . . . .	.	.	.	.	.	.	17	also as required for leather for upkeep of machine guns carrying equipment and general use
3	Ghee, Indian . . . . .	.	.	.	.	.	.	0 3	for upkeep of Vickers gun carrying equipment
4	Universal jelly, red . . . . .	.	.	.	.	.	.	20	for machine guns
5	Oil, lubricating, O. S. . . . .	.	.	.	.	.	.	150	for 16 for Vickers guns
6	Paint— Black, marking ready mixed . . . . .	.	.	.	.	.	.	1	for 64 for Lewis guns
7	White, outside ready mixed . . . . .	.	.	.	.	.	.	1	for 106 for arms
8	Salammoniac . . . . .	.	.	.	.	.	.	1	for repair of mule tanks
9	Soap yellow (a) . . . . .	.	.	.	.	.	.	204	for machine guns and general use
10	Turpentine . . . . .	.	.	.	.	.	.	11	for upkeep of machine guns carrying equipment
11	Wax, saddle and shoemakers . . . . .	.	.	.	.	.	.	0 6	for repair of mule tanks
12	Zinc, chloride, of, solution . . . . .	.	.	.	.	.	.	1	

(a) 3 of per man all ranks including Class I Followers; also for machine guns.

TABLE 2—UNIT EQUIPMENT—Contd.

Item No.	Description of items	Hq Hqns		Hq Wing		4 Cox Panic		Total battalion, war equipment	REMARKS.
		Peace equipt	Mob eq lpt	Peace equipt	Mob equipt	Peace equipt	Mob equipt		
1	2	3	4	5	6	7	8	9	10
1	1 alls horse shoe		(e)		(c)		(c)	4	for signalling boxes
2	1 adlocks trans 1 1/2							0 2	
3	11vets str 1—							0 2	
4	Donthead—							4	for upkeep of Vickers gun carrying equipment.
5	1/2 x 1 1/2							4	
6	Counters nk lead—							21	Fitted for immediate use
7	Shoes—							30	
8	Horse 1 1							8	16 for Vickers gun mules
9	Male 1 1								2 for covering a n
10	Pony 1 1								in million boxes
11	Covers waterproof 6 1/2 x 10 1/2							35	17 for regimental mess, of 8 A A when camel transport is supplied

TABLE 2.—UNIT EQUIPMENT—contd

Item No.	Description of Stores	In Hqs.		Hqr. Wing		4 Com Panier		Total battalion war equipment.	REMARKS
		Peace equipt	Mob equipt	Peace equipt.	Mob equipt	Peace equipt	Mob equipt		
1	2	4	6	7	8	9	10		
Section 13 C									
1	Cotton waste white	lb						52	{ 12 Visual telegraphy equipment. 40 for upkeep of machine guns for upkeep of Vickers gun carrying equipment. 2 per pony and V G mule and 1 per char ger for arms and machine guns
2	Dowels 7/8 tan.	yds			20		32	3	
3	Dusters			23	7	1		49	
4	Flannellette	doz yds		28	29		15	149 5	
5	Mittens hedging stretchers—	prs				45		48	
6	Ambulance 1 Y			4	4			8	
7	Blanket					1	(9) 15	16	
8	Wool sheep stuffing	lb			4			4	for upkeep of Vickers gun carrying equipment.
1	Cans lubricating No 9			4				4	for Vickers guns
Section 14									

Section 15 B

Molecular Vibration—

607011913 4/17/14 2 ea

— 24 —

Case 30-3 titled are factors

4. Cases 1 to 2: Infantry range finder

1. (Last) 20 Community member votes
2. (Last) 20 votes
3. (Last) 20 votes

உயிரியல் அறிவியல்

1970-1980

Exhibit No. 2

Figure 10-2
The one-flow industry No. 2

10 Spectacular United Nations
11 on page 112

State 19—

No 2. Infantry magazine

Wavelength 14.1 nm

Telefonat: 0204/111111

Set on fire

1. The argument is O bold

Abstract

W. Va. - submitting case to 3 courts

1000

—Buckley
1925

De It am nro n' k' hollm n' n' et
a 108 2 non 0 16 hollm n' n' et

(artlers, mananines, Lewis 303- M U

11

Walt Whitman

0 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31 32 33 34 35 36 37 38 39 40 41 42 43 44 45 46 47 48 49 50 51 52 53 54 55 56 57 58 59 60 61 62 63 64 65 66 67 68 69 70 71 72 73 74 75 76 77 78 79 80 81 82 83 84 85 86 87 88 89 90 91 92 93 94 95 96 97 98 99 100 101 102 103 104 105 106 107 108 109 110 111 112 113 114 115 116 117 118 119 120 121 122 123 124 125 126 127 128 129 130 131 132 133 134 135 136 137 138 139 140 141 142 143 144 145 146 147 148 149 150 151 152 153 154 155 156 157 158 159 160 161 162 163 164 165 166 167 168 169 170 171 172 173 174 175 176 177 178 179 180 181 182 183 184 185 186 187 188 189 190 191 192 193 194 195 196 197 198 199 200 201 202 203 204 205 206 207 208 209 210 211 212 213 214 215 216 217 218 219 220 221 222 223 224 225 226 227 228 229 230 231 232 233 234 235 236 237 238 239 240 241 242 243 244 245 246 247 248 249 250 251 252 253 254 255 256 257 258 259 260 261 262 263 264 265 266 267 268 269 270 271 272 273 274 275 276 277 278 279 280 281 282 283 284 285 286 287 288 289 290 291 292 293 294 295 296 297 298 299 300 301 302 303 304 305 306 307 308 309 310 311 312 313 314 315 316 317 318 319 320 321 322 323 324 325 326 327 328 329 330 331 332 333 334 335 336 337 338 339 340 341 342 343 344 345 346 347 348 349 350 351 352 353 354 355 356 357 358 359 360 361 362 363 364 365 366 367 368 369 370 371 372 373 374 375 376 377 378 379 380 381 382 383 384 385 386 387 388 389 390 391 392 393 394 395 396 397 398 399 400 401 402 403 404 405 406 407 408 409 410 411 412 413 414 415 416 417 418 419 420 421 422 423 424 425 426 427 428 429 430 431 432 433 434 435 436 437 438 439 440 441 442 443 444 445 446 447 448 449 450 451 452 453 454 455 456 457 458 459 460 461 462 463 464 465 466 467 468 469 470 471 472 473 474 475 476 477 478 479 480 481 482 483 484 485 486 487 488 489 490 491 492 493 494 495 496 497 498 499 500 501 502 503 504 505 506 507 508 509 510 511 512 513 514 515 516 517 518 519 520 521 522 523 524 525 526 527 528 529 530 531 532 533 534 535 536 537 538 539 540 541 542 543 544 545 546 547 548 549 550 551 552 553 554 555 556 557 558 559 560 561 562 563 564 565 566 567 568 569 570 571 572 573 574 575 576 577 578 579 580 581 582 583 584 585 586 587 588 589 590 591 592 593 594 595 596 597 598 599 600 601 602 603 604 605 606 607 608 609 610 611 612 613 614 615 616 617 618 619 620 621 622 623 624 625 626 627 628 629 630 631 632 633 634 635 636 637 638 639 640 641 642 643 644 645 646 647 648 649 650 651 652 653 654 655 656 657 658 659 660 661 662 663 664 665 666 667 668 669 670 671 672 673 674 675 676 677 678 679 680 681 682 683 684 685 686 687 688 689 690 691 692 693 694 695 696 697 698 699 700 701 702 703 704 705 706 707 708 709 710 711 712 713 714 715 716 717 718 719 720 721 722 723 724 725 726 727 728 729 730 731 732 733 734 735 736 737 738 739 740 741 742 743 744 745 746 747 748 749 750 751 752 753 754 755 756 757 758 759 760 761 762 763 764 765 766 767 768 769 770 771 772 773 774 775 776 777 778 779 780 781 782 783 784 785 786 787 788 789 790 791 792 793 794 795 796 797 798 799 800 801 802 803 804 805 806 807 808 809 810 811 812 813 814 815 816 817 818 819 820 821 822 823 824 825 826 827 828 829 830 831 832 833 834 835 836 837 838 839 840 841 842 843 844 845 846 847 848 849 850 851 852 853 854 855 856 857 858 859 860 861 862 863 864 865 866 867 868 869 870 871 872 873 874 875 876 877 878 879 880 881 882 883 884 885 886 887 888 889 890 891 892 893 894 895 896 897 898 899 900 901 902 903 904 905 906 907 908 909 910 911 912 913 914 915 916 917 918 919 920 921 922 923 924 925 926 927 928 929 930 931 932 933 934 935 936 937 938 939 940 941 942 943 944 945 946 947 948 949 950 951 952 953 954 955 956 957 958 959 960 961 962 963 964 965 966 967 968 969 970 971 972 973 974 975 976 977 978 979 980 981 982 983 984 985 986 987 988 989 990 991 992 993 994 995 996 997 998 999 1000 1001 1002 1003 1004 1005 1006 1007 1008 1009 1010 1011 1012 1013 1014 1015 1016 1017 1018 1019 1020 1021 1022 1023 1024 1025 1026 1027 1028 1029 1030 1031 1032 1033 1034 1035 1036 1037 1038 1039 1040

ON 21

Ammunition belt box 705 tripod mounting

Atascadero Lewis 303 M G

— 100 —

10-10-1971

1 All 303 in O
know harvest and clean/re pad 303-18 D

eventually be replaced by stretchers held
in position as required
by units proceeding overland.

TABLE 2--UNIT EQUIPMENT--cont'd

Item No.	Description of Stores	Inf.		Hq.		4 COM		Total battalion war equipment	REMARKS
		Regts.	Wing	Peace equipt.	Mob equipt.	Peace equipt.	Peace equipt.		
1	2	3	4	5	6	7	8	9	10
Section 16 B--cont'd									
1	Cases--cont'd.								
12	Spare parts and tools, Vickers 303" M O rifles		4					4	for contents see Appendix 3.
14	Guns machine Lewis, 303"							4	
15	Bands, barrel						10	10	spare
16	Barrels					4		10	1 per 4 guns for
17	Brushes wire rod cleaning cylinder					10		8	units 1 recelling
18	Cleaners gas regulator					8		10	overhaul
19	Cylinders gas					10			
20	Gauges--								
21	Concentricity of magazines		1					1	
22	Height of trigger point		1					1	
23	Hammers loading magazines							80	
24	Magazines, No. 6					80		424	incl des 1 per 2 guns
25	Moiv rod cleaning cylinder					10		16	spare.
26	Tools adjusting magazines		1			10		16	
27	Tools cleaning cylinder					32		32	
28	Tools cleaning cylinder					32		32	
29	Tools cleaning cylinder					32		32	
30	Tools cleaning cylinder					32		32	
31	Tools cleaning cylinder					32		32	
32	Tools cleaning cylinder					32		32	
33	Tools cleaning cylinder					32		32	
34	Tools cleaning cylinder					32		32	
35	Tools cleaning cylinder					32		32	
36	Tools cleaning cylinder					32		32	
37	Tools cleaning cylinder					32		32	
38	Tools cleaning cylinder					32		32	
39	Tools cleaning cylinder					32		32	
40	Tools cleaning cylinder					32		32	
41	Tools cleaning cylinder					32		32	
42	Tools cleaning cylinder					32		32	
43	Tools cleaning cylinder					32		32	
44	Tools cleaning cylinder					32		32	
45	Tools cleaning cylinder					32		32	
46	Tools cleaning cylinder					32		32	
47	Tools cleaning cylinder					32		32	
48	Tools cleaning cylinder					32		32	
49	Tools cleaning cylinder					32		32	
50	Tools cleaning cylinder					32		32	
51	Tools cleaning cylinder					32		32	
52	Tools cleaning cylinder					32		32	
53	Tools cleaning cylinder					32		32	
54	Tools cleaning cylinder					32		32	
55	Tools cleaning cylinder					32		32	
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58	Tools cleaning cylinder					32		32	
59	Tools cleaning cylinder					32		32	
60	Tools cleaning cylinder					32		32	
61	Tools cleaning cylinder					32		32	
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63	Tools cleaning cylinder					32		32	
64	Tools cleaning cylinder					32		32	
65	Tools cleaning cylinder					32		32	
66	Tools cleaning cylinder					32		32	
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69	Tools cleaning cylinder					32		32	
70	Tools cleaning cylinder					32		32	
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80	Tools cleaning cylinder					32		32	
81	Tools cleaning cylinder					32		32	
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83	Tools cleaning cylinder					32		32	
84	Tools cleaning cylinder					32		32	
85	Tools cleaning cylinder					32		32	
86	Tools cleaning cylinder					32		32	
87	Tools cleaning cylinder					32		32	
88	Tools cleaning cylinder					32		32	
89	Tools cleaning cylinder					32		32	
90	Tools cleaning cylinder					32		32	
91	Tools cleaning cylinder					32		32	
92	Tools cleaning cylinder					32		32	
93	Tools cleaning cylinder					32		32	
94	Tools cleaning cylinder					32		32	
95	Tools cleaning cylinder					32		32	
96	Tools cleaning cylinder					32		32	
97	Tools cleaning cylinder					32		32	
98	Tools cleaning cylinder					32		32	
99	Tools cleaning cylinder					32		32	
100	Tools cleaning cylinder					32		32	

Description of Stores

REMARKS

Item No

2

Section 27 A

Cartridges—
 Illuminating 1" : : :
 Signal, 1" green : : :
 Signal, 1" red : : :
 Cartridges, small arm—

Ball, 303"

Ran, revolver, 455 Wbley

Dummy, 303" Inspectors,

Section 27 B

Grenades, 303 Rifle No. 36

Peace equip.

Mob equip.

Peace equip.

Mob equip.

Peace equip.

Mob equip.

By

MGR.

HOR

WING

4 COY

PARTIES

Total battalion war equipment

10

Includes 100 rounds
 for clerk lift at the
 line
 48 rounds per pistol
 including British
 Officers of Battalion
 and 36 rounds for
 attached M O

144 army and cover
 ing force only issued
 by Ordnance
 on mobilization
 complete with 12
 detectors and 14
 cartridges per every
 12 grenades.

182,852

3,034

25

334

334

TABLE 2.—UNIT EQUIPMENT—cont'd

Item No	Description of Stores	Rt Hqs		Hq. Wing		4 Cox Parties		REMARKS
		Peace equipmt	Mob equipmt	Peace equipmt	Mob equipmt	Peace equipmt	Mob equipmt	
1	2	6	4	4	9	7	8	Total Battalion war equipment 10
Clothing Section 22								
1	Knives, clasp with marine spike and tin opener							} Line telegraphy equipment.
2	Lanyards for clasp knives							
M S D Supplies								
1	Apparatus water testing litrocks							}
2	lit medical lanterns— No. 1							
3	No. 2							
4	Field medical companion							
5	Field surgical haversack							
6	Field veterinary haversack, infantry pattern							

TABLE A.—PERSONAL CLOTHING AND NECESSARIES.

Field Service Scales of Clothing A 1 1, 943 of 1921

(Indian dismounted ranks)

Item No	Description of Stores,	Peace equipment.	Mobilization equipment.	Total war equipment.	Additional issues when specially authorized
ORDINARY SCALE.		<i>Scales per man</i>			
(I) CLOTHING					
<i>Clothing Section 6</i>					
1	Kullahs khaki, Indian troops	1		1	
2	Pagris, khaki (or hats felt for Gurkhas)	1		1	
<i>Clothing Section 7,</i>					
1	Helmets, Khaki, Wolseley, pattern (complete) (a)	1		1	
<i>Clothing Section 17,</i>					
1	Frock, d. k. Indian troops	1		1	
2	Pettico, khaki, universal	1		1	
<i>Clothing Section 18,</i>					
1	Blankets barrack	1		1	
2	Greatcoats drab, mixture dismounted universal	1		1	
<i>Clothing Section 23</i>					
1	Armlets (A)				
<i>Clothing Section 24</i>					
1	Boots, ankle, I F, universal	1		1	
(II) NECESSARIES					
<i>Clothing Section 25</i>					
1	Braces (g)	1		1	
Discs Identity—					
2	No 1, green with cord	1		1	
2	No 2, red	1		1	

TABLE 3—PERSONAL CLOTHING AND NECESSARIES—contd
 Field Service Scales of Clothing A. I. 1, 143 of 1924—contd
 (Indian dismounted ranks)—contd

Item No.	Description of Stores	Peace equipment.	Mountain equipment.	Field war equipment.	Additional necessary war equipment.
ORDINARY SCALE—contd		Units per month.			
(1) NECESSARIES—contd. Clothing Section 12—contd					
4	Housewives' flannel	(b)	1	1	1
5	Shirts, flannel, universal	1	1	1	1
6	Socks, worsted seamless	1	1	1	1
7	Towels hand	1	1	1	1
Clothing Section 23					
1	Titles shoulder	1	1	1	1
Clothing Section 24					
1	Laces, leather (spare)	1	1	1	1
ADDITIONAL SUMMER ARTICLES					
Clothing Section 17					
1	Knickersbockers 4 k. Indian troops (or Trousers, 6 k per universal) (a)	1	1	1	1
Clothing Section 13.					
1	Nets, mosquito	1	1	1	1
Clothing Section 21					
1	Pads, spine (f)	1	1	1	1
ADDITIONAL WINTER ARTICLES.					
(1) CLOTHING					
Clothing Section 17					
1	Knickersbockers serge drab mixture Indian troops (or Trousers, serge drab mixture, universal) (f).	1	1	1	1
Clothing Section 16.					
1	Blankets, barrack	1	1	1	1

TABLE 3 — PERSONAL CLOTHING AND NECESSARIES—*contd**Field Service Scales of Clothing A I I 943 of 1921—contd*(Indian dismounted ranks)—*contd*

Item No	Description of stores	Peace equip ment	Mobilization equip ment	Total war equip ment	Additional issues when specially authorized within a field force
ADDITIONAL WINTER ARTICLES—<i>contd</i>		No. to per man—<i>contd</i>			
(II) NECESSARIES					
<i>Clothing Sect on 2*</i>					
1	Caps comforter or comforters woolen		1	1	
2	Gloves worsted drab	prs	1	1	
3	Waistcoats cardigan drab mixture	1		1	
SPECIAL ISSUES IN THE FIELD					
<i>Clothing Section 18</i>					
1	Blankets, barrack				2
2	Greatcoats drab mixture dismounted universal lined with 2 thicknesses of flannel				(c)
<i>Clothing Sect on 12</i>					
1	Bagg kit universal				1
2	Drawers short flannel universal	prs			12
3	Jerkins leather				(c)
4	Shirts flannel universal (d)				12
5	Socks worsted seamless	prs			12
6	Vests flannel universal				12
<i>Clothing Section 24</i>					
1	Boots Giltie				(c)
N I V					
1	Tootnsticks				As required

(a) Only for Gurkhas Garhwals and Khasias when mobilized for hot climates

(b) If authorized in peace

TABLE 3 — PERSONAL CLOTHING AND NECESSARIES—*contd*

(All Followers)

Item No.	Description of Stores	Lease equipment.	Allocation equip- ment.	Total war equipment	Additional issues when specially authorized within a Unit force
ORDINARY SCALE		Scale per unit			
(I) CLOTHING					
Clothing Section 6					
1	Pagris khaki (or Hats felt for Gurkhas)	1		1	
Clothing Section 7					
1	Helmets khaki Wolseley pattern (complete) (a)		1	1	
Clothing Section 17					
1	Blouses d k. followers (or Frocks d k. Indian troops)	1		1	
2	Putties khaki, universal	1		1	
Clothing Section 18					
1	Blankets barrack	1		1	
Clothing Section 21					
1	Boots ankle I F followers	1		1	
(II) NECESSARIES.					
Clothing Section 22					
Discs identity—					
1	No 1 green, with cord	1		1	
2	No 2 red	1		1	
2	Socks worsted seamless	2		2	
Clothing Section 23					
1	Titles shoulder	1		1	

TABLE 3—PERSONAL CLOTHING AND NECESSARIES—*contd.*(All Followers)—*contd*

Item No	Description of Stores	Peace equipment	Mobilization equipment	Total war equipment	Additional issues when specially authorized
	ORDINARY SCALE—<i>contd</i>	<i>Scale per man—contd</i>			
	(1) NECESSARIES— <i>contd</i>				
	<i>Clothing Section 24</i>				
1	Leather gaiter (spare) PVS	1		1	
	ADDITIONAL SUMMER ARTICLES				
	<i>Clothing Section 17</i>				
1	Knickerbockers dark followers (or Trousers dark universal) (b)	1		1	
	<i>Clothing Section 18</i>				
1	Net mosquito	1		1	
	ADDITIONAL WINTER ARTICLES				
	(1) CLOTHING				
	<i>Clothing Section 17</i>				
1	Knickerbockers serge drab mixture 1 T (or PVS Trousers serge drab mixture universal) (b)		1	1	
	<i>Clothing Section 18</i>				
1	Blankets barrack	1		1	
2	Coats warm followers		1	1	
	(11) NECESSARIES				
	<i>Clothing Section 22</i>				
1	Waistcoats cardigan drab mixture	1		1	
	SPECIAL ISSUES IN THE FIELD				
	<i>Clothing Section 18</i>				
1	Blankets barrack				
*	Greatcoats drab mixture dismounted universal lined with 2 thicknesses of flannel		..		(c)

TABLE 3—PERSONAL CLOTHING AND NECESSARIES—*concl'd*
(All Followers)—*concl'd*

Item No.	Description of Stores	Peace equipment.	Mobilization equipment.	Total war equipment.	Additional issues when specially authorized within a field force.
SPECIAL ISSUES IN THE FIELD—<i>concl'd</i> <i>Clothing Section 13—concl'd</i>		<i>Scale per man—concl'd</i>			
3	Greatcoat drab mixture dismounted universal(d)				1
<i>Clothing Section 12</i>					
1	Bags kit universal				1
4	Cape comforter (or comforters woollen)				1
3	Drawers short flannel universal	prs			2
4	Gloves worsted drab				1
5	Housewives filled				(c)
6	Jerkins leather				(c)
7	Shirts flannel, universal				4
8	Socks worsted seamless	prs			1
9	Towels hand				1
10	Vests flannel, universal				2
<i>Clothing Section 14</i>					
1	Boots Gilt				(c)
A I F					
1	Toothsticks			—	As required.

- (a) Gurkhas, Gs hwalla and humsonia when mobilized for hot climates.
(b) Not for mounted men.
(c) 5 per cent of strength.
(d) In lieu of coats warm followers.
(e) 10 per cent of strength.

CONTENTS OF BAGS SPARE PARTS AND TOOLS LEWIS 303 INCH MACHINE GUNS—*contd*

Item No	Description.	Number per gun	REMARKS.
I	<i>Section 16 B—contd</i>		
	Springs pawl pinion	4	
	stop magazine	3 (c)	
	return	4	
	trigger	2 (d)	
	Strikers	2(d)	
	Guns machine Lewis 303 inch—		
	Screws butt cap	"	
	clamp ring No "	4	
	<i>Tools and appliances</i>		
	Boxes tin small parts M G	1	
	Cans oil M G	1	
	Guns machine Lewis 303 inch—		
	Balances spring combination (e)	1	
	Brushes wire rod cleaning cylinder	5 (f)	
	Handles loading magazine	5 (f)	
	Mops rod cleaning cylinder	1 (f)	
	Plugs clearing	1	
	Spanners mouthpiece barrel	1	
	Washers packing barrel	6	
	Punches No 3 or 4 M G	1	
	Reflectors mirror 303 inch M G	1	
	Screwdrivers small M G	1	
	Wallets Lewis 303 inch M G	1	
	<i>Weapon Section A</i>		
	Pullthroughs 303 inch arms—		
	Gauze wire, pieces	"	
	Pullthroughs double 303 inch arms	1	

(a) 6 per gun if Mark I extractors are issued

(b) 3 per gun for units proceeding overseas

(c) 2 per gun for units proceeding overseas

(d) 1 per gun for units proceeding overseas

(e) Or 1 balance spring M G

(f) Additional to those shown in Table "

APPENDIX 3

CONTENTS OF SPARE PARTS BOXES AND CASES SPARE PARTS AND TOOLS FOR VICKERS
MACHINE GUNS

NOTE—Articles carried in the filled box which are separately demandable and separately chargeable stores are not included in this appendix

Item No	Description.	Number	REMARKS
	BOX SPARE PARTS AND TOOLS.		
	Section 10 A		
	Pins keep split $\frac{1}{2}$ and $2\frac{1}{2}$	6	For Mark IV tripod mounting
	Section 16 B		
	Belt ammunition 303 inch 250-rounds—		
	Eyelets long or	1	
	Strips long	25	
	short	25	
	Boxes tin, small parts M G	3	
	Guns machine Vickers 303 inch—		
	Blocks feed R L.	2	
	Bushes axle side levers	1	
	Collars roller	1	
	Cups muzzle attachment	1	
	Discs muzzle attachment	4	
	Fuses with chain	1	
	Gibs	1	
	Levers extractor left	1	
	" right	1	
	Packing asbestos pieces 5 yds long	4	
	Pins axle trigger	1	
	tumbler	1	
	Spring	2	
	" screwed fixing crank handle	1	
	" split fixing collar roller No 2	2	
	" keeper bush, axle side levers	1	
	" " keeper check nut 10	1	

CONTENTS OF SPARE PARTS BOXES AND CASES SPARE PARTS AND TOOLS FOR VICKERS
MACHINE GUNS—*contd*

Item No	Description.	Number	REMARKS
<i>Section Id B—contd.</i>			
Guns machine Vickers 303 inch— <i>contd</i>			
	Pins split, keeper muzzle attachment	1	with chain ring and "S" hook.
	T fixing rear cross piece	2	
	Plugs front cover catch	2	
	Plungers front cover catch	2	
	Rollers	1	
	Springs bottom pawl R. H feed block	1	
	" rear cover lock	2	
	front cover catch	2	
	g b	1	
	lock	4	
	sear	2	
	top pawls feed block	2	
	Tools belt repasting	1	
Guns machine Vickers 303 inch—			
	Corks for plug	1	
	Glands packing	1	
	Plugs cork	1	with chain and 2 "S" hooks
	screwed	1	with link and "V" hooks
	Sights fore	1	
	tangent	1	
	Springs safety catch	2	with piston
	sliding shutter catch	2	
	" tangent sight	1	
	trigger bar	2	
	Hammers M G	1	
	Mountings tripod 303 M G —		
	Washers packing not elevating	6	
	Screwdrivers large M. G	1	
	Spanners shifting 303 inch M. G	1	

CONTENTS OF SPARE PARTS BOXES AND CASES SPARE PARTS AND TOOLS FOR VICKERS
MACHINE GUNS—*concl.*

Item No.	Description.	Number	REMARKS.
	Guns machine Vickers, .303 inch—		
	Fusees, with chain	1	
	Gibs	1	
	Pine axis, trigger	1	
	" " tumbler	1	
	" Ring	1	
	Protection muzzle	1	
	Seas	1	with spring.
	Springs, gib	1	
	" lock	2	
	Triggers	1	
	Tumblers	1	
	Washers adjusting, No 1	3	4 1/2-inch for connecting rod.
	" " No 2	3	4 1/2-inch for connecting rod.
	Files, cutting, M. G	1	
	Files, No 2, M. G	1	
	" No 5, M. G	1	
	Reflectors, mirror, .303 inch, M. G	1	
	Screwdrivers, small, M. G.	1	
	Wrench Set-screw		
	Pullthroughs, double 3 1/2-inch, arms	1	

APPENDIX 4

CONTENTS OF BAGS, ARMOURERS, S A.

Item No	Description of Stores	Number	REMARKS
<i>Section 7</i>			
	Files smooth flat 6-inch .	1	
	Hammers, rivetting, 4-oz .	1	
	Handles file, small	1	
<i>Section 9 A</i>			
	Cloth emery, No F sheets	2	
<i>Section 27 A</i>			
	Cartridges small arm, dummy, 303 inch inspectors.	20	
<i>Weapon Section A</i>			
	Implements, action, M. L. E. R. S.	1	
	Pullthroughs, double, 303 inch arm	3	
	" " cords (spare)	3	
	" gauge wire (spare)	30	
	Cocking piece M. L. E. R. S.	5	
	Heads, breech, bolt M. L. E. R. S.	30	
	Screws, swivel, M. L. E. R. S.	10	
	Bars M. L. E. R. S.	5	
<i>Weapon Section C</i>			
	Dracs, armourers . . .	1	
	Bits, screwdrivers, stockbolt, M. L. M.	1	
	Pincers, armourers . . . pairs	1	
	Screwdrivers, armourer's, large .	1	
	" " small . . .	3	
	" extractor, axle M. L. M.	1	
	Tools clearing, 303 inch, arms—		
	bits screw . . .	1	
	Bushes bit screw . . .	3	
	Rods, No. 2 . . .	3	
	Tools, removing striker, rifle, short, M. L. E.	3	
	" " wad stockbolt .	1	

APPENDIX 5

CONTENTS OF A FIELD VETERINARY HAVERSACK (INFANTRY PATTERN)
WEIGHT LBS 5½

Item No of priced vocabulary of medical stores (India) 1903	Articles	No or quantity	REMARKS
	<i>Drugs</i>		
68	Camphorodyne in flask (Item 2720 Ozs P V)	5	
150	Horse balls ammoni carbonas 4 drs Tins each, tins of 6	"	
189	Iodine powder in tubes	12	
350	Spiritus methylatus	8	
	<i>I struments</i>		
1180	Forceps pin cutting and holder	1	
1240	Needles suture f H curved for wire set of 2	3	
1953	Probes G S 9	"	
	<i>Appliances</i>		
1 84	Drenchers stuminium	1	
1633	Wire soft metal 17 S W G in 102 hanks	1	
	<i>Bandages and Dress ings</i>		
1701	Bandages lce e wove compressed	3	
1740 A	Tow Surgeon's compressed " oz Pkt packets	1	
1750	Wool cotton absorbent compressed 2 oz packets	1	
	<i>Su iries</i>		
1407	Pins common 1 oz packets	1	
2484	Tapes narrow pieces of 18 yards	1	
	<i>Bottles</i>		
2908	Bottles round stoppered and capped No 2 oz in leather case (Vety)	1	
2037	Field Veterinary Haversack empty	1	
	List of contents of Field Veterinary Haversack	2	

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3. Parties at issue	"
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Karnavan—A *karnavan* can alone sue for *kurwad* property.¹ See note to O 1 r 8

Lessee · Lessor out of possession.—As to a suit by a lessee, whose lessor is out of possession at the date of the lease, see the under-noted cases :

Mortgagee—A mortgagee may sue to set aside a sale of the mortgaged-property for arrears of revenue.²

Official Assignee—The Official Assignee is not a necessary party to a suit to recover a money debt from a person who is either insolvent at the time the suit is instituted or becomes insolvent pending the suit. But a decree made against an insolvent under such circumstances should be restricted in form so as not to allow the judgment creditor by means of execution to obtain an advantage over the general body of creditors.³

Partition—In all cases of joint ownership, each party has a right to enforce partition.⁴ It has been held by a Full Bench that unity of possession as well as of interest is not necessary to entitle a person to partition, and that it is not good law that there can be no partition between parties, the interest of one of whom is subordinate to that of others.⁵ In a partition-suit all persons interested in the property to be divided, including a purchaser or mortgagor of a co-partener's share, must be made parties.⁶ The circumstance that there has been a partition between members of a joint Hindu family does not alter their rights as to the property still undivided. As to this they continue to stand to one another in the relation of members of an undivided Hindu family.⁷ Two mortgagees held separate usufructuary mortgages, the one of a two-thirds share, the other of a one-third share, in an undivided area of *muzf* land, granted by the owners of those shares respectively *held*, that one mortgagee could not in a suit, to which neither of the mortgagors was a party, obtain partition of the share mortgaged to him.⁸ A Hindu infant who by will inheritance becomes entitled to an interest in a joint family business, does not necessarily become a member of the trading partnership carrying on the business. Even, under procedure therefore, where parties governed by the Mitakshara law, a need not be joined as a co-plaintiff in a suit by the father to recover a debt.¹⁰

Receiver.—A receiver may alone sue for every thing due to the estate.¹¹

Rent—In a suit in regard to an undivided fraction of rent, the other co-proprietors should be made parties;¹² nor can one sharer sue alone to enhance

¹ *Byathamma v. Avulla*, (1892) 15 Mad., 19

² *Tiery v. Kistodhoo Bose*, (1873) L. R., 1 I. A. 76; *Lokenath Ghose v. Jagannudhoo Roy*, (1876) 1 Cal., 297; *Achayya v. Hanumanthayudu* (1891) 14 Mad., 269; *Ugarchood v. Mudipi* (1887) 9 Bom., 324; *Saraj v. Dulpotnam* (1882) 6 Bom., 359; and *Varad-v. Titia*, (1882) 6 Bom., 387.

³ *Gobind Lal v. Bipra Das*, (1890) 17 Cal., 398

⁴ *Chandmull v. Ram Snehari*, (1897) 22 Cal., 239

⁵ *Mitta Kunth v. Neerajun* (1875) 14 B. L. R., 166; *Palmanandi Das v. Jagadamba Das*, (1879) 6 B. L. R. 134; *Skama Soodenjee v. Jurdine, Skinner & Co* (1875) 14 B. L. R., 167

⁶ *Hemadri Nath v. Ramesh Kant* (1897) 21 Cal., 575, but see, *Mukunda Lal v. Lahurau* (1892) 20 Cal., 379

⁷ *Saidu v. Ram Bho Goyind*, (1892) 16 Bom., 608; see, *Torittabhusan v. Toru-prasanna*, (1879) 4 C. L. R. 161.

⁸ *Govri Shankar v. Atimaram*, (1894) 18 Bom., 611

⁹ *Mangh Prasad v. Ishri Prasad*, (1896) 18 All., 476

¹⁰ *Lutchmanen v. Siva Prokasa*, (1899) 26 Cal., 340.

¹¹ *Bachulal v. Shamy*, (1883) 9 Bom., 536, but see, *Drubomgi v. Datta*, (1887) 14 Cal., 323, p. 339. See note under O. XI, rr. 1—3.

¹² *Obhoy Gobind v. Hurrychurn*, (1882) 8 Cal., 277.

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THE SCHEDULES

THE FIRST SCHEDULE

ORDER I.

Parties to Suits

1 All persons may be joined in one suit as plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if such persons brought separate suits, any common question of law or fact would arise.

Act XIV of 1882, Sect. 26, cf. R. S. O. 16, r. 1.

This rule has been re-drafted and brought directly into line with O. 16, r. 1, of the English Rules, as altered in 1895. It applies to H. C. and Prov. S. C. C.

All persons may:—By the General Clauses Act, X of 1897, Sect. 3 (39), "person" includes any company or association or body of individuals whether incorporated or not. The rule should not be read as though all members of a community must be joined as plaintiffs.¹

The same act or transaction.—The substitution of these words for "cause of action" seems to effect a change of considerable importance. Under the old rule thirteen persons who had been committed to jail under one warrant sued jointly for damages and their plaint was taken off the file,² and similarly six persons were not permitted to sue jointly for a declaration that their removal from office by a District Temple Committee was illegal.³ Also several members of the Calcutta Police were not permitted to sue jointly in respect of a newspaper article reflecting on the conduct of them all as members of the Police force.⁴

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¹ Baiju Lal v. Bulak Lal, (1897) 21 Cal., 345

² Ali Serang v. Beadon, (1885) 11 Cal., 524

³ Ramanuja v. Devanayaka, (1885) 8 Mad., 301

⁴ Aldridge v. Barrow, (1907) 31 Cal., 662; 11 Cal. W. N., 680

⁵ Smurthwaite v. Hamay, (1894) A. C., 494

⁶ P. & O. S. N. Co. v. Tsuno Kijima, (1895) A. C., 661

⁷ Carter v. Rigby, (1896) 2 Q. B., 113.

seem to fall within the wording of the present rule and to be maintainable. The plaintiffs' causes of action may now be separate and distinct so long as they arise out of *the same act or transaction or the same series of transactions* alleged and there is a common question of law or fact to be decided.¹

English Rulings—The following decisions under the new English rule serve as useful guides to the interpretation of this Rule—

Four plaintiffs who had taken debentures in a Company on the faith of statements made in the same prospectus, which they alleged to be false were permitted to sue jointly. Their right to relief arose out of the same transaction, namely the issue of the prospectus.²

Six market gardeners were allowed to sue the owner of a Market for a declaration that he was not entitled to exclude them from certain alleged rights connected with the market-place.³

But where a plaintiff sued the directors of a Company claiming damages for a fraud against himself personally in declaring a dividend improperly and further sued on behalf of himself and all other shareholders for a declaration that the declaration was illegal and for repayment, it was *held* that there were, in effect, two plaintiffs and that the two causes of action did not arise out of the *same transaction*.⁴

With this case may be compared *Nusserwanji v. Gordon*,⁵ in which in a suit against a Company and its directors, by the agents, two of whom were shareholders, the plaintiffs were not allowed to join a cause of action based on their agreement with a cause of action common to two plaintiffs only as shareholders. Under the old rule (sect 26, Act XIV of 1882) several members of a *caste* were allowed to join in a suit against trustees for maladministration.⁶

Alternative or Antagonistic claims.—The words "in the alternative" apply to cases in which there is a doubt as to the person entitled to sue upon a cause of action,⁷ as where if one of two plaintiffs can sue, the second is joined as a matter of caution,⁸ but it seems that where persons have conflicting or antagonistic claims in respect of the same subject-matter, this rule read with O XI, r. 3 *post* does not enable them to sue jointly, as where a Hindu widow and her adopted son sued together to recover a family property.⁹ But where a widow and her adopted son sued together to recover money due to the deceased husband of them, their suit was on 26)¹⁰ And it was also or a decree in favour of all rnative in favour of one of

This seems a convenient place to consider the reported decisions on cases in which the plaintiff's right to sue has been challenged:—

¹ *Stroud v. Lawson*, (1898) 2 Q. B., at pp. 52-54; *Bedford v. Ellis*, (1901) A. C., p. 12 and *Ann. Prac.* (1908) p. 147.

² *Dunlop v. Wood*, (1899) 1 Ch., 393.

³ *Ellis v. Bedford*, (1899) 1 Ch., 494; (1901) A. C., 12.

⁴ *Stroud v. Lawson*, (1898) 2 Q. B., 41 and see *Ann. Prac.* (1908) 148.

⁵ *Nusserwanji v. Gordon*, (1881) 6 Bom., 266, p. 275.

⁶ *Tilaksey v. Huthlum*, (1883) 8 Bom., at p. 450; and see *Kalidas v. Gor Parajurani*, (1890) 15 Bom., 309.

⁷ *Langiammal v. Venkatasamil*, (1883) 6 Mad., p. 243. The reasoning in *Haramoni v. Hari Churn*, (1895) 22 Cal., at pp. 829, 840, does not seem applicable to the altered rule. And see *Mohima v. Atul Chandra* (1897) 24 Cal., 540.

⁸ *Bukul v. Shunji*, (1885) 9 Bom., 536.

⁹ *Langiammal v. Venkatasamil*, (1883) 6 Mad., 243.

¹⁰ *Mintyunsjaya v. Janakanam*, (1903) 26 Mad., 617.

¹¹ *Lakshmakka v. Naga Reddi*, (1907) 28 Mad., 501.

Agent.—A *Karwari* *Samulwan* cannot sue in his own name in suits on behalf of the *dar-ul-rah*.¹ Nor can a *gumastha* sue for rent in his own name.² So in a suit for declaration of title against a zemindar and not his *darinshah* should be made a party.³ So also a manager appointed under Act XXXV of 1858, cannot sue in his own name for possession of the lunatic's property.⁴

Assignee.—In England the right to bring an action could not at Common Law be transferred or assigned, so that the assignee might bring a suit in his own name, in this country not only may a cause of action be so assigned, but also the liability to be sued.⁵ But see the *Transfer of Property Act*, IV of 1882, s. 136 which declares that no judge, legal practitioner or officer connected with any Court of Justice can buy any assignable claim. Where four persons sued for possession of property, one of them suing as assignee of part of the rights of the other three therein, it was held that there was no misjoinder.⁶

After suit brought.—Assignees may be added or substituted pending suit See 11 XXII, r 10 *post*. If substitution is effected, it must be done within the period of limitation.* See O L, r 10 (2) *post* and *Limitation Act* of 1908.

Benamidar.—In mere personal demands, such as Bengal bonds, the suit may be brought in the name of the person whose name is on the instrument, though he has no real interest in it, and the real owner can also sue, but in a suit for property or title the real owner must sue.⁷ A suit for foreclosure of a mortgage may be brought by a *benamidar*,⁸ as also a suit for sale of the mortgaged property,¹⁰ also a suit for redemption,¹¹ and a suit for damages.¹² A *benamidar* can sue on a promissory note.¹³ The payee and holder of a promissory-note is not debarred from suing on it by reason of the fact that a third person is really interested in it.¹⁴ In *Altharai*¹⁵ it has been held that a *benamidar* can sue in his own name for the recovery of immovable property, but this view has been directly dissented from in the Calcutta High Court,¹⁶ where it has also been decided that a *benamidar* cannot maintain a suit for ejectment.¹⁷ On second appeal against a decree dismissing a suit brought by a paise mortgagee to

¹ *Umri Nilakundin*, (1882) 4 Mad., 141. See also *Ramdasar v. Krishnen* (1880) 3 Mad., 270, *Krishnamurti v. Nili Kunden*, (1878) 2 Mad., 167.

² *Koonjo Behary v. Purno Chunder*, (1882) 12 C. L. R., 55, *Moolhuo Soolan v. Moran & Co.*, [1869] 11 W. R., 43.

³ *Madho Rao Apa v. Thakoor Pershad*, (1863) 3 Agra, 127.

⁴ *Nemava v. Detandruppa*, (1891) 15 Bom., 177.

⁵ *Kraiges v. Bhawant Churn Mitter*, (1863) B. L. R., F. B., 54.

⁶ *Sundar Jha v. Bansman Jha*, (1906) 33 Calc., 367, 10 Calc. W. N., 309.

⁷ *Harak Chand v. Dornath Sahay*, (1899) 25 Calc., 409, approved in *Abdul Rahman v. Amur Ali*, (1907) 31 Calc., 612 F. B., 5 Calc. L. J., 486; 11 Calc. W. N., 521. Overruling, *Hepat Singh v. Imrit*, (1880) 3 Calc., 720. See also, *Rampoy Nath Sarcar v. Shambhu Nath Shaha*, (1905) 9 Calc. W. N., 883.

⁸ *Gopeckristo Gossain v. Gunga Persad*, (1849) 6 Moo. I. A., 53, p. 72; R., 72; *Hari Gobind v. observations of Banerjee*, 903) 30 Calc., 271. See also 469.

⁹ *Sachidananda Mohapatra v. Baloram Gosain*, (1897) 21 Calc., 644.

¹⁰ *Yadram v. Umrai Sing*, (1899) 21 All., 380.

¹¹ *Digdu v. Balvant*, (1898) 22 Bom., 820.

¹² *Ravi v. Mahulev*, (1898) 22 Bom., 672.

¹³ *Sarat Chandra v. Kedar Nath*, (1897) 2 Calc. W. N., 286.

¹⁴ *Bojjamma v. Venkatasamayya*, (1898) 21 Mad., 30.

¹⁵ *Nand Kishore v. Ahmad Ata*, (1896) 18 All., 69.

¹⁶ *Baroda Sundari v. Dinku Baidhu*, (1899) 25 Calc., 874; 3 Calc. W. N., 12, *Mohender Nath v. Kabi Prasad*, (1903) 30 Calc., 927.

redeem a prior incumbrance,* it was ordered that the mortgagor be brought upon the record. On its appearing that the plaintiff was a mere name-lender and that it had not been intended that he should take any interest under the mortgage sued on, the Madras High Court dismissed the second appeal.¹ In a suit to recover a parcel of land, the plaintiff's case was that it had been purchased by him *benami* in the name of his brother, who had sued the present defendants to obtain possession in 1887, but had been negligent in the conduct of the suit, which was consequently dismissed. It was found that there had been no negligence in the conduct of the suit, which had been instituted with the plaintiff's knowledge: *held*, that the plaintiff was bound by the decree in the former suit, and could not recover on his secret title.² Where a *benamidar* purchased property with moneys borrowed from the appellant and afterwards mortgaged the purchased property to the appellant to secure the debt, the appellant being aware of the *benami* character of the title, *held*, in a suit against the *benamidar* and the beneficial owner that, even if the mortgagor had not created a valid hypothecation of the property, still the appellant was entitled in equity to a declaration that the sums advanced with interest were a charge thereon.³ When a purchaser had failed to raise the defence that the mortgage to him, which was the root of his title, had been taken *bonâ fide* and without notice of the mortgagor being a *benamidar*, but the High Court allowed the defence when taken in appeal, *held*, that it must prevail.⁴

Charities.—The Advocate-General is entitled to carry on all suits in the High Court for the administration of charitable funds and to appear and represent the Crown in them, if brought by another party.⁵ Several persons can join in a suit under s. 92.

Club Secretary.—A suit for the price of goods supplied to a member of a non-proprietary club cannot be brought in the name of the Secretary of the Club.⁶

Ejectment.—When a tenant has been admitted to possession by all the co-partners in an estate, a suit for ejectment cannot be brought against him unless all the partners join in the action.⁷

Foreign States—recognized by the Government of this country—can sue in their recognized names.⁸ A suit for property belonging to a Rajah cannot be brought in the name of his Political Agent,⁹ but in England a Minister of a foreign state has been allowed to sue in respect of State property.¹⁰

Forfeiture.—In a suit on a condition to re-enter all the lessors must join as plaintiffs;¹¹ so one sharer cannot bring a suit to avoid an under-tenure.¹²

¹ *Chunnam v. Ramchandra*, (1892) 15 Mad., 51.

² *Shangara v. Krishnan*, (1892) 15 Mad., 267.

³ *Sarju Parshad v. Bir Bhaddar*, (1892) L. R., 20 I. A., 103.

⁴ *Mahomed Mozuffer v. Kishori Mohan*, (1891) L. R., 22 I. A., 129; 22 Cal., 909.

⁵ *Attorney General v. Brodie*, (1816) 4 Moo. 1 A., 190; *Warens of Nossa benora v. Hartmann*, (1851) *Perry's Orient. Cases*, 313; *Advocate-General v. Dimothar*, (1872) 1 L., 526. See, *Pan bewrie Mull v. Chumoolall*, (1878) 3 Cal., 567; *Thackersey v. Harthum* (1884) 8 Bom., 432.

⁶ *Michael v. Briggs*, (1891) 14 Mad., 562.

⁷ *Gouri Sinker v. Tarthomnee* (1869) 12 W. R., 132; *Dundumthar v. Drobo*, *Moyce*, (1875) 24 W. R., 110; *Krishnappa v. Govind*, (1879) 3 Bom., 97, *note*; *Radha Prasad v. Euf*, (1881) 7 Cal., 414. But see, *Hariputra v. Ram Churn* (1892) 19 Cal., 544.

⁸ *U. S. v. Wagner*, (1867) L. R., 2 Ch. App., 532; *U. S. v. Mc. Rae*, (1867) L. R., 3 Ch. App., 79.

⁹ *Girdharr Dhar Powlett*, (1880) 2 AU., 690.

¹⁰ *Castaneda v. Clydebank Engineering Co.*, (1902) A. C. 521.

¹² *Basant Harnam v. Choorwar*, (1881) 7 Cal., 170; *contra*, *Harthum v. Carsetji*, (1887) 11 Bom., 611. And see *Hariputra v. Ram Churn*, (1892) 19 Cal., 548.

¹³ *Dwarkanath Pal v. Gish Chunder*, (1881) 6 Cal., 827.

Idol — A suit relating to property alleged to belong to a temple cannot be brought in the name of the idol of the temple.¹

Hindu widows, suits against — A suit to contest an adoption by a Hindu widow must be brought by the presumptive reversionary heir, but it may be brought by a more distant heir, if those nearer in the line of succession are in collusion with the widow.² The rule is the same in the case of an alienation made by a Hindu widow,³ but if there is no collusion or connivance, the more distant heir has no right to sue.⁴ In *Kaghupati v. Tirumalai*,⁵ it was held that according to the Hindu law in Madras, a reversioner is entitled to sue to establish the invalidity of a sale by the widow of the last male holder notwithstanding that he left a daughter who was alive at the date of the suit, but was not one of the parties.

Joint interest — All persons who entered into the contract should be made plaintiffs, even though they form a joint Mitakshara family.⁶ Thus, a member of a Hindu family carrying on an ancestral money-lending business who is not the managing member cannot sue for a family debt,⁷ but if the contract is in the name of one, he can sue alone,⁸ even though he be a minor in an undivided Hindu family,⁹ and generally where there is no evidence,¹⁰ and nothing on the face of the contract, to show that the person named in it is not acting in his individual capacity, he can sue.¹¹ A bond of indemnity was given to five persons to secure the liability of a *marb*. The *marb* was afterwards employed by three only of five obligees. Held, that on the *marb* misconducting himself, the three obligees could not sue on the bond.¹² Under a single contract to convey land to several persons it is not open to some of the joint contractors to enforce specific performance of the contract, if the other contractors refuse to have specific performance.¹³ The rule in England is that all persons having a joint interest must join in an action at law, but in equity it is sufficient if all interested in the subject of the suit should be before the Court, either in the shape of plaintiffs or defendants,¹⁴ and one of several mortgagees or trustees can maintain a suit, making the others co-defendants, if they are unwilling to be joined as plaintiffs, or have done some act which precludes them.¹⁵ In the Full Bench case of *Pjari Mohan v. Kedar Nath*,¹⁶

¹ *Raghunathji v. Shah Lal Chandel*, (1897) 19 All., 390.

² *Anand Kunwar v. Court of Wards*, (1881) 6 Cal., 704; *Gurulinga Swami v. Ramalakshmanam*, (1895) 18 Mad., 53; *Rama Bai v. Rangray*, (1893) 19 Bom., 614.

³ *Jhala v. Kanta Prasad*, (1887) 9 All., 411.

⁴ *Ishwar Narayan v. Janki*, (1893) 15 All., 132.

⁵ *Raghupati v. Tirumalai*, (1892) 15 Mad., 422.

⁶ *Ramsalak v. Ramfil Kumbhar*, (1881) 6 Cal., 815; *Kahidas v. Nathu*, (1883) 7 Bom., 217 (1892), but see *Shreeku v. Affjwal*, (1891) 15 Bom., 297.

⁷ *Jugal Kishore v. Hulas Ram*, (1886) 8 All., 261.

⁸ *Bungser Singh v. Sundar Lal*, (1881) 10 C. L. R., 261; *Umi Nambiar v. Nilakandan*, (1882) 4 Mad., 141; *Hari v. Mahadu*, (1896) 20 Bom., 435; *Jagan-nath Das v. Bah Senapati*, (1903) 8 Cal. W. N., xxxii.

⁹ *Yeknath Ramchandra v. Waman*, (1886) 10 Bom., 211.

¹⁰ *Ragho Vniyak v. Divil*, (1889) 13 Bom., 51.

¹¹ *Jagubhai v. Rustamji*, (1885) 9 Bom., 311.

¹² *Purbutti Nath v. Tejomooy*, (1889) 5 Cal., 303.

¹³ *Sifui Bahimran v. Mahirammunessa*, (1897) 21 Cal., 832; 1 Cal. W. N., 42.

¹⁴ *Wilkins v. Fry*, 1 Mer., 262; *Guru Prasad v. Ras Muihan*, (1879) 1 C. L. R., 431.

¹⁵ *Lake v. South Ken Hot. Co.*, (1877) 7 C. D., 789; (1879) 11 C. D., 121; *Kahidas v. Nathu*, (1883) 7 Bom., 217.

¹⁶ *Pjari Mohan v. Kedar Nath*, (1899) 26 Cal., 409; 3 Cal. W. N., 271. This was followed in *Biri Singh v. Nawal Singh*, (1902) 24 All., 226, and see, *Terini Kant v. Nand Kishore*, (1878) 2 C. L. R., 598; *Bissesswar v. Brojo Kant*,

it was held that a suit by one of two co-contractors, making the other a defendant, should not be dismissed simply because the plaintiff had failed to prove that his co-contractor had refused to join him as plaintiff. In *Van Gelder v Sowerby Society*,¹ where the plaintiffs would not apply, but would not object to placing a person as defendant whom the Court considered should be a co-plaintiff, the Court of Appeal considered it was the duty of the Judge to place him on the record as defendant and not to dismiss the suit. The Indian Courts follow the equity practice.² Where a document creates a joint obligation, all the parties should be on the record;³ and it is the same if the obligation is created by law. Thus, when upon the death of the obligee of a money-bond the right to realise the money has devolved in specific shares upon his heirs, each of such heirs cannot maintain a separate suit for recovery of his share of the money due on the bond.⁴

The right given by s. 37 of Act XI of 1859 to the auction-purchaser of an entire estate must be exercised by all the purchasers jointly where there are more purchasers than one.⁵

Joint family.—So, in a suit to recover ancestral property, all the members of a joint family should sue together; those only who refuse should be made defendants,⁶ and they cannot sue through some or one of their members.⁷ Nor can one member of an undivided family sue to establish a right of easement, unless he be the *karta*, and sue as such; otherwise, all the members must be on the record as plaintiffs or defendants,⁸ nor is he entitled to recover on a bond in favour of his undivided father, deceased, without the production of a certificate under Act VII of 1889, unless it appears on the face of the bond that the debt was due to the joint family of father and son.⁹ To a suit by one member of a joint Hindu family for a specific share of the joint family property, all the members are necessary parties.¹⁰ But it has been held that a suit for damages in the shape of mesne profits is maintainable by one share holder on the ground of his exclusive possession of the share of the land,¹¹ and that a member of a joint undivided Hindu family is not precluded from suing alone to obtain compensation in respect of a loss to himself personally caused by wrongful destruction of property in which he had a definite share.¹²

(1896) 1 Cal., W. N., 221; *Peria v. Velayutham* (1900) 20 Mad., 392. The following cases overruled—*Dwarkanath Mitter v. Tara Prasanna*, (1890) 17 Cal., 169; *She-hue Shikhareswar v. Giris Chandra*, (1896) 1 Cal., W. N., 679 and also *Jihanti Nath v. Gokul Chandra*, (1892) 19 Cal., 766.

¹ *Van Gelder v. Sowerby Society*, (1890) 41 C. D., 391, see p. 394. See also *Parton v. North Staffordshire Ry. Coys.*, (1888) 38 C. D., 458; *Kendall v. Hamilton* (1879) 4 App. Cas., 501, p. 516.

² *Rama Pisharody v. Narayanan*, (1879) 3 Mad., 234; *Ummi Nambhar v. Nilakandam*, (1882) 4 Mad., 141; *Arunachala v. Vythalalinga*, (1883) 6 Mad., 27; *Uma Sundari v. Habbal*, (1881) 9 C. L. R., 13; *Phoolbas Koomar v. Jageshwar*, (1876) L. R., 3 L. A., 7, p. 25; (1875) 1 Cal., 226.

³ *Gopal Chunder Goshoo v. Juggadamba Bostu*, (1866) 10 W. R., 411; *Pamjoy Sing v. Nagar Gizee*, (1866) 5 W. R., Act X, 68.

⁴ *Kandhaya Lal v. Chamlar*, (1885) 7 All., 313.

⁵ *Jatra Mohan v. Aukul Chamlar*, (1897) 21 Cal., 331.

⁶ *Harjani Tiwarie v. Lachman Pershad*, (1869) 12 W. R., 478; *Collector of Monghyr v. Hurdai Narain*, (1880) 5 Cal., 425.

⁷ *Balkrishna v. Municipality of Mahul*, (1886) 10 Bom., 32; *Hari Gopal v. Gokabhis*, (1888) 12 Bom., 158.

⁸ *Arunachala v. Vythalalinga*, (1886) 6 Mad., 27.

⁹ *Vankata Narasimha v. Kotayya*, (1891) 14 Mad., 377.

¹⁰ *Nehru Mohan v. Manraj*, (1876) 2 Cal., 110. See also: *Alim Manji v. Ashul Ali*, 16 W. R., 128; *Gokul Pershad v. Kewari Mahito*, 20 W. R., 138.

¹¹ *Chander Chamlar v. Mammabhai*, (1875) 23 W. R., 386.

¹² *Gopi Kishore v. Byland*, (1868) 9 W. R., 270.

Act XIV of 1882, sect. 28 and R. S. O. 16 r. 4.

This rule applies to H. C. and Prov. S. C. C.

The words "*in respect of the same matter*" have been amplified in the re-drafting of section 28, old Code, so that the numerous decisions on this point under Act XIV of 1882 are no longer of practical interest. Under this rule read with O. 11 r. 6 the Courts will no doubt refuse to allow entirely separate causes of action to be joined in one suit against different defendants unless they involve some common question of law or fact. Compare r. 5 *post* and see Ann. Prac. 1908, i. 153. For instance any attempt to combine in one suit claims for damages in respect of separate torts against separate tort-feasors¹ will probably be defeated in India as in England, and the principles laid down in the cases undernoted afford a guide which may well serve in the interpretation of this rule.

Misjoinder — As to misjoinder and non-joinder of parties see. O. 1, r. 9, *post* and the notes thereto.

Joinder of parties liable on the same contract, O. 1, r. 6 *post*—and where the plaintiff is in doubt O. 1, r. 7 *post*.

Joinder of Causes of Action is dealt with in O. 11, rr. 3-5.

All persons — Only persons whose claims must necessarily be taken into consideration before dealing on the plaintiff's title should be joined as defendants in the suit² and parties who are not likely to be affected by the result of a suit should not come into the suit³. A person is not liable to be added as a party to the suit, although he might be "likely to be affected by the result,"⁴ unless he is also entitled to or claims some interest in the subject-matter of the suit⁵. A ship is a person within this section⁶.

D, who became entitled to the rents from a certain date. **D** applied for payment to **B**, who said he had paid the whole in advance to **A**. *Held*, **D** could sue **A** and **B** for the rent, praying for a decree for rent against **B**, or a decree against **A**, if **B**'s allegation was correct⁷. On a suit brought by the plaintiff for recovery of possession of land against defendant No. 1 (the person by whom the plaintiff had been dispossessed), for an order for the registration of the plaintiff's name under Act VII of 1876, for mesne profits and also for a refund of the purchase money from the defendant No. 2 in case the plaintiff's claim against the defendant No. 1 failed, it was held that the suit was not bad for misjoinder of parties and causes of action⁸.

Cantonment Committee.—See, Cantonment Committee, *Pooná v. Barjorji*,¹⁰

¹ *Gower v. Conlidge*, (1898) 1 Q. B. at p. 352; *C. A.*, *Suller v. Great W. Ry.* (3d), (1896) A. C. 459; *Bullock v. London G. Omnibus Co.* (1907) 1 K. B. 201; *C. A.* and see other cases cited in *Ann. Prac.* (1909), i. pp. 153, 151. *Persons* should not be made parties merely for the purposes of discovery or to make them pay costs—*Barstall v. Beyfus* (1891) 26 C. D. 35 at p. 40.

² *Ferguson v. Government*, (1869) 9 W. R., 159.

³ *Pudilochann v. Lall Chand*, (1868) 10 W. R., 293.

⁴ *Koeglar v. Prosonno Coomar*, (1877) 2 Cal., 472.

⁵ *Bombay Steam Co. v. Shephard*, (1899) 12 B. & M., 237, p. 211.

⁶ *Child v. Stebbing*, (1877) 5 C. D., 695; *Buddoo Dass v. Hooto Mill & Co.*, (1882) 8 Cal., 170.

⁷ *Rajdhur v. Kali Krishna*, (1882) 8 Cal., 963.

⁸ *Madan Mohan v. Holloway*, (1896) 12 Cal., 535.

⁹ *Serajul Huq v. Abdul Rahaman*, (1902) 29 Cal., 257; 5 Cal. W. R., 211.

¹⁰ (1889) 14 B. & M., 280.

Owner of a share.—But a suit by the purchaser of the interest of one of several mortgagees will not lie unless all the other mortgagees are on the record¹. On the same principle, the owner of a portion of the equity of redemption must make all his co-sharers parties,² even though he sues for his own share.³

Registration.—In a suit for registration of a mortgage, it is not necessary to make all the co-mortgagors parties. A less all who are admittedly shareholders in the joint property are before the Court.⁴

To compel registration.—In a registration suit under s. 77, Act III, 1877 the Registrar need not be made a party.⁵

To declare there is no right of way.—In a suit by the owner of land to have it declared that land declared to be a public road by a Magistrate, is private property, the Secretary of State is not a necessary party.⁷

To determine right to rent.—A tenant has no right to bring a suit to have it determined which of two defendants is his landlord.⁸

Suit for land.—In a suit for land by one lessee against another, their lessors need not be parties,⁹ but if in addition, plaintiff requires a declaration that the defendant's lessors hold under a forged lease, they should be made parties.¹⁰

Suit for rent on lease.—Co-partners are not proper parties in a suit for rent on a lease for rent granted to one partner for himself and his co-partners.¹¹

Other cases.—In a suit for land where defendant's wife claims that her husband erected a house on it with her separate money, she should be made a party¹² and if it has been mortgaged, the mortgagor and mortgagee can be sued together.¹³

Court may give judgment for or against one or more of joint parties,

4 Judgment may be given without any amendment—

(a) for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to;

(b) against such one or more of the defendants as may be found to be liable, according to their respective liabilities.

¹ *Parsotam Siron v. Mula*, (1897) 9 All., 68.

² *Nalakant v. Suresh Chunder*, (1894) L. R., 12 I. A., 171, p. 180.

³ *Ragho Salvi v. Balkrishna*, (1895) 9 Bom., 128; *Fakir Baksh v. Sadat Ali*, (1885) 7 All., 376; *Gobardhan v. Sujan*, (1894) 16 All., 254.

⁴ *Alagappa Mudaliar v. Sivarama Sundara*, (1896) 19 Mad., 211.

⁵ *Pabaladi Singh v. Luchmunbutty*, (1869) 12 W. R., 256.

⁶ *Wishwambhar v. Prabhakar*, (1894) 8 Bom., 269; *Radha Kissen v. Choonee Lall*, (1880) 5 Cal., 445.

⁷ *Chuni Lall v. Ramkishan*, (1883) 15 Cal., 460, save in Bombay—*Balaram v. Magistrate of Igatpuri*, (1892) 6 Bom., 672.

⁸ *Koylash Chandra Dutt v. Goluk Chander Poddar*, (1897) 2 Cal. W. N., 61.

⁹ *Nagar Chand v. Duorga Dass*, (1869) 11 W. R., 137.

¹⁰ *Dukheena Mohun v. Amceerooddeen*, (1869) 12 W. R., 247.

¹¹ *Ragonath Das v. Moraji Jutha*, (1892) 16 Bom., 568.

¹² *Gour Gopal Dutt v. Bissanath Ghose*, *Coryton*, 41.

¹³ *Indar Kuar v. Gur Prasad*, (1889) 11 All., 33.

Act XIV of 1882, sects 26 and 28, R. S. O. 16, rr. 1-4.

This rule embodies in a more convenient form the provisions of sects. 26

COMPARISON OF FORMS UNDER ACT XIV OF 1882.

Defendant need not be interested in all the relief claimed.

5. It shall not be necessary that every defendant shall be interested as to all the relief claimed in any suit against him.

R. S. O. 16, r. 5 This rule applies to H. C. and Prov. S. C. C.

This rule does not sanction the joinder as defendants of persons who are introduced merely for the purpose of discovery or of making them pay costs.

See O. 1, r. 3, foot note (1) *supra*.

The words "*cause of action*" have been omitted in re-drafting the English Rule, under which they have, as might be supposed, led to considerable difficulty.

6 The plaintiff may, at his option, join as parties to the same suit all or any of the persons severally, or jointly and severally, liable on any one contract, including parties to bills of exchange, hundis and promissory notes.

Joinder of parties liable on same contract.

Act XIV of 1882, sec. 29, R. S. O. 16, r. 6

This Rule applies to H. C. and Prov. S. C. C.

The drawer and acceptor of a bill of exchange can be joined as defendants in a suit brought by the holder.¹ This rule does not refer to the case of liability to account under a will² and is in terms confined to contracts.

May join—Since the passing of the Indian Contract Act, a judgment obtained against some only of joint contractors is no bar to a second suit on the contract against the other joint contractors.³

7. Where the plaintiff is in doubt as to the person from whom he is entitled to obtain redress, he may join two or more defendants in order that the question as to which of the defendants is liable, and to what extent, may be determined as between all parties.

When plaintiff in doubt from whom redress is to be sought.

R. S. O. 16, r. 7. This rule applies to H. C. and Prov. S. C. C.

This is another new provision borrowed direct from the English rules.

Two or more defendants—This rule will not enable a plaintiff to join in one suit different causes of action against different defendants;⁴ but where there

¹ *Pestonjee v. Mirza Mahomed*, (1878) 3 Cal., 511. As to the nature of the liability between parties to bills of exchange, see *Duncan Fox and Co. v. N. and S. W. Bank*, 6 App. Cas. at p. 11.

² *Harrison v. de re*, (1891) 2 Ch. 319, and as to Trusts, see *Ann. Prac.* (1908) i, pp. 155, 156.

³ *Muhammad Askari v. Radhe Ram Singh*, (1906) 22 All., 207.

⁴ *Frankenburg v. Great Horseless Car Co.*, 81 A. T. 65 and cases referred to under r. 3, *supra*.

is one breach of contract and a doubt exists as to which of two persons caused it they may be joined,¹ or a suit may be maintained against one defendant for trespass and against a second (the plaintiff's lessor) for breach of his covenant for quiet enjoyment.²

Costs—In England the costs of a successful defendant may be ordered to be paid by the plaintiff, and added by the plaintiff to his costs against the unsuccessful defendant.³

8 (1) Where there are numerous persons having the same interest in one suit, one or more of such persons may, with the permission of the Court, sue or be sued, or may defend, in such suit, on behalf of or for the benefit of all persons so interested. But the Court shall in such case give at the plaintiff's expense, notice of the institution of the suit to all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the Court in each case, may direct.

(2) Any person on whose behalf or for whose benefit a suit is instituted or defended under sub-rule (1) may apply to the Court to be made a party to such suit.

Act XIV of 1882, sects 30, 32 R S O. 16, r. 9.

This rule applies to H C and Prov S C. C

Suits by or against partnership firms; see O XXX, and as to representation on death, marriage or insolvency, see. O. XXII.

Object of this rule—The general rule is that all persons interested in the subject-matter of a suit in respect of its object should be made parties.

interest.⁴ The "numerous parties" mentioned in the section must be capable of being ascertained.⁵

In England the rule is that such a suit is in order where there is a common interest and a common grievance and the relief sought by the plaintiff is beneficial to all whom he proposes to represent.⁶ And in India the Manager of an

¹ *Thompson v. London City Co.*, (1899) 1 Q. B. 840

² *Child v. Stebbing* (1879), 11 C. D. 82

³ *Sanderson v. Blyth*, (1903) 2 K. B. 533 C. A.; see *Ann. Prec.* (1908), 1, p. 156

⁴ *Cockburn v. Thompson*, (1808) 16 Ves., 321; *Chudasama Sursangji v. Partapsang Khengarji*, (1904) 28 Bom., 209

⁵ *Adamson v. Atamgam*, (1886) 9 Mad., 463; *Siddeswaraj v. Krishna*, (1891) 14 Mad., 177. See however, *Chun v. Ramkrishen*, (1889) 15 Cal., 460; and "SPECIFIC REMEDY, Public Roads," p. 77.

⁶ *Raghuraj Dial v. Kesho Ramanuj*, (1889) 11 All., 18; *Ragava v. Rajaratnam*, (1891) 14 Mad., 57.

⁷ *Sajedur v. Baidyanath*, (1893) 20 Cal., 397

⁸ See *Lord Macnaghten in Duke of Bedford v. Ellis*, (1901) A. C. at p. 8

unregistered religious society has been allowed to sue in his own name on behalf of all members of the society.¹

This rule is an enabling one, and does not debar certain members of a community, who do not represent the community, from suing in their own right.² When certain Mahomedans of a village brought a suit against other Mahomedans of the same village for the removal of a wall built by the defendants upon land found to belong in common to all the Mahomedan inhabitants of the village for the purpose of a burial ground, it was held on second appeal, that no permission was required from the Court and that the plaintiffs were entitled to maintain the suit.³ A suit will lie at the instance of individual tax-payers for an injunction restraining a municipality from misapplying its funds.⁴

Permission—If the Court's permission has not been previously obtained, the suit will be dismissed,⁵ but it may be given after the institution of the suit,⁶ even if leave to sue has been previously refused.⁷ The permission need not be express; it may be constructive.⁸ The omission to apply for leave under this rule is not in itself ground for dismissing a suit, but on objection being taken, the suit should not be allowed to proceed except on the terms of the plaint being amended and the requisite leave being obtained.⁹ If a suit is brought on behalf of a minor for himself and others without sanction, and the next friend does not satisfy the Court that it is for the benefit of the minor, he will be made to pay the costs.¹⁰

Defective order.—If an order purporting to be made under this section does not give permission to any definitely named persons, and notice has not issued it is void.¹¹

No permission—Though plaintiff claims a right in common with others, yet if he does not get permission, the result of the suit only binds the actual litigants.¹²

Plaintiffs—It is essential that the parties should be numerous, &c.

¹ *Atmanand v. Brahm*, (1907) A. W. N., 229; Cf. *Muhammadan Association v. Bakhsh*, (1891) 6 All., 284.

² *Baiju Lal v. Bulakhal*, (1897) 24 Cal., 385.

³ *Tanudin v. Pandu*, (1894) 18 Bom., 699.

⁴ *Vaman v. Municipality of Solapur*, (1899) 22 Bom., 616.

⁵ *See also Atman v. Atman*, (1893) 6 C. I. D., 229; *See also Bakh v. Bakh*, (1891) 6 All., 284.

⁶ *Fernandez v. Rodriguez*, (1897) 21 Bom., 731; *Balden Bharthi v. Bar Gir*, (1900) 22 All., 269.

⁷ *Chennu Menon v. Krishnan*, (1902) 25 Mad., 399.

⁸ Dictum of Stuart, C. J., to the contrary effect in *Hira Lal v. Bhairon*, (1887) 5 All., 602, dissented from—*Dhampur Singh v. Parsh Nath Singh*, (1894) 21 Cal., 180; *Kalu Khalar v. Jan Meah*, (1902) 29 Cal., 100.

⁹ *Srinivasa Charlar v. Raghava Charlar*, (1900) 23 Mad., 28. *Amendment*—Note the reasoning in *Rampurth v. Premnakh*, (1891) 15 Bom., 93.

¹⁰ *Geerdelala v. Chunder Kant*, (1885) 11 Cal., 217.

¹¹ *Kali Kanta v. Gouri Prasad*, (1890) 17 Cal., 906. And see *Ragava v. Rajaratnam*, (1891) 14 Mad., 57.

¹² *Tharakodi v. Munisappa*, (1885) 8 Mad., 196; and see *Ragava v. Rajaratnam*, (1891) 14 Mad., 57; compare *Mav v. Newton*, 31 C. D., 317.

¹³ *Harrison v. Stewardson*, (1812) 32 Hare, 570.

¹⁴ *Weld v. Bonham*, (1821) 2 Sim & S., p. 93.

plaintiff, or defendants must distinctly assert that they are competent to sue or be sued on behalf of all parties so concerned.¹ Where a crew were 80 in number, and 64 of them appointed two agents who sued for an account on behalf of the 64 only, and the remaining 16 were in no way brought before the Court, it was held impossible to take the account without bringing the 16 before the Court.² An individual worshipper in a mosque is not entitled to sue for the recovery of possession of land belonging to the mosque. While there is a trustee who has not been removed from his office, he is the only person entitled to sue for the recovery of land belonging to the institution.³

In England, the plaintiff cannot be compelled to give up the names and addresses of the persons on whose behalf he is suing.⁴ He retains absolute dominion over the suit until decree, and may dismiss the bill at his pleasure; but after decree he cannot deprive the persons of the same class from the benefit of it,⁵ and a defence to him is a defence to the suit.⁶ If the suit is dismissed before decree, it is no bar to a suit by the others; but the decree binds both sides,⁷ in the absence of fraud or collusion.⁸

Interest.—A Hindu shortly before his death directed his wife and mother to employ part of his property for the maintenance and up-keep of a charitable institution. The charitable trust having been neglected and an adoptive son having taken possession in his own right of the lands constituting the endowment, two Brahman residents of the neighbourhood who had obtained permission

proprietor of it for themselves and the other raiyats for a declaration of their

Same interest.—The parties must have *the same interest*. Thus, one creditor can sue on behalf of himself and all the other creditors of the deceased, for the object of each is to make out the estate of the deceased to be as large as possible;⁹ and so can one creditor under a trust deed for payment of debts,¹⁰ but he cannot sue alone;¹¹ and also a legatee on behalf of himself and all other

¹ Baldwin v. Lawrence, (1824) 2 Sim & S., 19; Good v. Blewitt, (1807) 13 Ves., 397.

² Leigh v. Thomas, (1751) 2 Ves., (Sr.), 312.

³ Kamaraju v. Asanali Sheriff, (1900) 23 Mad., 99; but see, Monmotha v. Harish, (1906) 33 Cal. 915; 10 Cal. W. N., 867.

⁴ Leathley v. MacAndrew, Weekly Notes, (1875) p. 259.

⁵ Daniell 215; 2 Ex., D., 392.

⁶ Leathley v. MacAndrew, Weekly notes, 1876, p. 39; see Alpha Co., in re, (1903) 1 Ch. 203.

⁷ Srikanth v. Indupuram, (1868) 3 Mad. H. C., 226.

⁸ Commissioners of Sewers v. Gellatly, (1876) 3 C. D., 610.

⁹ Ganapati v. Savithri, (1898) 21 Mad., 10.

¹⁰ Ahmedbhai v. Balkrishna, (1895) 19 Bom., 391.

¹¹ Bhundal Pandit v. Pandol Pos, (1898) 12 Bom., 221.

¹² Worraker v. Fryer, (1876) 2 C. D., 109; see also Woodridge v. Norris, L. R., (1868) 6 Eq., 410; Reese River Co. v. Atwell, (1869) L. R., 7 Eq., 347.

¹³ 1 Danell, 5th edition, 209.

¹⁴ Manickavelu v. Arunthnot, (1882) 4 Mad., 404; Burjorji v. Dhunbai, (1891) 16 Bom., 1.

legatees;¹ and an appointee under a will;² and some of the proprietors of a trading concern, on behalf of themselves and others, for an account against their co-partners;³ and one person on behalf of himself and others to avoid paying a cess;⁴ and a person for himself and others to protect property pending litigation and to prevent waste⁵ and the owner of land against one villager for himself and others asserting a right of way.⁶

Objection to join—If any of the persons whom plaintiff claims to represent considers that he does not represent him, his proper course is to apply to be put on the record, and then he can apply to get rid of any other he may think injurious to him or to take the conduct of the case out of the plaintiff's hands.⁷

Action by Company—One member of a corporation can sue on behalf of himself and others to restrain the Commission of an act which is *ultra vires*;⁸ he may also sue in his own name,⁹ or if the directors and majority are using their power for the purpose of doing something fraudulent against the minority.¹⁰ And one director can sue the others in his own name on the ground of individual injury, if they wrongfully restrain him from acting as director.¹¹ But as one object of incorporating bodies in England was to avoid a multiplicity of suits, in all other cases the corporate body must sue.¹²

Not same interest.—If the parties have not the same interest in the suit, this procedure cannot be adopted;¹³ and so where a shareholder filed a bill on behalf of himself and others to restrain the directors from enforcing a call and to obtain a return of the deposit and allotment money on the ground of misrepresentation, it was held that it would not lie on that ground, for the case of each person deceived by the misrepresentation was peculiar to himself and must depend on its own circumstances,¹⁴ nor will a suit lie by a shareholder for himself and others, when the act complained of is only voidable and capable of confirmation by the members of the company, or a mere matter of internal regulation;¹⁵ nor to dissolve a partnership.¹⁶ It will not be allowed in cases in which questions of priority or other matters are introduced, which may give rise to opposition between the plaintiff and the others, such as a suit by an incumbrancer for himself and others where the claims are not precisely of the same degree.¹⁷

¹ *Geereballa v Chunder Kunt*, (1885) 11 Cal., 213.

² *Manning v. Thesiger*, (1822) 1 Sim. & S., 106.

³ *Chaney v. May*, *Finch's Case* in Ch., 592.

⁴ *Attorney General v. Hech*, (1824) 2 Sim. & S., p. 71.

⁵ 1 Daniell, 5th edition, 231.

⁶ *Chun v. Ramkishen*, (1888) 15 Cal., 460.

⁷ *Watson v. Cave*, (1891) 17 C. D., 19. *Fraser v. Cooper*, (1892) 21 C. D., 718; in 1 see *May v. Newton*, (1886) 34 C. D., 347, p. 319.

⁸ *Bloxam v. Met. Railway Co.*, (1869) L. R. 3 Ch. App., 337; *Clinch v. Financial Corporation*, L. R., (1868) 5 Eq., 450; L. R., 4 Ch. App., 117.

⁹ *Hoole v. Great Western Railway Co.*, (1867) L. R., 3 Ch. App., 262.

¹⁰ *Atwood v. Merryweather*, L. R., (1868) 5 Eq. 464, note; *Mason v. Harris*, (1879) 11 C. D., 97; *Silber Light Co. v. Silber* (1879) 12 C. D., 717.

¹¹ *Pulbrook v. Richmond Consol. Mg. Co.*, (1878) 9 C. D., 610.

¹² *Green v. Jones*, (1872) 1 D. & C. App., 103. As to when a company may sue, see *Phillips*, (1882) 23 C. D., 11, in Ann. Prac. (1908).

¹³ *Jones v. Garcia Del Rio*, 1 T. & R., 297; *Attorney General v. Hech*, 2 Sim., & S., 76; see also *Weale v. West Middlesex Waterworks*, 1 J. & W., 358.

¹⁴ *Hollows v. Fernie*, (1869) 3 Ch. App., p. 471.

¹⁵ *Russell v. Wake-field Waterworks*, (1875) L. R., 20 Eq., 474.

¹⁶ *Long v. Yonge*, (1830) 2 Sim., p. 386.

¹⁷ *Newton v. Egmont*, (1812) 5 Sim., 137.

Enforcements—This section does not refer to subscribers, worshippers or devotees of an idol complaining of breach of trust,¹ otherwise, if a declaration of a joint right is sought² nor to any cases in which an individual right has been violated, but there are not many persons *jointly* interested in obtaining relief such as the right of a person to use a mosque for prayer,³ nor to the case where one of numerous co-sharers sues to prevent some of them retaining exclusive possession of the joint property.⁴ In a suit brought for the dismissal of a *dharmakarta*, all the members of the District Committee should join as parties.⁵ A person collecting subscriptions for the purpose of building a temple in pursuance of a resolution come to at a meeting of the community holds them in the capacity of a trustee, and a suit in respect thereof should be filed under this rule.⁶

Other cases—This procedure will not be applied in such cases as the following: in these all the persons interested must be brought before the Court; namely, suits to foreclose or enforce a vendor's lien,⁷ suits for partition,⁸ suits for contribution.⁹

Costs—Defendant applied to have the names of others added as plaintiffs to secure his costs. *Held* that it was not shewn the other names were necessary to completely adjudicate on the questions involved, and as to costs, the Court might interfere and order security.¹⁰ Persons interested on behalf of whom a suit is brought under this rule but not joining or joined as parties, may be bound by the decree, but should not be ordered to pay costs.¹¹

Defendants—Like plaintiffs the defendants must be numerous, and it must be alleged in the plaint that the suit is brought against them personally and on behalf of the others,¹² the number of defendants named must be so large that it can be justly said they will fairly and honestly try the legal right between themselves and all other persons interested and the plaintiff,¹³ they must have a common interest,¹⁴ and every right adverse to the plaintiff should be represented.¹⁵ Where fifteen hundred persons had a claim against a person for costs, which all depended on the same question, namely, the validity of certain certificates, it was held that he could file a bill against some of them to restrain the proceedings of all until the validity of the claims had been decided.¹⁶ If a person interested in the suit is of opinion that the defendant does not represent him, he should apply to be made a defendant.¹⁷

¹ *Thackeray v. Hurbham*, (1884) 8 Bom., 432.

² *Kalidas v. Gor Parjiram*, (1891) 15 Bom., 309.

³ *Jawahar v. Akbar* (1885) 7 All., 178; *Zafarab v. Pakhtawar*, (1883) 5 All., 497; *Raghubar Dial v. Kesho Rimanuj*, (1889) 11 All., 18; see, however, *Jai Ah v. Ram Nath*, (1882) 8 Cal., 32; *Lutifunnessa v. Nazim*, (1885) 11 Cal., 33. But see *Mahmudin v. Syedhm*, (1893) 20 Cal., 816.

⁴ *Hira Lal v. Bhairan*, (1893) 5 All., 602.

⁵ *Vira Sami v. Armachella*, (1878) 2 Mad., 290. See, *Mahomedan Association v. Bakshi*, (1884) 6 All., 284.

⁶ *Mahomed Nathulal v. Husen*, (1892) 22 Bom., 729.

⁷ *Attorney-General v. Sittingbourne, L. R.*, (1866) 1 Eq., 636; *Bishop of Winchester v. Mid Hants Railway Co.*, (1867) L. R., 5 Eq., 17.

⁸ *Pahalad Singh v. Luchmunbutty*, (1869) 12 W. R., 256.

⁹ *Ibu Husain v. Bamdal*, (1890) 12 All., 110.

¹⁰ *De Hart v. Stevenson*, (1876) 1 Q. B. D., 313.

¹¹ *Sajedur v. Binjya Nath Deb*, (1896) 1 Cal. W. N., 63.

¹² *Lanchester v. Thompson*, (1820) 5 Maddocks, 4.

¹³ *Adair v. New River Co.*, (1805) 11 Ves., p. 414.

¹⁴ *Temperton v. Russell*, (1893) 1 Q. B. 435 C. A.

¹⁵ *Mayor of York v. Pilkington*, (1737) 1 Atk., 232; *Cramer v. Bird*, (1868) L. R., 6 Eq., 143.

¹⁶ *Sheffield Waterworks v. Yeomans*, L. R., 2 Ch. App., 8.

¹⁷ *Fraser v. Cooper*, (1882) 21 C. D., 718.

Karnavan—In *Malabar* there is a practice of allowing the *karnavan* to sue and be sued as representative of the *tarwid*, but it is doubtful if such a practice should be allowed to continue, and whether these cases should not be dealt with under this rule.¹

Execution of decree.—See the under noted cases ²

Sub-section (2)—As to addition of parties as plaintiffs or defendants see notes to O. I, r. 10, *post*

9. No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.

Misjoinder and non-joinder.

Act XIV of 1882, sect. 31: R S O 16, r. 11.

This rule applies to H. C. and Prov S C. C.

As to effect of death, marriage or insolvency of parties see O. XXII *post*

Striking out or adding parties.—The next rule (O. I, r. 10) deals with the Court's power to add, substitute or strike out parties in cases of misjoinder or non-joinder:—

Misjoinder.—Cases of misjoinder may be divided into five classes:—

(a) Misjoinder of Plaintiffs.

(b) Misjoinder of Defendants.

Both these classes are dealt with in this Rule and such misjoinder cannot defeat the claim. The objection should be taken at the first opportunity³ and in England it has been held to be too late after judgment⁴

(c) Misjoinder of causes of action or subject-matters. This class is dealt with under O. II, rr 3, 6 *post*.

(d) Misjoinder of plaintiffs and causes of action or subject-matters

The right to relief must arise in respect of the same act or transaction or series of acts or transactions see O. I, r. 1 *ante*, or the Court may strike out some of the plaintiffs under O. I, r. 10 (2) *post* or dismiss the suit⁵

(e) Misjoinder of defendants and causes of action or subject-matters.

This is multifariousness strictly so called and is discussed in the notes to O. II, r. 3 *post*

Non-joinder not fatal.—A Hindu widow sued the heiress of her husband and pending suit adopted a son under a power; it was objected in the Privy Council that the son should have been joined, but their lordships overruled the objection.⁶

¹ *Muringa v. Valia Tamboratti*, (1894) 7 Mad., 87. See also, *Vasudevan v. Narayan*, (1893) 6 Mad., 121; *Varanakot v. Varanakot*, (1893) 2 Mad., 328; *Playachanidathil v. Kenatumkora*, (1892) 5 Mad., 201; *Moidin Kutti v. Krishnan*, (1897) 10 Mad., 322; *Komappan Nambiar v. Ukkaram Nambiar*, (1894) 17 Mad., 214

² *Sadagopachary v. Krishnamachari*, (1899) 12 Mad., 356; *Commissioners of Sewers v. Gellatly*, (1876) 3 C. D., 610; *Ragava v. Rajaratnam*, 14 Mad., 57.

³ O. I, r. 13 *infra*.

⁴ *Bullock v. London & Omnibus Co.*, (1907) 1 K. B., 264, C. A., see notes to O. I, r. 10 *infra*

⁵ *Ram Narain v. Annoda*, (1897) 14 Cal., 681; see also *Sudhendu v. Durga*, *id* 435

⁶ *Dhurm Das Pandey v. Shama Soodra*, (1813) 3 Moo., 1 A. 229

When plaintiff who was insurer under a contract of indemnity, sued to recover money paid by him on behalf of the person he indemnified, and in appeal it was objected that the person insured should have been made a party, the suit was not dismissed, but remanded.¹ Where three brothers were interested in certain mortgage transactions entered into by their father, and two only sued, it was held that the suits were not barred for non-joinder of the third brother.² In a suit in which it was objected that the plaintiff had not made his undivided brother a co-plaintiff, the plaintiff amended his plaint by describing himself as managing co-partner and representative of the joint family. *Held*, that the omission of plaintiff to join his brother was a mere formal defect and was not fatal to the suit.³ When two out of three defendants liable for a joint debt had promised to pay separately, it was held that the suit could proceed against them only.⁴ Even where parties are governed by the Mitakshara Law, an infant need not be joined as a co-plaintiff in a suit by the father to recover a trade-debt.⁵

Non-joinder when fatal.—In certain classes of suits the plea of non-joinder, if raised in time, is fatal—such as a suit on a joint contract when all the contractors are not parties,⁶ or one in which only three out of four managers sue for trust property and the fourth has not been on the record;⁷ or for recovery of a joint debt by one only of two or more surviving partners,⁸ or by only one member of a joint Hindu family,⁹ or on a mortgage governed by Chapter IV of the Transfer of Property Act;¹⁰ or for maintenance by an illegitimate son, when all the persons in possession of the father's property are not parties;¹¹ or for recovery of land by the managing member of a joint family without making his undivided brother a party,¹² or by a *benamidar* for possession of land without making the beneficial owner a plaintiff,¹³ or one for a declaration of a right to a certain sum of money without making all the persons interested in the same parties.¹⁴ In a suit brought by a plaintiff for the establishment of his right to certain property, it appeared that certain persons had obtained decrees against the defendants and had attached the property in dispute and had successfully resisted the plaintiff's claim to the property. *Held*, that the absent decree-holders were necessary parties, and that the plaintiff not having brought them on the record, the suit was not maintainable.¹⁵

¹ Chief of Limdi v Secretary of State, (1890) 14 Bom., 290.

² Mahabala v. Kunhanna, (1898) 21 Mad., 373.

³ Ramayya v Venkataratnam, (1891) 17 Mad., 122.

⁴ Bhingulath Thakur v Madhub Krsto, (1896) 23 Cal., 533, note. As to joinder of all mortgagees in mortgage suits, see Hira Lal v Krishan Lal, (1897) 19 All., 543, and Krishnan v Chaudhary, (1894) 17 Mad., 17.

⁵ Lutchmun v Biva Prokasa, (1899) 26 Cal., 319.

⁶ Ram Selank v Ram Lal, (1881) 6 Cal., 815.

⁷ Rajendra Nath v Mahomed, (1882) 8 Cal., 42, L. R., 8 I. A., 133; see also Paramathu v Sunkara, (1900) 23 Mad., 82, also Ramavarar v Krishnan, (1880) 3 Mad., 270.

⁸ Imamuddin v Laladhar, (1892) 14 All., 524, but see O. XXX, post.

⁹ Kalidas v Nathu, (1883) 7 Bom., 217.

¹⁰ Ghulam Kadir v Mustakim Khan, (1896) 18 All., 109, and the cases cited therein; see also Subhan v. Arun Chalam, (1892) 15 Mad., 487 and Rambakshi v Mohunt Ram Lal, (1874) 21 W. R., 428.

¹¹ Narayan v Laving, (1878) 2 Bom., 140.

¹² Angimuthu v Kolandivelu, (1900) 23 Mad., 190.

¹³ Kalee Prommo v Dho Nath, (1873) 19 W. R., 434; see O. J. r. 1 ante.

¹⁴ Haran Chunder v Nundogopal, (1874) 22 W. R., 71; or suits of the nature referred to in Kendal v Hamilton, (1879) 4 App. Cav., 504.

¹⁵ Durga Charan Sarkar v Jotindra Mohan Tagore, (1900) 27 Cal., 493. See also Pira Nath Das v. Ram Taran, (1903) 7 C. W. N., 601. As to the addition of co-plaintiffs, see Kalidas v Nathu, (1883) 7 Bom., 271; dissentient from in Ram Sebak v. Ram Lal, (1881) 6 Cal., 815.

* *Limitation*—A suit was brought for partnership accounts. Upon the objection of the defendant, it was found that a necessary defendant had been omitted and he was afterwards added as a party at a time when the suit as against him was barred. *Held*, that the whole suit was rightly dismissed.¹ A suit for

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then barred by limitation. *Held*, that the whole suit was not barred.²

10 (1) Where a suit has been instituted in the name of the wrong person as plaintiff or where it is doubtful whether it has been instituted in the name of the right plaintiff, the Court may at any stage of the suit, if satisfied that the suit has been instituted through a *bonâ fide* mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as the Court thinks just.

(2) The Court may at any stage of the proceedings either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.

(3) No person shall be added as a plaintiff suing without a next friend or as the next friend of a plaintiff under any disability without his consent.

(4) Where a defendant is added, the plaint shall, unless the Court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new defendant and, if the Court thinks fit, on the original defendant.

(5) Subject to the provisions of the Indian Limitation Act, 1877, section 22, the proceedings as against any person added as defendant shall be deemed to have begun only on the service of the summons.

Act XIV of 1882, Sects 27 and 32 R. S. O 16, rr 2, 11, 39

¹ Ram Doyal v. Jammunjoy, (1887) 14 Cal., 791.

² Jagdeo Singh v. Padarath Ahir, (1898) 25 Cal., 285.

This rule applies to H. C. and Prov. S. C. C.

Bona fide Mistake

This section does not give a Court unlimited power to remodel the proceedings.¹ It does not mean that a party's case should be so framed as to succeed, but it should be so framed that it can be adjudicated on by the Court.² A plaintiff can only be added under this section where there has been a *bona fide* mistake. Where certain persons having only an expectation, and not an interest, brought an action for administration, the persons directly interested not being parties and apparently objecting, it was held this section did not apply.³ The mistake may be of law as well as of fact. One shareholder sued on behalf of himself and others to set aside a contract not mentioned in the prospectus on demurrer the Court added the Company as co-plaintiff *without their consent*.⁴ This provision applies where a Collector institutes a suit without right in *bona fide* mistake.⁵ Where a person has been made a plaintiff under this section, a motion to strike out his name can only be made by himself.⁶ A defendant who has assigned all his rights in the subject matter of the suit has no right to be made a co-plaintiff. A plaintiff, who has no right of action when he brings his suit, cannot remedy the defect and acquire the right by joining with him persons who have the right of action.⁷ When a summons by mistake purported to be taken out by the Official Assignee of Bombay, when he should have been described as the constituted attorney of the Official Assignee of Madras, it was amended under this section at the hearing.⁸ An amendment of the plaint may be allowed in second appeal, when the suit by mistake has been instituted in the name of the wrong parties.⁹ A plaint may be amended so as to show the plaintiff as an administrator if he first sues erroneously in his personal capacity.¹⁰

Appeal—This section does not apply to an appeal filed in the name of a wrong person.¹¹

Costs—Amendment is an indulgence and it is usual to make the applicant pay the costs thrown away.

STRIKING OUT AND ADDING PARTIES.

At any stage of the proceedings These words have been substituted for "on or before the first hearing" in section 32, Old Code thus following the English rule.¹²

¹ *Turquand v. Pears*, 4 Q. B. D., 280.

² *Long v. Crossley*, 13 C. D., 388. See also *Smith v. Haseltine*, W. N., 1875, p. 250. See, however, the *Val de Travers Co. v. London Tramways Company*, 48 L. J., C. P., 312.

³ *Clowes v. Hilliard*, 4 C. D., 413.

⁴ *Duckett v. Gover*, 6 C. D., 82; *Mason v. Harris*, 11 C. D., 100, see also *Smith v. Haseltine*, Weekly Notes, 1875, p. 250, *Long v. Crossley*, 13 C. D., 388; *Ayscough v. Boller*, 41 C. D., 341, *Hughes v. Pump House Co.* (1902) 2 K. U., 485.

⁵ *Krishna v. Coll. of Tanjore*, (1907) 30 Mad., 419.

⁶ *Duckett v. Gover*, 6 C. D., 82; *Julooputee Chatterjee v. Chunder Kant*, (1865) 9 W. R., 309.

⁷ *Abdul Hak v. Gulam Jilani*, (1896) 20 Bom., 677; *Bhanu v. Kashinath*, (1896) 210 Bom., 537.

⁸ *Sardarmal v. Aranyal Sabhapathy*, (1897) 21 Bom., 205.

⁹ *Seethamma v. Chennappa*, (1897) 20 Mad., 467.

¹⁰ *Gopil Doss v. Buldeo Doss*, (1906) 33 Cal., 657, (1906) A. W. N., 602.

¹¹ *Dwarkanath Biswas v. Debendranath Tagore*, (1899) 4 Cal. W. N., 58.

¹² See *Oriental Bank v. ...* the suit has reached A. U., 332. It has been at a late stage in the Bom., 116, contra *Narain* (1903) A. W. N., 35.

After decree—Under Act XIV of 1882

Where an applicant possessed an eight anna interest in the suit, his name was added after decree,¹ and where in execution of decree against a Hindu widow as representing the estate, a claim was made on behalf of an adopted son, it was decided that he should be made a party.² And in a suit for partition a party

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General rule—Courts should not dismiss a suit merely on account of defect of parties, but should exercise the discretion vested in them by this section.⁶ The general rule is that all persons having an interest in the subject of the suit, and in whose absence the subject-matter of the suit cannot be fully investigated and disposed of, ought to be made parties, so that the questions raised in it shall not be raised again between the parties to the suit, or any of them, and third parties;⁷ and that a person whose interests might in any way be affected should be put on the record,⁸ but a person who has no interest, against whom there can be no relief given, ought not to be a party;⁹ and persons should not be made co-plaintiffs, unless their cause of action is the same as that of the other plaintiffs.¹⁰ Thus, a person claiming adversely to both plaintiff and defendant should not be made a party.¹¹ If a person, objects to be added as a plaintiff, he should be made a defendant.¹² The object of this section is to prevent needless litigation and there are cases when a Judge should exercise the discretion vested in him by this section, even if the plaintiff omits to ask him to do so.¹³ It is discretionary with a Court to add persons not before it as parties to a suit,¹⁴ and the provisions of this section are permissive, not imperative,¹⁵ and if embarrassment or inconvenience would be caused to the other parties the discretion would probably not be exercised.¹⁶

¹ *Lingamall v. Chuma*, (1883) 6 Mad., 227.

² *in Subbanna v. ...*, (1883) 9 Bom.,
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³ *Jotindra Mohan Tagore v. Bejoy* (1903) 32 Calc., 483, but see O. I, r. 13, *post*

⁴ *Hari Saran v. Shubaneswari*, (1889) 16 Calc., 40; L. R., 15 I. A., 193; and compare *Munghiram v. Gursahi*, (1890) 17 Calc., 347

⁵ *Goodall v. Mussoorie Bank*, (1888) 10 All., 97.

⁶ *Ruchpaul v. Johuree*, (1866) 1 Agra, 147; *Jonah Ali v. Golam Assad*, (1874) 21 W. R., 187; *Kondan Lal v. Faqir Chand*, (1903) 27 All., 75

⁷ *Vydanadayyan v. Sitaramayyan*, (1882) 5 Mad., 52

⁸ *Ahmedbhoy v. Vulleebhoy*, (1884) 8 Bom., 323; *Sailaja Nanda Dutta v. Unesh-ananda Dutta*, (1900) 4 Calc. W. N., 462.

⁹ *Abdool Gunnee v. Pogose*, (1869) 12 W. R., 436; *Fergusson v. Government*, (1868) 9 W. R., 158; *Nga Tha Yah v. Mee Khan Mhone*, (1870) 13 W. R., 443; *Puddolochan v. Lal Chand*, (1869) 10 W. R., 283

¹⁰ *Government v. Bouris Bhoomaz*, (1865) 2 W. R., 280

¹¹ *Joy Gobind v. Goureeproshad*, (1867) 7 W. R., 202.

¹² *Uma Sundari v. Ramji*, (1881) 7 Calc., 242.

¹³ *Motee Chand v. Murali*, (1871) 15 W. R., 432

¹⁴ *Gyaran v. Issur*, (1865) 2 W. R., 153

¹⁵ *Poran Mundul v. Sham Chand*, (1861) 1 W. R., 223.

¹⁶ *The Germanic*, (1896) p. 81 Cf. O. II, r. 6, *post*.

or community of interest with one or other of the parties;¹ they do not refer to questions arising between co-defendants or co-plaintiffs² such as deciding who is the legal representative of a plaintiff or defendant.³

New cause of action—And no new cause of action should be introduced⁴ Thus, it has been held that a Court is not competent to allow of the introduction into a suit of a person against whom no relief is sought by the plaintiff; nor has the Court any authority to receive a written statement from such person, or to permit him to appear at the hearing,⁵ and in a suit for damages by the purchaser of goods by sample, an application by the vendors to have their vendor on the same samples made a party was refused.⁶

Nature of suit should not be changed—But care should be taken that the nature of the suit is not changed. Where plaintiff sued for his share of the property of a person deceased, it was held that the Court could not add parties, and turn it into a general administration suit,⁷ and so where one person sues for himself and others, the names of the parties jointly interested will not be added.⁸

Party must be added—If the suit cannot go on without so doing such as a suit on a joint contract, contractors not parties;⁹ or for possession of property and complete justice cannot be done in the absence of one trustee,¹⁰ the suit should be dismissed, unless he should be made a defendant;¹¹ provided the objection has been taken by the parties and an issue has been decided on the point.¹²

Addition of Plaintiffs—This provision so far as the addition of plaintiffs is concerned, only applies to those cases in which the original party who brought the suit had some title to sue,¹³ but if a plaintiff at the time he brings the suit has no interest in the subject-matter thereof, the joinder of a person who has an interest cannot alter the plaintiff's position or confer on him any right to sue.¹⁴ Where a party desires to be added as the representative of a plaintiff after judgment, he must satisfy the Court that he is the proper person to be so added.¹⁵ A defendant who has assigned all his rights in the subject-matter of the suit and has no longer any interest in it, has no right to be made a co-plaintiff.¹⁶

Where a Hindu widow sues in respect of a right inherited by her from her deceased husband, and afterwards adopts a son, the latter should be made a co-

Hyder, (1876)
73) 20 W. R.,
W. R., 248;

¹ Har Narain v. Kharag Singh, (1887) 9 All., 417. Kalan Rai v. Rani Ratun, (1896) 18 All., 306.

² Muhammad Husain v. Khushalo, (1889) 10 All., 223; Vithu v. Dhama, (1891) 15 Bom., 145.

³ Dalton v. Guardians, &c., 47 L. T., 349.

⁴ Sarno Moyee v. Bykunt Chunder, (1876) 25 W. R., 17. See also Hotwell v. London Omnibus Co., 2 Ex. D. 365.

⁵ Mahomed Badsha v. Nicol Fleming, (1879) 4 Calc., 355.

⁶ Oh Ling Tee v. Awkinee, (1869) 10 W. R., 86.

⁷ De Hart v. Stephenson, Weekly Notes, 1876, p. 83. See O. I, r. 8, *supra*.

⁸ Ramabuk v. Ramlall, (1881) 6 Calc., 815.

⁹ Rajendronath v. Mahomed, (1882) 8 Calc., 42; L. R., 8 I A., 135.

¹⁰ Jaggodumba Dasi v. Haran Chunder, (1868) 10 W. R., 109.

¹¹ Shirekuli v. Ajjibal, (1891) 15 Bom., 297. See O. I, r. 9, *Vide* Non-joinder when fatal.

¹² Chunder Kumar v. Gokul Chunder, (1881) 6 Calc., 370.

¹³ Bhanu Tukaram v. Kashunath, (1896) 20 Bom., 537; Subbavar v. Kristnairar, (1876) 1 Mad., 383.

¹⁴ Muhammad Husain v. Khushalo, (1887) 9 All., 131.

¹⁵ Abdul Hak v. Gulam Jilani, (1896) 20 Bom., 677.

plaintiff¹. And where a Hindu sued his brothers for his share of the family property, and was transported, his children were added as co-plaintiffs.² In general where the plaintiff has assigned a share in the proceeds of a suit, and the agreement is not void, the defendant can apply to have the assignee made a party.³

Addition of defendants—Where an action is brought against one of several joint contractors, the defendant is entitled as of right, to have the other contractors added as defendants.⁴ And in a suit on a bond the obligor was described as manager of an endowment. His sons, the defendants, pleaded that the money was borrowed for the endowment. *held*, the representative of the endowment was rightly added.⁵

Foreclosure.—In a suit for foreclosure by a puisne mortgagee, the prior mortgagee should be made a party under s. 85 of the Transfer of Property Act.⁶

Joint Hindu family—A manager of a joint Hindu family who, as such, has granted a lease, is during his lifetime the only person to sue for rent due under the lease. After his death, his son, who has not succeeded his father in the management, cannot sue without joining the other members of the joint family as parties.⁷

Mutation—The Collector of a district is a necessary party to a suit by a purchaser against his vendor to compel mutation of names in a register.⁸

Partition—In a suit for partition, the mortgagee of the plaintiff need not be made a party,⁹ but all the shares must be brought before the Court.¹⁰

Partnership—In 1887, the plaintiff appointed the defendant to serve for

in the absence of the other partners in the business, (2) that the name of the plaintiff could not be taken as designating his partners also, and (3) that the names of the plaintiff's partners could not be added in appeal, as this would be to deprive the defendant of the defence of limitation.¹¹ Except possibly in the case of an assignment by the other surviving partner or partners, it is not competent to one only of two or more surviving partners to sue for a debt due to the firm.¹² In a partnership suit for account in which there were twenty-one defendants, plaintiff, having settled with most of them, wished to withdraw. Two of the defendants applied that they should be made plaintiffs, and the plaintiff defendant. The application was granted.¹³

¹ Paravartani v. Ambalavana, (1862) 1 Mad. H. C., 197.

² Byreddi v. Chinnu, (1893) 6 Mad., 331.

³ Chander Kant v. Ram Coomar, (1874) 13 B. L. R., 330, 2 App. Cas., 186.

⁴ Pilley v. Robinson, 20 Q. B. D., 155; Ramseuk v. Ramli, (1881) 6 Calc., 815 and Sec. O. I., r. 9 *supra*. Vide *v. Non jinder* when fatal.

⁵ Thirthasani v. Gopala, (1890) 13 Mad., 32.

⁶ Sorahji v. Rattonji, (1898) 22 Bom., 701.

⁷ Dayabhai Lalubhai v. Gopulp Dayabhai, (1891) 16 Bom., 41.

⁸ Virasani v. Ramadas, (1892) 15 Mad., 350.

⁹ Mohindroobhossun v. Soshet Bhoosun, (1880) 5 Calc., 882.

¹⁰ Kali Kanta v. Gourji Prasad, (1890) 17 Calc., 996; Timappaya v. Lakshmi Narayana, (1883) 6 Mad., 284; see, however, Chandu v. Kuthamed, (1891) 14 Mad., 324.

¹¹ Alagappa v. Vellian, (1895) 18 Mad., 33.

¹² Imanuddin v. Laladhar, (1892) 14 All., 521.

¹³ Edalji v. Vellelday, (1883) 7 Bom., 167. See O II XXX post.

Possession—Nor can one member of a joint family sue for property belonging to himself and the others,¹ even if he be manager.² A share-holder cannot sue for possession of a share of joint property, without making all the co-sharers parties,³ and all the trustees or *sebhais* must be parties in a suit for recovery of the trust property.⁴ In an ejectment-suit the persons in possession are necessary parties.⁵

Rent 1st.—Under the old law, a share holder could not sue for a fractional portion of rent; less there had been a separate agreement or separate collections,⁶ though one sharer could sue for apportionment,⁷ but he should make his co-sharers parties,⁸ and under the same circumstances a co-sharer could not enhance,⁹ nor measure,¹⁰ nor eject,¹¹ otherwise on the original side of the *High Court*.¹² A co-sharer who is manager cannot even with the consent of his co-sharers maintain a suit by himself and in his own name to eject a tenant who has failed to comply with a notice calling on him to pay enhanced rent.¹³ One co-sharer cannot sue for a justment of rent after measurement.¹⁴ *Patindars* are proper parties to a suit brought to have it settled whether plaintiffs or the *patindars* are entitled to rent from tenants.¹⁵ Now, as regards Bengal, see s. 188, Act VIII of 1885. See note to O. I. r. 1. ¹⁶ RENT.¹⁷

Adoption—The plaintiff, claiming a remote reversionary interest in the estate of a deceased Hindu, sued for a declaration of the invalidity of an adoption made by the widow. The nearer reversioners who refused to call in question the validity of the adoption were joined as defendants. *Held*, that the latter were rightly impleaded in the suit.¹⁸

Right to Settlement—Where a suit is brought to obtain a settlement of a *chur*, to obtain a declaration of title with possession, and to set aside a settlement of the *chur* made with the defendant; *held*, that the Government should be made a party,¹⁹ and in a suit regarding a *talukdars* settlement in Bombay, the Settlement Officer must be a party.²⁰

¹ Gokul Pershad & Dwarka Mahoa, (1873) 20 W. R., 138; Nundan Lal v. Lloyd, (1874) 22 W. R., 74; Balkrishna v. Municipality of Mahad, (1880) 10 Bom., 32.

² Hari Gopdhar Gokuldas, (1888) 12 Bom., 154.

³ Chunilal Chundhry v. Maenaghten, (1875) 23 W. R., 386.

⁴ Hajendro Nath & Mahomed, (1841) 8 Cal., 42; L. R., 8 I. A., 131; Bechu Lal v. Ohullab, (1845) 11 Cal., 334.

⁵ Binola v. Narengan, (1907) 31 Bom., 250.

⁶ Manohar v. Manzar, (1843) 5 All., 40; Gani Mahomed v. Morun, (1879) 4 Cal., 96.

⁷ Ishwar Chunder v. Ram Krishna, (1880) 5 Cal., 902; 6 C. L. R., 421.

⁸ Olhoy Gahad v. Hury Churn, (1882) 8 Cal., 277; Tara Chunder v. Ametr Mundul, (1874) 22 W. R., 394; Behareo Lal v. Radha Nath, (1874) 22 W. R., 229.

⁹ Blackoo v. Omar Khan, (1869) 1 All. H. C., 236; [Intaseo Doorga Prosul Myttee v. Joynarain Hazrah, (1877) 2 Cal., 474; Rashbehari v. Sakhi, (1883) 11 Cal., 644; Jogendro Chunder v. Nolan Chunder, (1882) 8 Cal., 353].

¹⁰ Nanteo Ram Panjah v. Bykunt Parya, (1873) 19 W. R., 280; Abdool Hossein v. Lal Chand, (1884) 10 Cal., 36.

¹¹ Tulsi Panday v. Lala Bachu, (1842) 12 C. L. R., 223; Doh v. Ikram Ali, (1879) 4 C. L. R., 63.

¹² Ibrahim v. Cursetji, (1887) 11 Bom., 641.

¹³ Balkrishna v. Moro, (1897) 21 Bom., 151.

¹⁴ Bindu Bashini v. Pearl Mohun, (1893) 20 Cal., 107.

¹⁵ Hridoy Nath v. Mohobutnessa, (1893) 20 Cal., 235.

¹⁶ Gurulingaswami v. Rama Lakshammam, (1893) 18 Mad., 53.

¹⁷ Krishna Lal v. Bhyrab Chunder, (1874) 22 W. R., 52; Cannon v. Bissonath, (1880) 5 C. L. R., 154.

¹⁸ Sirdarsinghji v. Ganpatanghi, (1890) 14 Bom., 393, p. 399.

Corporation—Where a corporate body was sued through its agent, and not as a corporation, it was held that the corporation could not be affected by the result of the suit, and that an application to make it a party was properly refused.¹ The Secretary of State is not a necessary party to a suit against a Municipality.²

Government—Government is not a necessary party to a suit for a declaration that the plaintiff is *latter rank* of a village.³ In a suit to set aside a revenue sale, the Secretary of State is not a necessary party.⁴

Where a Magistrate was sued instead of the Secretary of State, an amendment was allowed in special appeal.⁵

Joint Hindu family—A loan was made to the defendant out of joint family funds and a bond for the amount was given in the name of one of the members of the joint family held, that the other members of the family were not necessary parties.⁶

Mortgage—A person interested in one of three properties subject to a mortgage need not be joined in a suit upon the mortgage instituted after that property was redeemed.⁷ If a mortgagee sues for foreclosure of part only of the mortgaged property he need not join persons interested only in the property not sued for.⁸ Persons claiming adversely to the mortgagor and mortgagee are not proper parties to a suit to enforce a mortgage,⁹ neither is a first mortgagee a necessary party to a suit to enforce a second mortgage.¹⁰ It is obligatory upon a mortgagee to bring before the Court all persons interested in the equity of redemption of whose interest he has notice, if he omits a party of whose interest he has no notice, his decree does not thereby become infructuous.¹¹

Rent suit—As to whether an intervenor in a rent suit should be made a party or not, the latest decision in Bengal is to the effect that he should not.¹² In an ejectment suit by a landlord against his tenant, the Court should not bring on to the record the person from whom the plaintiff holds the land or persons claiming to hold it from a third party, or such third party.¹³ If the plaintiff in an ejectment suit makes out a legal title to the land, he is entitled to maintain a suit against the person in actual juridical possession of such land for its recovery without making the person under whom the latter claims to hold a party to the suit.¹⁴

¹ Nubeen Chunder Paul v. Stephenson, (1871) 15 W. R., 334, Ameur Sahib v. Venkatarama, (1893) 16 Mad., 296.

² Krishayya v. Bellary Municipal Council, (1892) 15 Mad., 292.

³ Irappa v. Aji Sahib, (1892) 16 Bom., 649.

⁴ Bil Mukond v. Jugudhoo, (1883) 9 Cal., 277; Balkishen Das v. Simpson, (1898) 25 Cal., 833; L. R., 25 I. A. 151, and 2 Cal. W. N., 513, but in a suit to set aside a sale under the Public Dependents' Recovery Act, he is—Govinda Chandra v. Hemanta Kumari, (1904) 31 Cal., 159; 8 Cal. W. N., 637.

⁵ Nilkanthappa v. Magistrate of Sholapur, (1883) 6 Bom., 671; and see Manni Kasaundhan v. Crooke, (1879) 2 All., 296.

⁶ Hari Vasudev v. Mahadu, (1896) 20 Bom., 435.

⁷ Nazki v. Nihal (1905) A. W. N., 156.

⁸ Sheo Tahal v. Sheodan, (1905) A. W. N., 214.

⁹ Joggeswar v. Bhuban, (1906) 33 Cal., 423; 3 Cal. L. J., 205.

¹⁰ Surjeram v. Barhamdeo, (1905) 1 Cal. L. J., 337; Gurdeo v. Chandrikah, (1907) 5 Cal. L. J., 611.

¹¹ Ganga Das v. Jogendra Nath, (1907) 5 Cal. L. J., 315.

¹² Lodai Mohib v. Kally Dass Roy, (1882) 8 Cal., 233. See also, Choolie Lal v. Kokil Singh, (1873) 19 W. R., 248, 16 W. R., 132, Goorn Proumo v. Malakar v. Srasteenarain, (1874) 21 W. Mohun, (1874) 22 W. R., 526, Katqama v. Gresh Chunder, (1880) 23 W. R., 168.

¹³ Sankaran v. Anantha Narayanayyan, (1897) 20 Mad., 375.

¹⁴ Kashi v. Sadashiv, (1897) 21 Bom., 229.

Other cases.—On the death of the obligee of a money-bond, one heir cannot sue for his share;¹ but a surviving partner can sue for a trade debt without making the representatives of a deceased partner parties.² One member of a Malabar *Amrad* cannot sue *karnavan* for maintenance or to set aside a deed binding the property without making the other members parties;³ and in a suit for redemption all parties interested must be on the record,⁴ and so in case of foreclosure or to enforce a vendor's lien;⁵ or to determine the rights of contending mortgagees,⁶ or for contribution.⁷

Plaintiff sued certain persons for money due on a contract entered into by A as defendants' agent; defendants denied the agency; *held*, that the name of A could be added and the plaint amended so as to sue for alternative relief against the agent.⁸ A legatee is entitled to sue an executor for a legacy bequeathed to him, and in such a suit the executor may apply for his own protection that other legatees shall be made parties.⁹

possession

Defend-

had paid

the rent, might be made a party. Archibald, J., held that it was unnecessary to make her a party.¹⁰ A sues his lessor for possession of land; C intervenes,

e suit.¹¹ A sued the

B's estate, and asked

claiming a portion of

Court; it was decided

en parties, each con-

tending that he is the judgment-creditor, the judgment-debtor need not be made a party.¹² The plaintiff, an importer and seller of watches, sued to restrain

the defendants from importing into or selling in Bombay or other parts of

of watches imported and

of the plaintiff to add

re application should be

rom that of the manu-

facturer.¹⁴

¹ *Kanlthya v. Chaudar*, (1883) 7 All., 313; *Parsolam v. Mulu*, (1887) 9 All., 68.

² *Govind Prasad v. Chaudar*, (1887) 9 All., 486; *contra Ram Narain v. Ram Chaudar*, (1891) 18 Cal., 85. See *Partnership*, O XXX post.

³ *Moidin v. Krishnan*, (1887) 10 Mad., 322; *Mamunth v. Pakki*, (1884) 7 Mad., 428.

⁴ *Raghu v. Balkrishna*, (1883) 9 Bom., 128; *Bhaidin v. Ismail*, (1887) 11 Bom., 425; *Dattaram v. Gangaram*, (1893) 21 Bom., 257, [though a sharer can redeem the whole—*Mora Joshi v. Ramchandra*, (1891) 15 Bom., 24].

⁵ *Attorney-General v. Sittingbourne, L. R.*, 1 Eq., 636.

⁶ *Hughes v. Delhi Bank*, (1888) 15 Cal., 35.

⁷ *Bu Husam v. Baidin*, (1890) 12 All., 110.

⁸ *Ind Lee Dos v. Hoare, Miller & Co.*, (1882) 5 Cal., 170.

⁹ *Purshottam v. Kaji Govindji*, (1896) 20 Bom., 301.

¹⁰ *Lovell v. Holland*, *Weekly Notes*, 1876, p. 53.

¹¹ *Bhola Singh v. Mashook Ali*, (1871) 15 W. R., 572; *Joy Govind v. Gourec. Jashal Shaha*, (1867) 7 W. R., 292; *Joy Krishen v. Raj Krishen*, (1871) 16 W. R., 101; but see *Kales Pershad v. Joy Narain*, (1891) 11 W. R., 361, referred to in *Bani Coomur v. Chaudar Canto*, (1877) 2 Cal., 233 p. 240; *Ram Taruk v. Ralha Bultab*, (1871) 15 W. R., 97.

¹² *Ahmed Hossein v. Khosla*, (1868) 10 W. R., 369; see, however, *Vallabhadriyan v. Sathrasayyan*, 3 (1882) Mad., 52; *Ahmedbhai v. Vallabhai*, (1884) 8 Bom., 323, p. 331. But a mortgagee before suit, a purchaser *pendente lite* and a special legatee in a suit against executors have been added—*Ahmedbhai v. Vallabhai*, (1884) 8 Bom., 323.

¹³ *Abdul Gannoe v. Pogue*, (1869) 12 W. R., 436.

¹⁴ *Hauiger v. Drow*, (1891), 25 Bom., 433.

Joint plaintiff—In a suit on a joint contract all the parties must be added, whether the claim was barred against them or not, and if barred as against some of the joint plaintiffs, the suit must be dismissed,¹ but if when the plaint is presented a person is named as one of the plaintiffs and he does not repudiate the suit, he must be considered as a party from the commencement of the litigation.² And the same rule applies if a necessary defendant has been added after time.³ A and his three brothers formed a joint Hindu family. A with their consent sued for a joint debt, and when an objection was raised on the ground of non joinder, it was too late to make the brothers co plaintiffs. The suit was dismissed.⁴ In a suit for partnership, if the claim is barred against either vendor or vendee, it must be dismissed.⁵

In appeal—If a person is a party to the suit, but not a party to an appeal from the decision in it, he can be made a party after the period for appealing has expired.⁶

Sued R and N jointly for money. The first Court decreed the suit against N and dismissed it in regard to R. N appealed, but S did not. At the first hearing of the appeal R was made a respondent, the period allowed to S to appeal having expired. The appellate Court dismissed the suit as against N and gave S a decree against R. *It is held* that the Court was not competent to give S a decree against R, the former not having appealed within the proper period.⁷ On appeal to the High Court, the plaintiff made respondents certain persons who after the passing of the decree had purchased at execution sales the rights and interests of the defendant in portions of the family estate. *Held*, that such persons not being affected by the decree had been unnecessarily made parties to the appeal.⁸

The power of an appellate Court to make a person a respondent under O J, r 20 is not affected by the Limitation Act.⁹

Assignment—Assignees must be added within the period prescribed by the law of limitation, otherwise the suit is barred.¹⁰

Corporation—Limitation does not apply where a Corporation is sued in the name of the wrong officer.¹¹ The Poona Cantonment Committee is a Corporation.¹²

Application.—An application may be *ex-parte* to add parties;¹³ but not, if it be to strike out or change the parties on the record.¹⁴ In the case of a plaintiff, consent is necessary,¹⁵ but the section does not require that the

¹ Ramschuk v. Ramdath, (1881) 6 Cal., 815.

² Mohini Mohini v. Bangar, (1890) 17 Cal., 580.

³ Ramdoyal v. Jumeenjoy, (1887) 11 Cal., 591.

⁴ Kaldas v. Nathu, (1883) 7 Bom., 217. See, however, Uma Simlani v. Ramji, (1881) 9 C. L. J., 13, 7 Cal., 212.

⁵ Habibullah v. Achabar, (1882) 4 All., 145. See, Patmabhai v. Purbhai Virji, (1897) 21 Bom., 580.

⁶ Marickya v. Barola, (1882) 11 C. L. J., 430, 9 Cal., 355.

⁷ Ramji Sing v. Sheo Prasad, (1879) 2 All., 487. And see, Krishna v. Gosta, (1907) 5 Cal. L. J., 434.

⁸ Radha Kishen v. Baehhamun, (1880) 3 All., 118.

⁹ Solna v. Khalik Sing, (1891) 13 All., 78; Bimleshai v. Ganga Saran, (1892) 14 All., 134. See also, Court of Wards v. Gaya Pershad, (1879) 2 All., 108.

¹⁰ Harak Chand v. Deonath Sahay, (1898) 25 Cal., 409, foll. in, Abdul Rahman v. Anur Ali (1907) 31 Cal., 612, 5 Cal. L. J., 486; 11 Cal. W. N., 521.

¹¹ Manni Kasaulthan v. Crooke, (1879) 2 All., 296.

¹² Cantonment Committee v. Baryarji, (1899) 14 Bom., 236.

¹³ Weekly Notes, 1876, p. 23.

¹⁴ Tildesley v. Harper, (1876) 3 C. D., 277. See however, Horwell v. London Omnibus Co., (1877) 2 L. D., 365, 379, 382 3.

¹⁵ Uma Sundari v. Ramji, (1881) 7 Cal., 212; 9 C. L. J., 13.

consent of a person proposed to be added as plaintiff should be given in writing. It is sufficient if any solicitor consents on his behalf¹

Who may apply.—A person not a party may apply to be added². The rule does not contemplate an application by the person proposed to be added³

A plaintiff applying under this section to join another as co-plaintiff must have a cause of action. A company transferred all its property, estates, and effects with appurtenances, "including a mortgage with the benefit of all securities" to a new company. At the date of transfer, the old company claimed a right of action for breach of trust in respect of this mortgage. The new company sued; *held*, that the right of action did not pass to them; and as they had no right of action, they could not join the old company as co-plaintiffs⁴

Consent—According to the English practice if a necessary party declines to join as a plaintiff he should be indemnified against costs and made a defendant⁵

Name struck out, effect of.—All the evidence produced by the party whose name has been struck out, should be removed from the record.⁶ If, when a name is struck out, the Court has not jurisdiction to try the case, the plaint should be returned to be presented to the proper Court⁷

Name added, effect of.—In a suit to recover property from plaintiffs' vendor, who did not substantially contest the claim, a person claiming the property was made a defendant. *Held*, the plaintiffs having proved their title against the original defendant, it was for the added defendant to prove his possession⁸. Where a person is added, evidence already on the record cannot be used against him without his consent⁹

Appeal.—On appeal from an order made under this section, the order must be attacked, in

the appeal under sec. 104 of Order O. XIII and the order must be attacked, in appeal from the final decree,¹⁰ and then only if the order has affected the decision on the merits or the jurisdiction of the Court¹¹. If no objection is raised in the original or first appellate Court, the order cannot be made the subject of a special

¹ Cox v. James, (1881) 19 C. D., 55.

² Athiappa v. Ayanna, (1885) 8 Mad., 300; Oriental Bank v. Charriol, (1886) 12 Cal., 612; Rabbaba v. Noorjehan, (1886) 13 Cal., 90.

³ Mohindroobhossan v. Shosheebhossan, (1880) 5 Cal., 882.

⁴ See also, *Ne. v. ...* 76, p 215, Dwarka v. Coomar v. Gocool (1892) 15 Mad., 54;

⁵ Cullen v. Knowles, (1898) 2 Q. B., 380.

⁶ Bncha Singh v. Mashook Ali, (1871) 15 W. R., 572.

⁷ Shridhar v. Chima, (1873) 10 Bom. H. C., 17.

⁸ Balma Kundu v. Adikunda, (1880) 7 C. L. R., 360, following Juggodannud v. Hamid, (1868) 10 W. R., 52. See however, Ram Taruck v. Radha Bullab, (1871) 15 W. R., 97; Bhyrath Nath v. Mohesh Chunder, (1870) 13 W. R., 168.

⁹ Watson & Co. v. Hargobind, (1874) 22 W. R., 33.

¹⁰ Beckett v. Attwood, (1881) 18 C. D., 51.

¹¹ Karmar v. Masi Lal, (1879) 2 All., 901; Abirunnisa v. Kommunnissa, (1880) 13 Cal., 100.

¹² Lakshman v. Paramasiva, (1889) 12 Mad., 489.

¹³ George Sahoo v. Premilal, (1881) 7 Cal., 113.

¹⁴ Balbharth Sahay v. Gopee Sahay, (1870) 14 W. R., 90; Har Naram v. Kharag, (1887) 9 All., 417.

appeal,¹ and possibly if the order is not objected to, at first, it cannot be contested in regular appeal.² In a suit for rent the defendant alleging that a person not a party had a joint interest with the plaintiff, got his name put upon the record against the wish of the plaintiff *held*, in special appeal, that if added at all, it should be as defendant.³ Where an order adding a defendant was not appealed against, and no objection was taken thereto in the memorandum of appeal from the decree in the suit in which it was passed, an oral objection taken in appeal to such order was disallowed.⁴

Appellate Court—The Court in second appeal is competent to bring on the record persons who had been originally joined in the suit, but were not joined in the lower appellate Court.⁵ An appellate Court has power to add as parties to the appeal persons who were not parties to the original suit, and in a case dealing with a public trust an appellate Court has inherent power to add such new parties as may be necessary for the protection of the public interests.⁶

11. The Court may give the conduct of the suit to such person as it deems proper.

Conduct of suit.

Act XIV of 1832, sect 32; R. S. O., 16, r. 39

This rule applies to H. C. and Prov. S. C. C.

As to the English practice—See *Ann. Prac.* (1908), i, pp. 188, 189 notes to O. 16, r. 39

12. (1) Where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding; and in like manner, where there are more defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.

(2) The authority shall be in writing signed by the party giving it and shall be filed in Court.

Act XIV of 1882, Sect. 35. This rule applies to H. C. and Prov. S. C. C.

A decree-holder for himself and as agent for his nephews applied for execution of a decree passed in favour of the applicant and the father of the nephews. The application was rejected on the grounds—(1), that although applicant produced a *mukhtarname* authorising him to execute the decree, it was special and on a stamp of 8 annas, and not a general power under s. 17, cl. 1, Act VIII, 1859, and (2) that the *mukhtarname* was not produced with the application. It was held that under this section no general powers-of-attorney were necessary, and, as the *mukhtarname* was filed before the Judge had passed his order, the application should have been granted.⁷

¹ *Bakhal Doss Mundul v. Protap Chunder*, (1869) 12 W. R., 455, *Beer Chunder Roy v. Fumee-roodech*, (1869) 12 W. R. 87, *Lil Mahomed v. Peer Nuzur*, (1872) 18 W. R., 112.

² *Kewal Sahoo v. Issur Dyal*, (1869) 12 W. R., 344.

³ *Googlee Sahoo v. Premalal Sahoo*, (1891) 7 Cal., 148.

⁴ *Bansi Lal v. Ramji Lal*, (1898) 20 All., 370.

⁵ *Paya Matatlul v. Kovomal Amma*, (1896) 19 Mad., 151.

⁶ *Gyanananda Agram v. Kristo Chandra*, (1904) 8 Cal. W. N., 404.

⁷ *Ambaram v. Himatsing*, (1864) 2 Bom. H. C., 103.

By s. 40, Act XX of 1865, any suitor may appear, plead and act in any suit, appeal or other proceeding on behalf of any co-sutor; but he cannot recover any fee or reward.

13. All objections on the ground of non-joinder or misjoinder of parties shall be taken at the earliest possible opportunity and in all cases where issues are settled, at or before such settlement, unless the ground of objection has subsequently arisen, and any such objection not so taken shall be deemed to have been waived.

Objection as to non-joinder or misjoinder.

Act XIV of 1882, Sect. 34. This rule applies to H. C and Prov. S. C. C.

Issues are settled etc.—These words are substituted for "before the first hearing."

Appeal.—A Hindu widow sued for partition, pending the suit adopted a son, but still carried on the litigation in her own name. It was held that it should be assumed as a matter of law that she litigated as his guardian, and the suit should not be dismissed because the son was not a party¹ and where one member of a joint Hindu family sued for family property, and it was contended in the Court of first appeal that he could not sue alone, the contention was considered too late². Plaintiffs were the widow and alleged adopted son of defendant's uncle and they sued on title. The first appellate Court considering that the interests of the plaintiffs were antagonistic, dismissed the suit for misjoinder: *held*, the objection had been taken too late³. In a suit to enforce a right of pre-emption the vendor was not made a party; *held*, this objection could not be raised in special appeal⁴. So, when maintenance was decreed to a mother and her two children jointly, an objection in special appeal that there were three causes of action and separate sums should have been adjudged, was rejected⁵.

Subsequently arisen.—This rule does not prevent a defendant from objecting to the want of a proper party after settlement of issues, if the objection did not exist at that time⁶.

Practice—If a question concerning parties is raised at or before first hearing, it probably should be tried quickly⁷ and if the Judge finds that the objection is valid, he should act under O. 1, r. 10 and not dismiss the suit⁸.

¹ *Dhurn Das v. Shama Soondra*, (1811) 3 Moo. I. A., 229; *Haji Saran v. Bhulabanswari*, (1857) L. R., 15 I. A., 195; 16 Calc., 49.

² *Paramasiva v. Krishna*, (1891) 14 Mad., 498. See also, *Ooma Smulani v. Ramji*, (1891) 7 Calc., 242; (1891) 9 C. L. R., 13.

³ *Fakirapa v. Rudrapa*, (1892) 16 Bom., 119.

⁴ *Hiralal v. Ramjas*, (1884) 6 All., 57.

⁵ *Tulsha v. Gopal Rai*, (1884) 6 All., 632.

⁶ *Medhe v. Dongre*, (1881) 5 Bom., 609.

⁷ *Richards v. Bucher*, 62 L. T., 867.

⁸ See remarks of Bowen J., in *Van Gelder v. Sewell & Son*, (1880) 41 C. 193.

ORDER II.

Frame of Suit

1. Every suit shall as far as practicable be framed so as to afford grounds for final decision upon the subjects in dispute and to prevent further litigation concerning them.

Frame of Suit

Act XIV of 1882, Sect. 42

This rule applies to H. C.

"Subjects in dispute" means the legal relation between the parties for the determination of which the suit is brought.

2. (1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

Suit to include the whole claim

(2) Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

Relinquishment of part of claim

(3) A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs, but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.

Omission to sue for one of several reliefs

Explanation—For the purposes of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action.

Illustration

A lets a house to B at a yearly rent of Rs. 1,200. The rent for the whole of the years 1905, 1906 and 1907 is due and unpaid. A sues B in 1908 only for the rent due for 1906. A shall not afterwards sue B for the rent due for 1905 or 1907.

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¹ Ramasami v. Vythimatha, (1903) 26 Mad. 760

Cause of action.—see note to s 20, p. 141, *ante*

Principle and application of this rule.—The principle on which this rule is founded, is that where the cause of action is the same, and the plaintiff has had an opportunity in the former suit of recovering what he seeks to recover in the second, the former recovery is a bar to the later action.¹

This provision contemplates a separate suit in respect of each distinct cause of action, the rule, however, being subject to certain modifications as set out in O II, rr. 3-5.²

This rule does not apply to suits for the recovery of the same thing or the same debt.

It does not apply to cases where the plaintiff brings a fresh suit³ but where a condition (e. g. as to payment of a sum of money) is made a part of the rule which will bar a fresh suit in respect of any portion of the claim which he may have omitted to include in his previous suit.⁴

Minors—The rule applies to suits by minors, in which their guardians have relinquished part of their claims.⁵

Award—It applies to a person applying to have an award filed in Court and asking leave to abandon part of his claim.⁶

Set-off.—The rule applies equally to a claim for set-off.⁷

Previous suit.—There must have been a regular suit; the rejection of an application to sue *in forma pauperis* does not bar a fresh suit.⁸

Execution-proceedings—This rule does not apply to proceedings in execution of decree.¹⁰

Leave of the Court.—The leave may be obtained when the case is called on for first hearing.¹¹

The pleadings must be compared—A second suit by the same plaintiff will not be barred unless the same cause of action be found within the four

¹ *Nelson v. Couch*, 15 C B (N. S.) 99; and see *Hanuman v. Hanuman*, (1890) L R, 18 I A, 158; 19 Cal, 123, unless in the first action plaintiff had no opportunity of satisfying his claim—*Bruneden v. Humphrey*, (1881) 14 Q B D, 148; *Serrao v. Noel*, (1885) 15 Q B D, 549, p 556.

² *Mullick, Kifait Hossein v. Sheo Pershad*, (1896) 23 Cal, 821, p 827.

³ *Mothuram Mohun v. Khammankutse*, (1866) 5 W R., 182. This rule applies to suits under the N. W. P. Rent Act—*Madho v. Murli*, (1883) 5 All., 406 and to suits under Act X of 1859—*Parbhoo v. Ramjeeawun*, (1869) 1 All H C, 19; *Ram Soonder v. Krishna*, (1872) 17 W. R., 380; *Naram Kumari v. Raghu*, (1886) 12 Cal, 50; and to suits under the Decan Agriculturists Relief Act—*Ibbu Lalaji v. Hari*, (1883) 7 Bom, 377.

⁴ *Venkata v. Ranga*, (1887) 10 Mal, 160; *Mukhaml v. Bhikari*, (1885) 7 All, 621.

⁵ *Hair Nath Das v. Syed Hossain Ali*, (1905) 10 Cal. W. N., 8.

⁶ *Gopal Rao v. Narasinga*, (1899) 22 Mad, 309.

⁷ *Gresh Chunder v. Brojmath*, (1873) 20 W. R., 56.

⁸ *Nawlat Pattuck v. Mohesh Narayanlal*, (1905) 32 Cal, 634; 1 Cal L J, 364.

⁹ *Naram Singh v. Jaswant Singh*, (1899) 21 All, 359; but see, *Vajeram v. Purshotamdas*, (1905) 7 Cal L J, 135.

¹⁰ *Radhya Krishna v. Radha Pershad*, (1891) 18 Cal, 515; *Sudho Saran v. Hawal Pande*, (1897) 19 All., 98.

¹¹ *Pestonji v. Abdul Bahman*, (1881) 5 Bom, 463.

corners of the plaint in the first suit,¹ and if the question is that the second claim should have been included in the first, the pleadings and judgment of the first case can be referred to.² A sued B for a declaration of his title to certain property of which he alleged himself to be in possession. The suit was dismissed on the ground that he was not in possession at the time of filing the suit. A subsequent suit for possession was held not to be barred.³

This rule governs only the second suit and not the first.⁴ If it has been held in the first suit that the plaint discloses no cause of action, the second suit will not be barred.⁵

A person having been killed in a railway accident, his widow took out letters of administration to his estate. She then sued the Railway Company under Lord Campbell's Act (see the corresponding Indian Act, XIII of 1855) for damages and got a decree by consent. She afterwards sued the Railway Company for damage suffered by the personal estate and effects of the deceased. *Held* that the former suit was no bar to maintaining the second one.⁶ The plaintiff while driving his cab came into collision with a van of the defendant's through the negligence of the defendant's servant, whereby he sustained bodily injury and his cab was damaged. He then sued the defendant in the County Court for damage done to the cab. The defendant paid the sum claimed into Court, and the action was discontinued. The plaintiff again sued the defendant in the Queen's Bench Division for the bodily injury sustained by him. *Held*, that the second suit was not barred.⁷

The true test of the application of this provision is whether there has been a splitting of the cause of action,⁸ and it has been said that one test in deciding whether the cause of action in two suits is the same is to see whether the same suit would support both.⁹

The following decisions under the former Procedure Codes will serve as examples for the determination of this question in cases under this rule—

Claims held to be in respect of the same cause of action—The following suits were held to be barred by this provision—

Misappropriation—Fresh suit for further property misappropriated, claim omitted in first suit through ignorance.¹⁰ A second suit against the *Karta* of a joint Hindu family,¹¹ and against a general Agent¹² for alleged misappropriation.

Maintenance—Where a Hindu widow suing for maintenance obtained a decree declaring her entitled to maintenance at a specified rate, a second suit by

¹ *Jilmiti Nath v. Shih Nath*, (1882) 8 Cal. 819, followed in *Komola Kannay v. Loke Nath* (1882) 8 Cal. 825, and in *Noron Singh v. Anand Singh*, (1886) 12 Cal. 291.

² *T. J. Jones v. S. J. Jones*, 1883, 11 L. R., 181 A, 163.
³ *Jak 819 Ram Sewak v. Nakhed*, 1180, (1892) 14 All. 512, *Amrin v. Ram Gangaram*, (1876) 1 All. 252, and *Honstoun v. Marquis of Sligo*.

⁴ *Chos Sing v. Bahadur Singh*, (1906) 1 Agra. 53, *Soondler v. Khulloo Mull*, (1871) 2 All. H. C., 90.

⁵ *Ram Soondar v. Krishno Chund*, (1872) 17 W. R., 380.

⁶ *Leggott v. Great Northern Railway Co.*, (1876) 1 Q. B. D., 599.

⁷ *Brunsdon v. Humphrey*, (1884) 14 Q. B. D., 141.

⁸ *Golab Singh v. Rao Kurun Singh*, (1873) 10 B. L. R., 1 P. C.

⁹ *Brunsdon v. Humphrey*, (1884) 14 Q. B. D., at p. 149.

¹⁰ *Bazloor Rubeen v. Shamsunnessa*, (1866) 11 Moo. 1 A., 551, *Udaya Texar v. Katarina Natchiyar* (1861) 2 Mad., 11 C., 131, but if there be fraud the second suit will not be barred—*Lachman Sing v. Sanwal Singh* (1876) 1 All., 543.

¹¹ *Radha Kishoree v. Ram Goomar*, (1869) 3 B. L. R., (A. C.) 265, 12 W. R., 79.

¹² *Mouohur Das v. Seetal Prosad*, (1875) 23 W. R., 418.

her to have the maintenance charged on the family property was held to be barred.¹

Immoveable property.—First suit for land and trees, second suit for value of the fruit of the trees, barred.²

After dismissal of plaintiff's suit for possession of a piece of land and for damages on the ground that no dispossession had taken place, plaintiff obtained a decree in another suit for possession and mesne profits of this piece of land, together with other lands. A third suit by him for damages which was the subject-matter of the first suit was held not barred.³

First suit for possession of land, second suit for declaration of title to palm-trees on that land, barred.⁴

Partition—The first suit was for partition of certain debts due to the joint family, the plaintiff alleging that all the rest of the joint family property had been divided; the suit was compromised and withdrawn. The same plaintiff again sued for partition of certain lands which had been left joint on the first partition. *Held*, that the suit was barred.⁵

Specific reference—First suit for specific performance of a contract to sell land decreed against vendor and subsequent purchaser with notice, second suit for damages against vendor for breach of contract barred.⁶

In a suit by purchasers against vendors for specific performance of their agreement, it appeared that both parties had previously sued, praying relief only as regards possession of the property sold or compensation for its disturbance, the purchasers in their cross-suit omitting to seek the relief now claimed. *Held* it was barred.⁷

Mortgage—See p 448 *infra*; a mortgagee holding two mortgages on the same property cannot sue for the sum due on the latter by sale of the property comprised in the earlier mortgage,⁸ nor can he maintain a suit on his later mortgage after he has got a decree on his earlier mortgage without mention of the later and brought the mortgaged property to sale.⁹

A suit to redeem on the ground of the mortgagee being over-paid will bar a subsequent suit for the over-payment.¹⁰ In April 1879, B gave a usufructuary mortgage to A for four years certain and after until redemption. A never got possession, and in 1882 he instituted a suit for interest unpaid. Subsequently, he sued for other interest and the principal sum. It was held that the non-delivery of possession was the cause of action in both cases, and the second suit would not lie.¹¹ When a mortgagee had brought the mortgaged property to sale in execution of a money decree against his mortgagor and such sale was set aside; *held*, that he was not debarred from bringing a suit for sale on his mortgage.¹² In *Gowind Hari v. Parashram*,¹³ there was an agreement to pay a debt partly in cash and to secure the balance by mortgage or in default to

¹ *Bangamma v. Vohalayya*, (1888) 11 Mad., 127; and see, *Samara jutti v. Shannings*, (1882) 5 Mad., 47; *Saminatha v. Rangathanmal*, (1889) 12 Mad., 285.

² *Debi Dial v. Ajub Singh*, (1881) 3 All., 513.

³ *Mahabeer Singh v. Ram Bhajun*, (1889) 16 Cal., 545.

⁴ *Maksool Ali v. Nargie Dye*, (1893) 20 Cal., 523; see *Rangasani v. Krishna*, (1899) 22 Mad., 279.

⁵ *Ukha v. Daga*, (1883) 7 Bom., 182.

⁶ *Shib Kristo v. Abdulool*, (1871) 15 W. B., 408.

⁷ *Bangayya v. Nanjappa Rao*, (1900) L. R., 28 I. A., 221.

⁸ *Kishayram v. Ramlal*, (1906) 30 Bom., 156, 7 Bom. L. R., 811; *c f* *Sringopal v. Puthi Pal*, (1902) 24 All. 429, *Qure*, per P. C. at p. 439.

⁹ *Nattu Krishna v. Apangara*, (1907) 30 Mad., 357.

¹⁰ *Rajoo v. Tamangoola*, (1869) 6 Bom., H. C., 97.

¹¹ *Hikmatulla v. Inam Ali*, (1890) 12 All., 203.

¹² *Bholu Nath v. Muhammad Sadiq*, (1901) 25 All., 223.

¹³ *Gowind Hari v. Parashram*, (1901) 27 Bom., 161.

execute a mortgage for the whole amount. The defendant failed to pay part in cash and the plaintiff sued and obtained a decree for that part. He subsequently brought a suit for the giving of a mortgage for the balance. *Held*, that the second suit was barred. This section does not preclude a mortgagee from obtaining relief under s. 93 of the Transfer of Property Act, 1882, although a claim to such relief has not been included in his suit.¹

Rent—See "Arrears of rent," p. 449, *infra*.

Representative—Where certain trustees had failed to ask for an account in a suit brought by them the Advocate General representing the same interest was held barred from bringing a subsequent suit for an account.²

Contract—A suit for the price of goods sold and delivered bars a subsequent suit for non-acceptance of other goods under the same contract of sale.³ First suit for damages for wrongful dismissal decreed, second suit for wages for a period subsequent to dismissal held to be barred.⁴

Collateral security—Barred by explanation, see, *Guman v. Ram Padmiah*,⁵

Not the same cause of action—A Mahomedan widow sold a portion of her deceased husband's property to A, and afterwards sold another portion to B. The heirs of the husband sued the widow and B to set aside the alienation to the latter, and they subsequently sued the widow and A to set aside the alienation to him. *Held*, that the second suit was not barred.⁶ A sued B for possession of his share of property bought with joint funds in the name of X. His heir afterwards sued B for possession of his share in other property bought with joint funds in the name of Y. *Held*, that the second suit was not barred.⁷ A, by will, left part of her immoveable property to B and part to C and directed her moveable property to be equally divided between them. After A's death, C tried to get his name registered for B's portion of the immoveable property. B then sued C for possession, and for a declaration of B's right to registration. B afterwards sued C for a half share of the moveable property. *Held*, that the second suit was not barred.⁸

Mortgage—See p. 448, *infra*. A mortgagee obtained a decree against his mortgagor for sale of the mortgaged properties. At the date of the institution of the suit, some of those properties had been taken up by Government for public purposes and the sale proceeds deposited in the Collector's Court to the credit of the mortgagor. A subsequent suit by the mortgagee against attaching creditors of the mortgagor to have it declared that his mortgage covered the money in the hands of the Collector, held, not barred.⁹ The purchaser of the equity of redemption of a share of certain mortgaged property sued the mortgagee in possession for the recovery of his share by redeeming the whole, and obtained a decree under which he got possession of his share. He afterwards purchased the mortgagor's interest in the remainder of the mortgaged property and sued the mortgagee for possession thereof. *Held*, that the suit was not barred.¹⁰

¹ *Maslich Zamun Khan v. Inayatullah* (1892) 14 All., 713, *Hamidullah v. Bedar Nath*, (1899) 20 All., 386.

² *Advocate General of Bombay v. Pungalon* (1894) 18 Bom., 551.

³ *Dunn Bros v. Jettmull Greenhatch Lall*, (1892) 13 Cal., 372. See, *Premnath v. Bismath* (1897) 29 All., 270; A. W. N. 41.

⁴ *Simpson v. Claghorn* (1890) 6 C. L. R., 91.

⁵ *Guman v. Ram Padmiah* (1873) 2 All. 538.

⁶ *Jehan v. Sarwak*, (1866) 1 Agia, F. B. 109.

⁷ *Ramharry v. Mothoor Mohun*, (1873) 20 W. R., 450, for a similar decision see *Binayattullah v. Nasir*, (1884) 6 All., 616, where the plaintiff who claimed two houses under the same title had been dispossessed of them at different times by the defendant's ancestor.

⁸ *Pittapur Raja v. Surya Ram* (1885) 8 Mad., 520; L. R., 12 I. A., 116.

⁹ *Kristadas v. Ramkant*, (1881) 6 Cal., 142.

¹⁰ *Brabannayaki v. Krishna*, (1886) 9 Mad., 92.

A suit on a second mortgage is no bar to a suit on the first.¹ The breach of a covenant in a mortgage bond to pay interest each year, which covenant is not confined to the fixed period of the mortgage and is distinct and independent of the claim of the mortgagee to recover the principal sum, and the performance of which is secured in a different manner, gives rise to a distinct cause of action, which can be sued upon without suing for the principal, and a decree obtained on such bond for overdue interest does not bar a subsequent suit to recover the principal and interest by sale of the mortgaged property.²

A got a money decree on a mortgage bond against his mortgagor, and then sued a purchaser of part to enforce his lien. He afterwards brought a second suit against the purchaser of the remainder. It was held that he might have sued, but was not bound to sue, both purchasers in one suit;³ and as to the propriety of suing all such persons jointly See ⁴ A suit on a mortgage bond against the mortgagors does not bar a subsequent suit to enforce the mortgage-lien against the mortgagor and subsequent mortgagees who denied the plaintiff's right to priority over them ⁵

Dower—A Mahomedan widow first sued for her dower. She then sued the same defendant for a declaration of a life-interest in the estate of her deceased husband and for possession; *held*, that the second suit was not barred ⁶

Partnership.—Certain partners who had been defendants in a certain partnership suit sued on the allegation that the partnership account had been adjusted by an *amin* in the previous suit. They therefore prayed for the amount due to them under the *amin's* adjustment. *Held*, that the suit was not barred ⁷

Partition—See p. 447 *infra*. The plaintiff in execution of a decree purchased the property of his judgment-debtors and got a sale certificate. He next instituted two suits, one after another for possession of parts of properties purchased by him and obtained decrees, basing his claim on the sale certificate. The remainder of the lands being held by the heirs of the judgment-debtors jointly with others, he instituted a suit for partition, basing his claim upon the sale-certificate. *Held* that the suit was not barred ⁸

When the plaintiff sued the defendant to compel him to execute a deed of sale and the Court executed a deed of sale in plaintiff's favour and the plaintiff sued on this deed of sale, the suit was held not to be barred ⁹. A suit for possession of joint property, a portion of the property being omitted from the claim, does not bar a suit for partition of the joint estate, including the portion, previously omitted ¹⁰

Title—When a Judge has before him a case consisting of two parts, a question of title and an incidental question of account depending on title, it does not require any provision of the Civil Procedure Code to authorize him to decide the first question, and reserve the second for further investigation ¹¹

The plaintiff sued in a former suit for certain land. He then sued for some other land. The ground of title was similar in both suits, but the defendants were different and the lands were different. *Held*, that the suit was maintainable ¹²

¹ *Moro v. Bilaji*, (1883) 13 Bom., 45.

² *Yashwant v. Yithal*, (1897) 21 Bom., 267. See also, *Badi Bibi v. Sami Pillar*, (1895) 18 Mad., 277.

³ *Hirce Mohun Paramanick*, (1871) 15 W. R., 486; see *Ram Tewari v. Luchman Pershad*, (1867) 8 W. R., 15.

⁴ *Hiralal v. Prosunno*, (1883) 12 C. L. R., 556.

⁵ *Banshee Singh v. Sudhet Lal*, (1881) 10 C. L. R., 263; 7 Cal., 739.

⁶ *Mahomed Husein Ali v. Husein Bano*, (1894) 21 Cal., 157, L. R., 20 I. A., 155.

⁷ *Dharam Sah v. Bhagurath Saha*, (1895) 22 Cal., 692.

⁸ *Narayan v. Sham Rao*, (1887) 27 Bom., 379.

⁹ *Nathu v. Budhu*, (1884) 18 Bom., 537.

¹⁰ *Abdul Nasir v. Rasuln*, (1893) 20 Cal., 385.

¹¹ *Abdul Majid v. Abdul Aziz*, (1896) L. R., 24 I. A., 22.

¹² *Dampjanaloginai Met v. Addula Ramaswami*, (1902) 25 Mad., 736.

Where the plaintiff has sustained an injury, in respect of his proprietary or permanent interest in an estate, and also one in respect of a temporary or leasehold interest and filed two suits, the causes of action are not identical.¹

Miscellaneous—The plaintiff sued for an injunction to restrain the defendants from removing shells stored on certain land. This suit was dismissed as not maintainable. The defendants then converted the shells to their own use, and the plaintiff sued for their value. *Held*, that the suit was not barred.² One R. D. sued M and G for cash and ornaments belonging to the estate of S. B. R. and B applied to be and were added as defendants. H. L., the son of R. D., then sued B. R. and B for possession of a house, belonging to the same estate. *Held*, that the suit was not barred.³

Specific performance—A Plaintiff had obtained a decree for specific performance of a contract of sale against defendants nos 3 to 7 and subsequently sued them and other persons in whose favour they had executed a conveyance for possession. *Held*, that the claim against the two sets of defendants did not arise out of the same cause of action, and that the suit for possession was not barred.⁴ Plaintiffs had paid the defendants a sum of money on a contract under which defendants undertook to renew a *kanom*, and had previously sued the defendants for specific performance of that contract. Plaintiff then sued to recover the money. *Held*, that s. 43 of the former code did not bar the suit.⁵

Cancellation of a document—A suit to cancel a document on the ground that it had not been executed, is not the same as a suit to obtain a declaration that it had been executed only for a nominal purpose.⁶

Partition—In a suit for partition, a certain field in the possession of a mortgagee was not included. It was afterwards redeemed by the defendant in the partition suit and by him mortgaged to X. The plaintiff in the partition suit then sued the defendant in that suit and X for possession of his share of the land. It was held that the suit was not barred, as the land included in the second suit was not available for partition at the time the first suit was brought.⁷ A suit brought by some members of a family against other members of the same family for partition of the joint family property does not preclude a second suit by the same plaintiffs for partition of other property belonging jointly to their family and strangers.⁸ The plaintiffs having obtained a declaration of the title to continue to enjoy separate possession of certain land sued the former defendant again for partition of the same lands. *Held*, that the suit should be dismissed.⁹ And where the land could not have been included in the first suit without the previous permission of the Government, it was held not to be incumbent on the plaintiff to ask for such permission before bringing the first suit.¹⁰ The plaintiff having previously obtained against his brother, defendant no. 1, who had been the managing member of their family a decree for partition of the family property, including certain debts scheduled in the plaint therein, now sued to recover his share of certain other family debts collected by the defendant no. 1 without the plaintiff's knowledge. *Held*, that the claim was not barred.

¹ *Upendra Lal v Secretary of State*, (1893) 20 Cal. 716.

² *Chidambaram Pillai v Kakketh Kunhambam*, (1902) 27 Mad. 669.

³ *Hingu Lal v Baldeo Ram*, (1902) 24 All. 573.

⁴ *Abdul Majid v Boudinath Dhar*, (1901) 6 Cal. W. N. 314. See also, *Venkata Rama v Venkata Subrahmaniam*, (1901) 24 Mad. 27.

⁵ *Parangodan Nair v Perantoduka*, (1904) 27 Mad. 380.

⁶ *Nagathal v Ponnusami*, (1890) 13 Mad. 44.

⁷ *Narayan v Pandurang*, (1875) 12 Bom. H. C. 148.

⁸ *Purnachottam v Atmaram* (1899) 24 B. n. 397, otherwise if it had been available—*Ukha v Diga*, (1893) 7 Bom. 182, *Srinaj v Sahab Lal*, (1895) 3 W. R. 25, *Moro v Bilaji*, (1899) 13 Bom. 45.

⁹ *Andi v Thatha*, (1887) 10 Mad. 317.

¹⁰ *Pattaravay v Andimula*, (1869) 5 Mad. H. C. 419, [*Complic. Jammout v. Bannasoodersee*, (1865) 2 W. R. 148].

by s 43 former Code (O II r 2)¹ The plaintiff was the *zamorin* of Calicut and he sued in 1887 for a moiety of certain property in Malabar alleged to belong in equal undivided shares to his *stanom* and that of the defendant and to be in occupation of tenants. The cause of action was stated to have arisen in 1881, when partition was demanded by the *zamorin* of Calicut and refused by the defendant. It appeared that the *zamorin* had previously brought suits and obtained decrees for partition of certain parcels of land as belonging equally to the two *stanoms* the defendant in each case being the present defendant and tenant in occupation of the land *held*, that the suit was not barred.² Plaintiffs, believing that certain buildings had been partitioned by a Revenue Court, brought a suit for recovery of their share in them, alleging that they had been dispossessed. They were defeated upon the ground that only the sites of the houses could have been partitioned by a Court of Revenue. Upon a second suit being brought by the plaintiffs in a Civil Court, asking for partition of the house property, it was held that the suit was not barred.³

Mortgage Possession—A sued B to redeem the land in dispute which he alleged had been mortgaged to B. The suit was dismissed as the mortgage was not proved. A then sued for possession on title. *Held*, the suit was not barred.⁴ Nor does failure in a suit for simple ejectment affect a subsequent suit to enforce a mortgagor's right to be redeemed.⁵ When a plaintiff had sued and obtained a personal decree on a mortgage against a mortgagor, this provision will not bar a suit against the mortgagor's sons after the death of their father.⁶ Certain land mortgaged to A, was sold to B. A brought a suit on his mortgage without joining B as a party, obtained a decree for sale and became the purchaser under the decree. B then sued to eject him, praying for a declaration that the sale was not binding on him. The suit having been dismissed, he now sued to redeem. *Held*, that the suit was not barred.⁷ In a previous suit, plaintiff had sued to redeem a *kanom* of 1859. The *kanom* not being established, the suit failed. At the time of bringing the suit, plaintiff was aware that the defendants in possession had in various documents admitted that they were *kanomdars* under the plaintiff's predecessors in title. On the plaintiff bringing a suit based on the admissions referred to *held*, the plaintiff could and should in the previous suit have based his claim in the alternative on the admissions, instead of confining that suit to the specific mortgage which he failed to prove, and that therefore the suit was barred.⁸ When a usufructuary mortgagee (15 of the Decan. Agriculturists' Mortgage) can, notwithstanding the provisions of s 43, former code, sue for an account without at the same time asking for redemption.⁹ There is nothing in the Code to prevent the holder of two independent mortgages over the same property, who is not restrained by any covenant in either of them, from obtaining a decree for sale on each of them in a separate suit.¹⁰ The defendant having agreed to sell land to the plaintiff, but having failed to execute a conveyance, the plaintiff sued for specific performance and obtained a decree, and the Court executed a conveyance of the land to him.

¹ *Marathodi v. Appu*, (1892) 15 Mad., 296.

² *Ittappan v. Manavikrama*, (1898) 21 Mad., 153.

³ *Balbhaddar Nath v. Ram Lal*, (1911) 26 All., 501.

⁴ *Naro Balyant v. Ranchandra*, (1859) 17 Bom., 326.

⁵ *Shridhar Vinayak v. Narayan*, (1874) 11 Bom. H. C. 224, p. 290; *Amanat v. Imdad Husain*, (1887) L. R., 15 I. A. 106, 15 Cal., 800; *Narasimha v. Venkatarayana*, (1893) 16 Mad., 491.

⁶ *Ramayya v. Venkataratnam*, (1891) 17 Mad., 122.

⁷ *Kuppu Nayudu v. Venkatakrisna*, (1897) 20 Mad., 82.

⁸ *Rangaiah v. Krishna*, (1897) 22 Mad., 250.

⁹ *Lalji v. Hulsar*, (1881) 3 All., 660.

¹⁰ *Lakshmi v. Girappa*, (1896) 29 Bom., 469. See also, *Balmakund v. Sangari*, (1897) 19 All., 379.

¹¹ *Sundar v. Bholu*, (1899) 20 All., 322.

He now sued for possession *held*, that the right to possession having arisen at the same time as the right to the execution of the conveyance, the suit was not maintainable.¹

Possession and title—A purchased a share of joint property from a member of a Mitakshara family, but his suit to recover possession of it was dismissed. A subsequent suit brought by him to recover the purchase-money by reason of failure of consideration was held not to be barred.² A plaintiff who seeks to redeem a specific mortgage or to eject on a specific lease and fails, because such mortgage or lease is not proved, is not thereby precluded from seeking to redeem the same property or a portion thereof from another specific mortgage or to eject on the strength of his title the person in possession.³

Possession and mesne profits—A suit to redeem does not bar a suit for mesne profits for the period between the date of the suit and the delivery of possession in execution of the decree,⁴ nor does a suit for possession and partition do so.⁵ And a suit for mesne profits does not bar a subsequent suit for possession.⁶ Where a plaintiff sued for possession of immoveable property upon a forfeiture and for rent in respect of the said property up to the date of the alleged forfeiture, and, having obtained a decree, subsequently brought a separate suit for mesne profits including the period from the date of the institution of the former suit *held*, that the claim for mesne profits for the period above-mentioned was barred.⁷

A summary suit for possession under the Specific Relief Act will not bar a subsequent suit for mesne profits.⁸

Arrears of rent : Instalments . Illustration—On a date when the rents for 1281, 1282, and 1283, were due, the lessor sued for the rent of 1281 only *Held*, a second suit for the rents of 1282 and 1283 was barred.⁹ In *Alagu v. Abdoola*,¹⁰ two suits for rents of successive years were filed on the same day in the S. C. Court. The High Court allowed plaintiff to withdraw them, and bring one suit in a competent Court. A suit for the rent of 1289 at an enhanced rate will not bar a subsequent suit for rent of the same year at the old rate.¹¹ Though this rule may preclude a landlord from suing for rent not

¹ *Narayana v. Kanilasami*, (1899) 22 Mad., 21.

² *Hanuman Kamut v. Hanuman Mandur*, (1899) 15 Cal., 51.

³ *Rama Sami v. Vythinatha*, (1903) 26 Mad., 760, *Veerana v. Muthukumara*, (1904) 27 Mad., 102.

⁴ *Gour Kishen v. Sahay*, (1867) 7 W. R., 364, *Sarnaomoyee v. Protap Chunder* (1870) 13 W. R., (1st B.), 15.

⁵ *Imad Ali v. Boonyad Ali*, (1870) 14 W. R., 92, *Sitaram v. Bhagvant*, (1869) 6 Bom., II C., 109; *Venkoba v. Subbanna*, (1898) 11 Mad., 151.

⁶ *Monohur v. Gouri Sunkur*, (1893) 9 Cal., 283, *Tirupati v. Narasimha*, (1888) 11 Mad., 210.

⁷ *Mewa Kuar v. Banarasi Prasad*, (1895) 17 All., 533.

⁸ *Sheo Kumar v. Narain Das*, (1902) 24 All., 591.

⁹ *Taruck Chunder v. Pancha*, (1891) 6 Cal., 791, *Madho Prakash Singh v. Murl Manohar*, (1883) 5 All., 406, *Naram Kumari v. Raghun Mohapatro*, (1886) 12 Cal., 50, *Balaji Sitaram v. Bhikaji*, (1894) 8 Bom., 161; *Assanulla*

after principal and interest became due.

¹⁰ *Alagu v. Abdoola* (1895) 8 Mad., 147.

¹¹ *Suddhruddin v. Beni Madhub*, (1893) 15 Cal., 145, overruling *Kunnoek*

not prevent him from adopting any his rent, & g., distraint.¹ Plaintiff 1305 under a registered *muchilika*, respect of *Fasli*, 1306. Suit held barred.²

A suit for rent in the Revenue Court will not bar a suit in the Civil Court to realise a mortgage given by the lessee to secure payment of the rent.³

"Omit to sue in respect of, or intentionally relinquish."—The words in s. 7, Act VIII of 1859, were "relinquish or omit to sue for" and it was held, that these words included "accidental or involuntary omission as well as acts of deliberate relinquishment,"⁴ of portions of one whole claim arising from one cause of action, *i.e.*, the cause of action for which the suit is brought.⁵ This portion of the rule assumes that the plaintiff was, at some time prior to the suit, aware or informed of the claim, or aware of the facts which would give him a cause of action;⁶ for a right which a litigant possesses without knowing or ever having known that he possesses it, can hardly be regarded as a 'portion of his claim'.⁷ A plaintiff cannot reserve his right to sue again by asserting in his plaint that he intends bringing a second suit for the portion omitted.⁸ But a portion of a claim abandoned in order to bring it within the pecuniary jurisdiction of a Court, may be revived in the Court having jurisdiction over the entire claim, when the suit is transferred to such other Court.⁹ So, where a plaintiff originally sued for a certain sum upon his *khatta* books, and on objection by the defendants, amended the plaint by suing for the amount admittedly due upon a *hatchitta*, in addition to the amount he claimed upon his *khatta* books, *held*, that the causes of action which were before amendment of the plaint distinct, became afterwards united and that there was no relinquishment within the terms of this rule.¹⁰

A person entitled to more than one relief in respect of the same cause of action, &c.—A suit for rent would bar a second suit to enforce a forfeiture for non-payment of the same rent,¹¹ and a suit for specific performance of a contract will bar a subsequent suit for damages for failure to perform.¹²

Since the passing of the Transfer of Property Act, IV of 1882, a mortgagee holding a money-decree against his mortgagor cannot execute it against

Chunder v. Gurudas, (1883) 9 Cal., 919, as the cause of action is different. See also Khedaroomissa v. Boodhee, (1870) 13 W. R., 317, and Sura Sundari Devi v. Oholam Ali, (1873) 19 W. R., 142; 15 B. L. R., 125, *note*.

¹ Eswara Dass v. Venkataroyar, (1898) 21 Mad., 236.

² Shannugam Pillai v. Ghulam Ghosh, (1901) 27 Mad., 116.

³ Chumli Lal v. Bina-pat, (1887) 9 All., 23; Banda v. Abadi, (1832) 4 All., 180; Imami Begum v. Govind Prasad, (1882) 4 All., 318.

⁴ Burloor Ruheem v. Shumsomissa, (1857) 8 W. R., P. C., 3; 11 Moo. I. A., 551, at p. 605, *foli. m.*; Syed v. Horkissen (1905) 2 Cal., L. J. 490.

⁵ Pittapur Bahad v. Suripa, (1894) L. R., 12 I. A., 116; 8 Mad., 520; see also Ram Churn v. Dromomoyee, (1872) 17 W. R., 122; Bulwant v. Chittan, (1871) 3 All. H. C., 27.

⁶ Viraragava v. Krishnasami, (1883) 6 Mad., 344.

⁷ Amnat v. Imdad Hussain, (1887) L. R., 15 I. A., 106; 15 Cal., 899; Ambu v. Kethlamma, (1891) 14 Mad., 23; Marathodi v. Appu, (1892) 15 Mad., 296; Sankaran v. Parvathi, (1896) 19 Mad., 145.

⁸ Soondar v. Khiloo Mull, (1870) 2 All. H. C., 99; Mahsud Ali v. Nargis Dye, (1897) 20 Cal., 322.

⁹ Ram Lal v. Braji Hari, (1896) 1 Cal. W. N., 32.

¹⁰ Ram Tarun v. Hosein Buksh, (1878) 3 Cal., 756.

¹¹ Subbaraya v. Krishna, (1843) 6 Mad., 159.

¹² Shob. Krishna v. Abdul Subhan, (1871) 15 W. R., 408; and Vice-versa—Rangya v. Narappa, (1862) 6 Cal. W. N., 17; 24 I. A., 221; 21 Mad. 491.

the mortgaged property, but must bring a suit under s 67 of the same Act—see Transfer of Property Act, s 99¹. A Hindu widow who has obtained a decree for maintenance against her husband cannot bring a second suit to have it declared that it is a charge on certain lands, because he had alienated other properties to defraud her of her maintenance².

When the holder of a bond, in which property is hypothecated, sues for all his remedies and obtains a decree declaring his lien, but which is infructuous on account of the Court having no jurisdiction over the land, he can bring a second suit to enforce his lien against a subsequent purchaser from the mortgagor.³

Previous judgment refusing or omitting to adjudicate.—If the Judge in the first case refuses to adjudicate on the effect of a document, a subsequent suit will lie, though it is on the same cause of action⁴. A suit for redemption of land without specification of details includes a claim for restoration of all accretions and improvement which it may have received while in the hands of the mortgagor; and if the Court omits to adjudicate upon parts of the claim, the mortgagor is not precluded from bringing a second suit in respect of that part⁵.

Stamp duty.—The plaintiff in a suit upon a certain instrument not duly stamped was compelled to pay the amount of duty and penalty. The defendant was the person bound to bear the expense of providing the proper stamp. The plaintiff sued the defendants to recover such amount. *Held*, that such amount could not be regarded as part of the costs of the suit in which it was paid and a separate suit to recover it was maintainable⁶.

3 (1) Save as otherwise provided, a plaintiff may unite in the same suit several causes of action against the same defendant, or the same defendants jointly, and any plaintiffs having causes of action in which they are jointly interested against the same defendant or the same defendants jointly may unite such causes of action in the same suit.

(2) Where causes of action are united, the jurisdiction of the Court as regards the suit shall depend on the amount or value of the aggregate subject-matters at the date of instituting the suit.

Act XIV of 1882, sect 45, see R S O, 18 r 1. This rule applies to H. C. and Prov. S. C. C.

Save as otherwise provided. See O. II, rr. 4 and 5 *post*, and *sects 15–20 ante*. And as to joinder of parties see Order I *ante*, particularly noting the newly added provisions contained in Rules 1 and 5. This is an enabling provision and should not be regarded as restricting O. I, rr. 3 and 5⁷.

¹ Kaveri v Ananthayya, (1897) 10 Mad, 129, and see on this point—Durgayya v Anantha, (1891) 14 Mad, 74; Dinendra v. Chunder (1896) 12 Cal, 436; Bholu Sundari v. Bakhal, (1896) 12 Cal, 593.

² Saminatha v. Rangathammal, (1869) 12 Mad, 295.

³ Grish Chundra v. Rameshwar, (1874) 22 W. R., 303. Bungee Singh v. Sudist Lal, (1881) 10 C. L. R., 263, 7 Cal, 749. As to a declaratory decree, see the Specific Relief Act, I of 1877, s 42; Sardarsingji v. Ganpatsingji, (1890) 14 Bom, 395.

⁴ Becharji v. Pujari, (1890) 14 Bom, 31, p. 55.

⁵ Baksheram v. Darku Tukaram, (1873) 10 Bom. II. C., 369.

⁶ Ishar Das v. Masud Khan, (1894) 6 All., 70.

⁷ Narsingh Das v. Mangil Dubey, (1893) 5 All., 178; per Mahmud J.

Application of this rule—This rule applies to cases where there are only one plaintiff, one defendant, and several causes of action, and to cases where the plaintiffs, (or defendants), though consisting of two or more individuals, may be considered as a unit with reference to all the different causes of action.¹

Under the former Code it was held that distinct causes of action against distinct sets of defendants, *i. e.* causes of action in which all the defendants are not jointly interested, could not be united in the same suit,² but it remains to be seen how far the Courts will sanction such suits under this Code having regard to O. I, rr. 1, 3 and 5 *ante*. See generally the notes to those rules

Jurisdiction.—It is a pre-requisite of the right to join in one suit more than one cause of action against a defendant that the Court in which the plaint is presented should have jurisdiction over all the causes of action.⁴

Only certain claims to be joined for recovery of immovable property.

4. No cause of action shall, unless with the leave of the Court, be joined with a suit for the recovery of immovable property, except—

- (a) claims for mesne profits or arrears of rent in respect of the property claimed or any part thereof;
- (b) claims for damages for breach of any contract under which the property or any part thereof is held; and
- (c) claims in which the relief sought is based on the same cause of action:

Provided that nothing in this rule shall be deemed to prevent any party in a suit for foreclosure or redemption from asking to be put into possession of the mortgaged property.

Act XIV of 1882, Sect 44 rule a. *R. S. O. 18, r. 2.*

This applies to H. C.

¹ *Narsing Das v. Mangal Dabey*, (1893) 5 All., 163; *Bhagwati v. Budesbri*, (1894) 6 All., 106. It does not apply to cases of multifariousness, strictly so-called. See the remarks of Selbourne, L. C., in *Burstell v. Beyfus*, (1894) 26 C. D., 35, p. 39. See notes to O. I, r. 9.

² *Kifait Hosain v. Sheo Pershad*, (1896) 23 Cal., p. 826. For other examples of such suits held to be multifarious under the old Code, see *Ram Prasad v. Sachhi Dassi*, (1901) 6 Cal. W. N., 585; *Sarala v. Sarala*, (1905) 2 Cal. L. J., 602. Parties claiming adversely to mortgagor and mortgagee not to be joined, (1906) 3 Cal. L. J., 205. But *in*, (1906) 3 Cal. L. J., 95; and cases collected in

³ *Jivraju v. Parashotam*, (1881) 7 Mad., 173.

Leave of Court—Application for leave should be made before the plaint is filed,¹ though possibly, on good cause shown, leave may be given afterwards.²

Leave given—Leave will be given to join whenever it is sought to recover immovable and moveable property comprised in the same instrument. Thus leave has been given to join in one suit claims for recovery of possession of land, an injunction to restrain the defendants from receiving the rents of the land, the appointment of a receiver, and delivery up and cancellation of a deed under which the defendant claimed to be entitled to the land sought to be recovered,³ and claims for the administration of personal estate and to establish a title to real estate have been joined, where both estates rested on a common gift in the same will.⁴ The law does not compel a plaintiff to get leave to join distinct causes of action.⁵

Procedure on objection—An objection for mis-joinder of causes of action must be taken in the Court of first instance,⁶ and cannot be raised for the first time in appeal,⁷ and if the Court instead of rejecting the plaint or returning it for amendment proceed to trial, it should not subsequently dismiss the suit for mis-joinder, but dispose of it on the merits.⁸

Meaning of rule—This rule refers to a suit formed upon an existing title in which the plaintiff asks for a declaration of such title or for possession.⁹ It does not prevent joinder of several causes of action to recover immovable property, but only the joinder with such causes of action of certain other causes of action of a different character.¹⁰ Nor does it prevent a plaintiff suing for moveable and immovable property, if the cause of action is the same.¹¹ Claims for possession and mesne profits are distinct claims, and separate suits will lie. This rule only permits their joinder.¹² When a zamindari share and the *sir* land held with it were sold to the same vendee by two separate deeds of sale executed on the same day, it was held that a suit to pre-empt both the zamindari share and the *sir* land was not liable to be defeated on the ground of mis-joinder of causes of action.¹³ This rule is not applicable to a suit, unless it is for the recovery of immovable property. Even in these cases the defect of multifariousness is cured, if the leave of the Court is obtained previous to the bringing of the suit.¹⁴ It has no application to the case of a plaintiff who holding two mortgage deeds over separate properties joins both in one suit for sale or foreclosure.¹⁵

Sale.—A suit for recovery of a mortgage—debt with an alternative prayer for sale of the mortgage property is not a suit to recover immovable property.¹⁶

¹ *Filcher v. Hinds*, (1879) 11 C. D., 505.

² *Munjiav v. Stevens*, W. N., 1881, p. 163, *Clark v. Wray*, (1883) 21 C. D., 69, and see *Mulkearn v. Doerks*, 53 L. J., Q. B., 526.

³ *Cook v. Enchmarch*, (1876) 2 C. D., 111.

⁴ *Whetstone v. Dewis*, (1875) 1 C. D., 99.

⁵ *Sheo Ratan v. Sheosahai*, (1894) 6 All., 358, *Becharji v. Pujari*, (1890) 14 Bom., 31, p. 53.

⁶ *Dhondiba v. Ramchandia*, (1881) 5 Bom., 554.

⁷ *Maula v. Gulzar Singh*, (1894) 16 All., 130.

⁸ *Kishna Ram v. Raknum*, (1887) 9 All., 221. See "RETURN OF PLAINT," O. VII, r. 10.

⁹ *Cutts v. Brown*, (1890) 7 C. L. R., 171 (1891) 6 Calc., 328.

¹⁰ *Chidambara v. Ramasami*, (1882) 5 Mad., 161. See also, *Sheo Ratan v. Sheosahai*, (1884) 6 All., 358.

¹¹ *Giyana v. Kandisami*, (1887) 10 Mad., 375, p. 506; *Mazhar Ali Khan v. Sajjad Husam Khan*, (1902) 24 All., 358, *Gladhill v. Hunter*, (1880) 14 C. D., 493, *Ganesh Dutt v. Jewall Thakuram*, (1903) L. R., 31 I. A., 10.

¹² *Lalson Bahai v. Janki*, (1892) 19 Calc., 615.

¹³ *Amlaka Dat v. Ram Udit*, (1895) 17 All., 274.

¹⁴ *Nunda Lal v. Nistaram*, (1902) 7 Calc. W. N., 353.

¹⁵ *Raghubar Dyal v. Jwala Singh*, (1903) 25 All., 229.

¹⁶ *Govinda v. Mana Vikraman*, (1891) 14 Mad., 284.

Foreclosure.—In England, it has been held that a suit for foreclosure is not a suit for land under this rule and leave has been given to join in one suit claims for the administration of the trusts of a mortgage deed, and for foreclosure of the mortgage;¹ and it seems desirable in such suits to add a claim for possession.² The proviso to this rule now settles this question in India.

Suit to establish title.—In England, an action to establish title to land and recover rent, but not claiming possession, is not an action for land³ and this case has been omitted from this rule in redrafting sect. 44 rule a, former Code.

Specific performance.—A suit for specific performance of an agreement to sell a share of a house may be joined with a suit to recover a sum of money due from a defendant on promissory notes.⁴

Court-fees.—A suit upon one and the same cause of action for possession of immovable property and for mesne profits or damages for the wrongful detention of such property is not a suit embracing two or more distinct subjects within the meaning of s. 17 of Act VII of 1870.⁵

5 No claim by or against an executor, administrator or heir, as such, shall be joined with claims by or against him personally, unless the last mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff or defendant sues or is sued as executor, administrator or heir, or are such as he was entitled to, or liable for, jointly with the deceased person whom he represents.

Act XIV of 1882, Sect 44; R. S. O. 18, r. 5

The meaning of the rule is this. In suing an executor or administrator, it frequently becomes a question whether he should be sued as legal representative or personally, and the minds of the framers of that rule were directed to *Ashby v. Ashby*⁶ and cases of the same class,⁷ where the executor or administrator has been dealing with the assets, or making contracts, in the course of the administration, properly and fairly in his character of executor or administrator; and then it becomes a question whether, the contracts being personally entered into by him, he should be sued in his character of legal personal representative or in his personal character, being left afterwards to get payment, if he could, out of the assets, in the course of administration. The object of the clause was to get over such difficulties.⁸ A suit by the assignee of a Mahomedan widow for the recovery of part of the assignor's dower and of part of the estate of the assignor's late husband does not contravene the provisions of s. 44 rule (b),⁹ (former Code) under sec 328, Act X of 1865, an administrator is liable for neglect to get in any part of the property of the deceased person.¹⁰

¹ *Tawell v. Sate Company*, (1876) 3 C. D., 629.

² *Withal v. Nixon*, (1885) 28 C. D., 413.

³ *Gledhill v. Hunter*, (1880) 11 C. D., 492.

⁴ *Cutts v. Brown*, (1897) 7 C. L. R., 271; (1881) 6 Cal., 328.

⁵ Reference under the Court Fees Act, 1870, s. 5, (1901) 16 All., 401.

⁶ *Ashby v. Ashby*, (1827) 7 B. & C., 414.

⁷ *Farhall v. Farhall*, (1871) L. R., 7 Ch. App., 123.

⁸ *Palwick v. Scott*, (1876) 2 C. D., 736.

⁹ *Abmalulhu v. Sikandir*, (1896) 18 All., 256. See also *Smith v. Richardson*, 4 C. P. D., 112.

¹⁰ *Khusrulhal v. Hormajsha*, (1893) 17 Bom., 637.

Heir as such—This means that the plaintiff rests his claim entirely on the allegation that he is the heir of another, and as such asserts a right against the defendants¹.

6 Where it appears to the Court that any causes of action joined in one suit cannot be conveniently tried or disposed of together, the Court may order separate trials or make such other order as may be expedient

Act XIV of 1882, Sect 45, of R. S. O. 16, r. 1-9 and O. 18, r. 1

The language of this rule has been modified to follow almost exactly O. 18, r. 1 of the English rules, under which it has been said that this provision assumes that the suit has already been properly constituted as regards parties².

It seems that an application by the parties is not necessary and that the Court can act of its own motion under this rule³.

Multifariousness—procedure to be followed—In *Subramanya v Sadayasa*⁴ a suit was brought by a Hindu for partition of joint family property against his father, brothers, and sixteen other persons to whom, it was alleged, the father had improperly alienated numerous parcels of the said property at different times. The alienees were the only defendants who opposed the plaintiff's claim, and as to them the suit was dismissed on the merits. On appeal, the High Court said that the Court of first instance should have directed separate trials in respect of the alienations. And in a suit of a similar kind the High Court, in special appeal, said the first appellate Court should have tried the suits separately.

The result of the older decisions had been thus stated⁵—

"If an objection on this ground is pressed and carried to a decision in the first Court, this Court will, even upon special appeal upon its being shown to be well founded, give the objector the benefit of it. But, on the other hand, if it is not pressed and carried to a decision in the first Court, and if the parties go to trial in the same way as if the objection had not been made, then the objection will not be given effect to at a later stage, unless it appears clearly that there was a defect in the original trial in consequence of the misjoinder of the causes of action to which the objection is directed." And in some cases the High Court would not in special appeal interfere with the order of the lower Court, disallowing the objection⁷. Where several plaintiffs instituted separate suits against the same defendant in respect of the same subject-matter, *held*, that the proper course was to consolidate the suits, and try them as one, as the defendant requested, or to try each case separately on the merits, and that it was wrong to try only one case and treat the others as governed by it⁸.

¹ *Ashibat v. Hiji Tyeh*, (1882) 6 Bom., 390.

² *Per Bowen L. J. in Hamlyn v. Smithwaite*, (1891) 2 Q. B., at p. 423.

³ *Sec. Ann. Priv.* (1909) p. 225 note to O. 18, r. 1.

⁴ *Subramanya v. Sadayasa*, (1895) 8 Mad., 73.

⁵ *Shonoo v. Mothoon Mohm*, (1865) 4 W. R., 109. See also as to procedure which ought to be followed—*Ratta v. Dunsroo*, (1870) 2 All. H. C., 153; *Vithu v. Narayan*, (1867) 3 Bom. H. C., 30, *Komduu v. Hummit Singh*, (1871) 3 All. H. C., 86.

Per Phear, J. in Tarnet v. Hussman, (1873) 20 W. R., 240. See also, *Ram Dyal v. Ram Doolal*, (1869) 11 W. R., 273.

Mahomed Hossain v. Potan, (1873) 20 W. R., 447; *Shankur v. Lala*, (1870) 2 All. H. C., 443.

Nihal Singh v. Ali Ahmed, (1871) 15 W. R., 110.

Where a landlord sued four tenants holding three distinct tenures to enhance the rent of each tenure, *held*, that separate trials should have been ordered.¹ Where A sued B for possession, and C, claiming the lands sued for, was made a party without A or B objecting, *held*, that this section did not empower the Court to strike C's name off the record, but only to order separate trials.²

Return of plaint.—When the Court of appeal reverses a decree on the ground of misjoinder, it may return the plaint for amendment.³ In Calcutta the practice has been to reject the plaint; if this has not been done and the objections are raised in the written statement, the judge should raise an issue on the point and decide it;⁴ or in doubtful cases, an issue for misjoinder may be raised with other issues, evidence taken and the case dismissed for misjoinder without recording a finding on the other issues;⁵ or the plaintiff may be called on to elect against which defendant he will proceed.⁶ In Allahabad, the appellate Court dismisses the suit.⁷

7. All objections on the ground of misjoinder of causes of action shall be taken at the earliest possible opportunity and, in all cases where issues are settled, at or before such settlement, unless the ground of objection has subsequently arisen, and any such objection not so taken shall be deemed to have been waived.

Act XIV of 1882, Sect 34; R. S. O. 16, r. 12.

This rule applies to H. C. and Prov. S. C. C.

Earliest time.—Objection for want of parties should be taken at the earliest opportunity and before the first hearing.⁸

Plaintiff.—A Hindu widow sued for partition and pending the suit adopted a son, but still carried on the litigation in her own name. It was held that it should be assumed as a matter of law that she litigated as his guardian and the ^{plaintiff} and where one ^{party} it was contended ^{that} he contention was defendant's uncle and they sued on title. The first appellate Court considering that the interests of the plaintiffs were antagonistic, dismissed the suit for misjoinder: *held*, the objection had been taken too late.¹¹ In a suit to enforce a

¹ Juggut Chunder v. Har Mahomed, (1875) 24 W. R., 217.

² Khadar v. Chotibibi, (1884) 8 Bom., 616.

³ Lingammal v. Chinna, (1893) 6 Mad., 239.

⁴ Rani Tewary v. Luchmun, (1867) 8 W. R., 15.

⁵ Imrit Nath v. Dhunpat Singh, (1871) 9 B. L. R., 241.

⁶ Hurro Monce v. Onookool, (1867) 8 W. R., 461. See also Kachar v. Bai Bathore, (1883) 7 Bom., 299; Mohomed v. Krishnan, 11 Mad., 106, p. 111.

⁷ Karan Singh v. Mahammal, (1883) 7 All., 869. But in Behari Lal v. Kodu Ram, (1893) 15 All., 390, it was said in the High Court that the plaintiffs should have been allowed to amend their plaint by striking out the name of one of them.

⁸ Rajnarain Bose v. Universal Life Assurance Co. (1881) 7 Calc., 594; Obhoy Govind v. Hury Charn, (1882) 8 Calc., 277; see also Phoolbas Koonwar v. Jogeshur (1875) L. R., 3 L. A., 7 p. 25; 1 Calc., 226.

⁹ Dhurm Das v. Shama Soondra, (1873) 3 Moo. L. A., 220; Hari Saran v. Bhutanawari, (1887) L. R., 15 L. A., 195; 16 Calc., 40.

¹⁰ Paramasba v. Krishna, (1891) 11 Mad., 491. See also, Sundari v. Ramji, (1881) 7 Calc., 242; 9 C. L. R., 13.

¹¹ Fakiraj v. Rudrapa, (1892) 16 Bom., 119.

right of pre-emption the vendor was not made a party; *held*, this objection could not be raised in special appeal.¹ So, when maintenance was decreed to a mother and her two children jointly, an objection in special appeal that there were three causes of action and separate sums should have been adjudged, was rejected.²

Subsequently arisen.—This rule would not prevent a defendant from objecting to the want of a proper party after first hearing, if the objection did not exist at that time.³

Parties.—An apparent objection to parties may sometimes mean an attempt to sue on a different cause of action.⁴

Practice.—If a question concerning parties is raised at or before the first hearing, it probably should be tried quickly;⁵ and if the Judge finds that the objection is valid, he should act under O. 1, r. 10 (2) and not dismiss the suit.⁶

Appeal.—Misjoinder of parties is not an objection which should be allowed to be taken in special appeal.⁷

¹ Hiralal v. Ramjas, (1884) 6 All., 57.

² Tulsha v. Gopal Rao, (1884) 6 All., 632.

³ Modhe v. Dongre, (1881) 5 Bom., 609.

⁴ Scarf v. Jardine, (1882) 7 App. Cas., 344; London Bank v. Bhanji, (1878) 2 Bom., 116.

⁵ Richards v. Butcher, 62 L. T., 867.

⁶ See remarks of Bowen J., in Van Gelder v. Sowerby Society, (1890) 44 C. D., 374.

⁷ Tiluck Chunder v. Maddon Mohun, (1869) 12 W. R., 504; Lall Mahomed v. Peer Nuzur, (1872) 18 W. R., 112; Lutchmoodhur v. Rughubur, (1873) 21 W. R., 286; Nurmooddeen v. Zuhoorun, (1868) 10 W. R., 45; Magaluri v. Narayana, (1881) 3 Mad., 359.

ORDER III.

Recognized Agents and Pleadors.

1. Any appearance, application or act in or to any Court, required or authorized by law to be made or done by a party in such Court, may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by a pleader duly appointed to act on his behalf:

Appearances, etc., may be in person, by recognized agent or by pleader.

Provided that any such appearance shall, if the Court so directs, be made by the party in person.

Act XIV of 1882, sect 36.

This rule applies to H. C. and Prov S. C. C.

Appearance.—If a recognized agent, though able to do so, does not think proper to conduct the case on behalf of his principal, his mere presence in Court is not an appearance in the suit.¹

Attorney.—An attorney who has acted for a party to a suit and has discharged himself, cannot afterwards act for the opposite party, and the Court will restrain him from doing so.²

Authority.—The Court may enquire as to the agent's authority. If under O. I, r. 10 it substitutes the name of the principal, it does not decide that the agent had authority.³

Recognized agent.—Under this section a recognized agent can file an application or enter an appearance on behalf of his principal; he cannot institute or defend a suit or appear in his own name;⁴ nor can he address the High Court as a suitor himself may do.⁵

Objection not allowed.—A suit should not be dismissed by the first appellate Court on the ground that the plaint has not been filed by a recognized agent; such an error does not affect the merits of the case.⁶

Pauper suits.—Applications to sue *in forma pauperis* cannot be made by a recognized agent.⁷

¹ Soonder Lal v. Goorprasad, (1899) 23 Bom., 414.

² Bam Lal v. Moonia Biba, (1891) 6 Cal., 79.

³ Nam Narain v. Raghu Nath, (1892) 19 Cal., 478; L. R., 19 I A., 135.

⁴ Mokha Hurruckhraj v. Bissessar, (1870) 13 W. R., 311; 5 B. L. R., App., 11; Carter v. Misree, (1870) 2 All. H. C., 179.

⁵ Prannath Chowdhry v. Ganendra Mohun, (1865) 3 W. R., 108.

⁶ Munoo Doss v. Ishan Chunder, (1871) 15 W. R., 245. See "OBJECTION TO AGENT ACTION," O. III, r. 2, p. 469 post.

⁷ Dargie Guru Sambhagie, ex parte, (1867) 4 Bom. H. C., 91; Mokha Hurruckhraj v. Bissessar, (1870) 5 B. L. R., App., 11; (1870) 13 W. R., 311.

2. The recognized agents of parties by whom such appearances, applications and acts may be made or done are—

Recognized agents.

- (a) persons holding powers-of-attorney, authorizing them to make and do such appearances, applications and acts on behalf of such parties ;
- (b) persons carrying on trade or business for and in the names of parties not resident within the local limits of the jurisdiction of the Court within which limits the appearance, application or act is made or done, in matters connected with such trade or business only, where no other agent is expressly authorized to make and do such appearances, applications and acts

Act XIV of 1882, sect. 37. This rule applies to H. C. and Prov. S. C. C. As to Oudh, see Act XVIII of 1876, s. 18 and as to Ajmere and Merwara, see the Ajmere Courts Regulation (I of 1877), s. 28.

The terms of this rule are more extensive than those of section 37, (former Code). There is no restriction in para (a) as to residence outside jurisdiction and all powers of attorney are included according to their terms.¹

Power to refuse.—A person holding a power-of-attorney authorising him to appear and defend suits may act or not, as he pleases, upon the power. He is at liberty to refuse to accept service of summons.²

Mukhtars.—are included in para (a)

Special power.—A mere power to sue does not authorise an agent to do more than employ a *vakil* on the terms of paying him a reasonable remuneration,³ it does not enable him to terminate a suit by the oath of the opposing party;⁴ and a mere authority to look after a case does not make the donee of the power a recognised agent under this rule.⁵

Para (b).—In Act VIII, 1859, s. 17, the words "where no other agent is expressly authorized" imply that the persons so carrying on trade or business for or in the names of parties not within the jurisdiction of the Court, are purely agents and the words "carrying on trade or business for or in the names of parties not within the jurisdiction of the Courts" refer to a *gomasta* or agent, and not to a partner.⁶ This decision was subsequently dissented from in *Ram Chandra Bose v. Snead*,⁷ so that the point may still be considered as undetermined. Mukhtars and *karpardazes* carrying on *zamindari* business are not servants or agents on whom summonses can be served.⁸

Not agents.—Para (b) of this rule and O. V, r. 13 are to be construed together, and are intended to carry out the same scheme of relief, which rests

¹ In the Calcutta High Court under Rules 743 of the Rule and Orders the Court may require further evidence of the verification of a power of Attorney. In the goods of Myles (1906) 33 Cal., 625.

² *Luchmee Chund, in re*, (1882) 8 Cal., 317, at p. 326.

³ *Keshav v. Narayan*, (1886) 10 Bom., 18.

⁴ *Sadashiv v. Maruti*, (1880) 14 Bom., 453.

⁵ *Bhugwan v. Nund Lall*, (1886) 12 Cal., 173, p. 178.

⁶ *Luchmeput Dogare v. Sibnarain Mundle*, (1862 3) 1 Hydr., 97.

⁷ *Ram Chandra Bose v. Snead*, (1871) 7 B. L. R., App., 58.

⁸ *Nobin Chunder v. Buroda Kant*, (1873) 19 W. R., 341: Reference, 23 W. R., 223.

upon the idea that wh
place of his principal
such principal (at th
proceeding that may
been virtually a local principal. The manager or agent contemplated by the Code is one who has an initiative and independent discretion, although subject possibly to principles and general orders prescribed for his guidance. A mere servant employed to carry out orders or to execute a particular commission, or a factor, or common agent who is not identified with the firm for which he acts, is not such an agent. A Bombay firm simply employed by the owners, resident er for a particular . carrying on busi- deemed authorised note at p. 111 of

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As to the recognized agents of Government, see O. XXVII, rr. 2 and 4 and in the case of Princes and Chiefs, see s. 85. A Political Agent is not, as such, a recognized agent.³

Objection to agent acting.—An agent cannot act under this rule so long as his principal is within jurisdiction. Thus, where the manager of a firm instituted a suit to recover a sum of money while one of the partners was within jurisdiction, it was held that the partner and agent should have joined in present.

the same Court.⁵ See "OBJECTION NOT ALLOWED," O III, r 1, p. 458 *ante*

Agency ceasing.—A gomasta of a firm ceases to be a recognized agent as soon as the firm ceases to exist⁶ but the *mumim* of a firm which has ceased to transact business, who is engaged in collecting the assets of that firm and otherwise winding up its affairs, is a recognised agent of the owner of such firm and can, on behalf of his absent principal, maintain or defend a suit brought in respect of the business of the firm whose affairs he is engaged in winding up.⁷

Resident—See *Ramchandra v. Keshav*.⁸

Carrying on trade or business.—See note under s. 16, p. 129, *ante*

3. (1) Processes served on the recognized agent of
Service of process on a party shall be as effectual as if the
recognized agent, same had been served on the party in
person, unless the Court otherwise directs.

(2) The provisions for the service of process on a party to a suit shall apply to the service of process on his recognized agent.

Act XIV of 1882, sect. 38.

This rule applies to H. C. and Prov. S. C. C. As to Oudh, see last rule.

¹ *Goculdas v. Ganeshlal*, (1850) 4 Bom., 416.

² *Ratanji v. Saunders*, (1871) 8 Bom. H. C., 159.

³ *Venkatray v. Madhavray*, (1857) 11 Bom., 53.

⁴ *Bhavaday v. Lakshmichand Kishinchand*, (1869) 6 Bom. H. C., 159.

⁵ *Parvatibai v. Vinayek*, (1888) 12 Bom., 68.

⁶ *Mokha Hurruckhraj v. Bisessur*, (1870) 13 W. R., 311.

⁷ *Holkar v. Pitambardas*, (1871) 9 Bom. H. C., 427.

⁸ (1882) 6 Bom., 100.

This rule does not bar service of notice on the parties themselves.¹

Service upon an attorney's clerk of an order directed to be served on the attorney is not good.²

A person to whom a power of attorney has been given may refuse to accept service of summons, that is, refuse to act on the power.³

4. (1) The appointment of a pleader to make or do any appearance, application or act for any person shall be in writing, and shall be signed by such person or by his recognised agent or by some other person duly authorized by power-of-attorney to act in this behalf.

(2) Every such appointment, when accepted by a pleader, shall be filed in Court, and shall be considered to be in force until determined with the leave of the Court, by a writing signed by the client or the pleader, as the case may be, and filed in Court, or until the client or the pleader dies or until all proceedings in the suit are ended so far as regards the client.

(3) No advocate of any High Court established under the Indian High Courts Act, 1861, or of any Chief Court, and no advocate of any other High Court who is a barrister shall be required to present any document empowering him to act.

Act XIV of 1882, Sect. 39

This rule applies to H. C. and Prov. S. C. C.

Para 3 extends the privilege to all barristers enrolled under any of the Indian High Courts.

Appointment in writing—A letter is sufficient authority, if sufficiently stamped.⁴ The appointment must be in writing and that writing must be executed by the party or by a person acting on his behalf and acting under the authority of a general power of attorney, unless the person is a recognized agent of the party within the definition of O. III, r. 2.⁵ The appointment of a pleader must be in

A legal practitioner

High Court

over his business

not delegate his authority in this way and that the suit as regards the defendant whose pleader did not attend, was decided *ex parte*.⁶

¹ Ram Lall Chowdhry v. Sardaree Jah, W. R., 1864, M. S., 21.

² Emritlall Sahigram v. Kidd, (1864) 2 Hyde, 116.

³ Luchmee Chund, in re, (1892) 8 Cal., 326.

⁴ Bhogoban Prasad Pandey v. Bandi Sethi, (1897) 1 Cal. W. N., ccviii.

⁵ Badri Prasad v. Bhagwati Dhar, (1894) 16 All., 240.

⁶ Shima Prasad Ghose v. Taki Mullik, (1901) 5 Cal. W. N., 816.

⁷ Matadin v. Gangabai, (1857) 9 All., 613.

⁸ Shivdayal v. Khetu Gangu, (1896) 20 Bom., 293.

They may be executed by the principal or star or not,¹ when executed insibility of all such documents being properly executed rests with the vakil.²

The acceptance of a vakalutnamah should be unconditional in all cases.³ It remains in force until revoked, with the leave of the Court, in writing by the client.⁴

No vakalutnamah is necessary to appear in any Privy Council,⁵ or to appear in a ward given a vakalut-Wards.⁶

To act.—Subject to the rules of the High Court, an advocate may perform all the duties of a pleader without producing a vakalutnamah.¹⁰

Court of Wards.—The Collector of the District as Agent of the Court of Wards gave a vakalutnamah to a pleader whom he retained to conduct the case of a ward. The Collector died before judgment. Held, a second vakalutnamah was unnecessary.¹¹

5. Any process served on the pleader of any party or left at the office or ordinary residence of such pleader, and whether the same is for the personal appearance of the party or not, shall be presumed to be duly communicated and made known to the party whom the pleader represents, and, unless the Court otherwise directs, shall be as effectual for all purposes as if the same had been given to or served on the party in person.

Service of procession
pleader.

Act XIV of 1882, Sec. 40. This rule applies to H. C. and Prov. S. C. C.

It has been held that service upon the attorneys on the record is good even after a decree nisi in a divorce suit.

6 (1) Besides the recognized agents described in rule 2 any person residing within the jurisdiction of the Court may be appointed an agent to accept service of process.

Agent to accept service.

¹ Nutee Bux, petitioner, (1867) 7 W. R., 491.

² Maharaja of Bordwan, petitioner, (1867) 7 W. R., 475.

³ Goopenath Mudiluck, petitioner, (1870) 14 W. R., 7.

⁴ King v. King, (1862) 6 Bom., 416, p. 420; Watkins v. Fox, (1895) 22 Cal., 945.

⁵ Shah Makhun v. Sreekishan Sing, (1867) 8 W. R., 92.

⁶ Sutto Churn Ghosal, petitioner, (1869) 12 W. R., 465.

⁷ Gopal Jaya Chand v. Hargovind, (1867) 5 Bom. II. C., 83; Sidashtis Ganpatrao v. Vitthalbhas Nauchand, (1896) 20 Bom., 193.

⁸ (1864) 4 Mad. II. C., xiii.

⁹ Krishna Vijaya v. Marudanayagam, (1892) 15 Mad., 135.

¹⁰ Bakhtawar v. Sant Lal, (1887) 9 All., 617. See "PLEADERS AND VARILS," p. 2 (17), p. 20 ante.

¹¹ Krishna Vijaya v. Marudanayagam, (1892) 15 Mad., 135.

(2) Such appointment may be special or general and shall be made by an instrument in writing signed by the principal, and such instrument or, if the appointment is general, a certified copy thereof shall be filed in Court.

Appointment to be in writing and to be filed in Court.

Act XIV of 1882, Sec. 41 This rule applies to H. C and Prov. S. C. C.

ORDER IV.

Institution of Suits.

1. (1) Every suit shall be instituted by presenting a plaint to the Court or such officer as it appoints in this behalf.

(2) Every plaint shall comply with the rules contained in Orders VI and VII, so far as they are applicable.

Act XIV of 1882, Sec. 48 This rule omit applies to H. C. and Prov S. C. C.

Plaint—According to this rule a suit must be commenced by a plaint, and any proceeding initiated otherwise would not appear to be a suit within the meaning of this Code.¹
Court setting out a caution word does not necessarily

Orders VI and VII.—The Court must observe strictly the new provisions of orders. Under this provision a plaint drawn in accordance with the rules of Orders VI and VII.

Time of presentation—The date of institution must be reckoned from the date of presentation of the plaint, and not from the date on which the requisite Court-fees are subsequently put in,² nor from the date of acceptance. A suit is not instituted within the meaning of the explanation of s. 4 of the Limitation Act by the presentation of a document purporting to be a plaint, if that document while not under-valuing the claim, is written on paper that does not bear the proper Court-fee.⁴ When two suits are filed on the same day, it must be presumed until the contrary is proved, that they were presented and admitted in the order in which their numbers appear in the Register of Civil Suits.⁵

Sunday.—A plaint may be received and admitted on a Sunday or any other holiday,⁶ but there is no necessity to do so; for under the Limitation Act, s. 5, if the period of limitation expires when the Courts are closed, the suit may be admitted on the day the Court re-opens; and so may any application.⁷

Place of presentation.—In the North-West Provinces, the plaint must be presented to the Court or to the District Officer at the place where the Court sits.

¹ Venkata Chandrappa v. Venkatarama, (1899) 22 Mad., 258.

² Aswan v. Pathamma, (1899) 22 Mad., 495, per Subramania Ayyar J., See O. VII, r. 1, post.

³ Moti Sahu v. Chhattri Das, (1892) 19 Calc., 780. See also, Yakutunnissa v. Kishoree Mohun, (1892) 19 Calc., 747.

⁴ Venkatramayya v. Krishnayya, (1897) 20 Mad., 319.

⁵ Murti v. Bhole Ram, (1891) 16 All., 165.

⁶ Unnuto Ram v. Protal Chunder, (1871) 10 W. R., 230; Kumur v. Hargopal, (1869) 3 B. L. J., App., 72; 11 W. R., 537; Ram Dass v. Official Liquidator, (1887) 9 All., 390, p. 380.

⁷ Peary Mohun v. Annuda, (1891) 18 Calc., 631.

⁸ Jai Kuar v. Heera Lal, (1875) 7 All. H. C., 5.

the clerk of a Small Cause Court has been held to have been properly filed,¹ and where a plaint, sent by post, was accepted, the institution was considered sufficient in Madras.² But in Bombay, a plaint presented to the *Larkun* left in charge of a Court during vacation was held to be invalid.³ The Nazir of a Small Cause Court is not authorized to receive plaints, they cannot be filed with him.⁴

For the officer appointed under the corresponding section 48 of Act XIV of 1882, for the Chief Court of Lower Burmah, see *Burmah Gazette*, 1900, Pt IV, p 264.

When the Court of a Subordinate Judge is temporarily closed, the Court of the District Judge does not become the Court of first instance in which the original suit should be filed, and the proceedings are void.⁵

2 The Court shall cause the particulars of every suit to be entered in a book to be kept for the purpose and called the register of civil suits. Such entries shall be numbered in every year according to the order in which the plants are admitted

Register of suits.

Act XIV of 1882, sect 38

This rule applies to H C., and Prov S C C

For power to prescribe separate registers for suits between landlords and tenants, see Central Provinces Tenancy Act (IX of 1883), sect 66, and Bengal Tenancy Act (VIII of 1885), Sect 146

¹ *Mudliar Mohun Chunderbuttery v Taheer Bhowas*, (1863) 5uth, S C Ref, 36

² *Sankaranarayana v Kunjappa*, (1845) 8 Mad, 411

³ *Nandavallabh v Allibhai*, (1869) 6 Bom H C, 254

⁴ *Raj Chunder Gope v Joogal Gope*, (1872) 18 W. R., 172.

⁵ *Ramaya Elip v Muhamadkhan*, (1873) 10 Bom H C., 495, *Motilal Ramdas v. Jannadas Javerdas*, (1864) 2 Bom H C, 40; see also, *Ledgard v. Bull* (1885) L. R., 13 L. A., 134, 9 All, 191.

his, that he had failed¹ But in *Hanlon v. India Branch Railway*² a new summons was granted on an objection to the sufficiency of service, without any petition.

Fresh notice of appeal—Where a party had failed for twelve months to serve notice of appeal on the respondent a second notice was refused³

Summons not to issue—If the defendant voluntarily appears, there is no reason to issue a summons. See proviso *supra*

Form of summons.—See App B Nos. 1, 4 and 6.

2. Every summons shall be accompanied by a copy of the plaint or, if so permitted, by a concise statement.

Copy or statement
annexed to summons.

Act XIV of 1882, sec 65

This rule applies to H C and Prov S C C

Concise Statements—May be served with the leave of the Court where the plaint is of great length See O VII, 19 *post*

3. (1) Where the Court sees reason to require the personal appearance of the defendant, the summons shall order him to appear in person in Court on the day therein specified.

Court may order de-
fendant or plaintiff to
appear in person

(2) Where the Court sees reason to require the personal appearance of the plaintiff on the same day, it shall make an order for such appearance

Act XIV of 1882, sec 66

This rule applies to H C and Prov S C C

No party to be
ordered to appear in
person unless resident
within certain limits

4. No party shall be ordered to appear in person unless he resides—

- (a) within the local limits of the Court's ordinary original jurisdiction, or
- (b) without such limits but at a place less than fifty or (where there is railway or steamer communication or other established public conveyance for five-sixths of the distance between the place where he resides and the place where the Court is situate) less than two hundred miles distance from the court-house

Act XIV of 1882, sec 67.

This rule applies to H C and Prov S C C

The longer limit of distance in force under sec 67 of Act XIV of 1882, is now altered from two hundred miles to less than 200 miles, but the personal attend-

¹ *Urquhart v. Gilbert*, 1 Ind Jur, N S 224

² *Hanlon v. India Branch Railway*, (1862 3) 1 Hyde, 197.

³ *Deolee v. Nirban*, (1873) 20 W. R., 62.

ance of a party in such a case can now be required, not only where there is railway communication for five-sixths of the distance, but also where there is steamer communication or other established public conveyance for five-sixths of the distance

5. The Court shall determine, at the time of issuing the summons, whether it shall be for the settlement of issues only, or for the final disposal of the suit; and the summons shall contain a direction accordingly :

Summons to be either to settle issues or for final disposal

Provided that, in every suit heard by a Court of Small Causes, the summons shall be for the final disposal of the suit.

Act XIV of 1882, sec 68

This rule applies to H. C. and Prov. S. C. C

6. The day for the appearance of the defendant shall be fixed with reference to the current business of the Court, the place of residence of the defendant and the time necessary for the service of the summons; and the day shall be so fixed as to allow the defendant sufficient time to enable him to appear and answer on such day.

Fixing day for appearance of defendant.

Act XIV of 1882, sec 69

This rule applies to H. C. and Prov. S. C. C

Sufficient time—The last paragraph of sec 69 of Act XIV of 1882 with reference to determining what is sufficient time has been omitted.

The nature of the rights involved, the importance of the claim, the distance of the parties from the Courts, and often various other circumstances, will be elements essential to the determination of what time is reasonably allowable. Two days have been held sufficient in a claim for six thousand rupees involving questions of Mahomedan law.²

7. The summons to appear and answer shall order the defendant to produce all documents in his possession or power upon which he intends to rely in support of his case.

Summons to order defendant to produce documents relied on by him.

Act XIV of 1882, sec. 70

This rule applies to H. C. and Prov. S. C. C.

An important alteration has been made by this rule, in as much as the defendant is now only required by the summons to produce the documents relating to his own case; and not, as in sec. 70 of Act XIV of 1882, any document in his

¹ *Lakshnath v. Subanath*, (1866) 5 W. R., Act X, 39

² *Kholar v. Rahman*, (1866) 3 Mad. H. C., 167.

possession or power relating to the merits of the plaintiff's case. Production of documents of the last mentioned description, which are in the defendant's possession or power, can be obtained by discovery at a later stage. See O XI *post*.

On issue of summons for final disposal, defendant to be directed to produce his witnesses.

8 Where the summons is for the final disposal of the suit, it shall also direct the defendant to produce, on the day fixed for his appearance, all witnesses upon whose evidence he intends to rely in support of his case.

Act XIV of 1882, sec 71.

This rule applies to H C and Prov S C C

The defendant can apply for summonses to his witnesses under O XVI, r. 1 at any time after the suit has been instituted

Service of summons.

9. (1) Where the defendant resides within the jurisdiction of the Court in which the suit is instituted, or has an agent resident within that jurisdiction who is empowered to accept the service of the summons, the summons shall unless the Court otherwise directs, be delivered or sent to the proper officer to be served by him or one of his subordinates.

(2) The proper officer may be an officer of a Court other than that in which the suit is instituted, and, where he is such an officer, the summons may be sent to him by post or in such other manner as the Court may direct.

Act XIV of 1882, sec 72

This rule applies to H C and Prov S C C

The words "unless the Court otherwise directs" are new

Foreign territory—A special bailiff of any Court cannot be sent to execute a civil process in a foreign territory ¹

Proper Officer—The Nazir is the proper officer in Mofussil Courts ²

10. Service of the summons shall be made by delivering or tendering a copy thereof signed by the Judge or such officer as he appoints in this behalf, and sealed with the seal of the Court.

Act XIV of 1882, sec 73

This rule applies to H C and Prov S. C C

From the similarity of this section to s 154, Act X of 1872, it would appear that merely showing the summons to the accused, without tendering or delivering a copy, is not good service ³

Corporations and Companies—See O XXIX, r 2

¹ *Cassim Azim v Cassim Mahomed*, (1863) 10 W R., 349, 2 B. L. R., 39.

² *Parsotam v Abdul*, (1859) 13 Bom., 300

³ *Reg v. Karsanlal*, (1867) 5 Bom. H. C., Cr, 20.

Rent-suits, Bengal.—The Court can direct service by registered letter—Act VIII of 1885, s. 148 cl. (d), and s. 1.

11. Save as otherwise prescribed, where there are more defendants than one, service of the summons shall be made on each defendant.

This rule corresponds to the first paragraph only of sec. 74, Act XIV of 1882. The remainder of the section, which relates to service on a partnership, is embodied in O. XXX, r. 3, q. v. This rule applies to H. C. and Prov. S. C. C.

12. Wherever it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on such agent shall be sufficient.

Act XIV of 1882, sec. 75.

This rule applies to H. C. and Prov. S. C. C.

Agent empowered.—*Gomashtas* and *am-mooktears* looking after the affairs of the defendant are not ordinarily empowered.¹ See also the notes under O. III r. 2.

Where by the custom in India, a Hindu woman of rank could not be personally served with an order of revivor, the Judicial Committee allowed service to be substituted on her Dewan.²

13. (1) In a suit relating to any business or work against a person who does not reside within the local limits of the jurisdiction of the Court from which the summons is issued, service on any manager or agent, who, at the time of service, personally carries on such business or work for such person within such limits, shall be deemed good service.

(2) For the purpose of this rule the master of a ship shall be deemed to be the agent of the owner or charterer.

Act XIV of 1882, sec. 76.

This rule applies to H. C. and Prov. S. C. C.

To satisfy the conditions of this rule as to service of summons on an agent, there must be a person residing within the local jurisdiction, but carrying on such business or work within these limits by a manager or agent, and sued on account of such work, that is, business either actually itself carried on by the agent or manager or forming part of the business in the sense of a connected course of transactions to the management of which he has been duly appointed.³

Service on ship's agent.—Formerly, service on a ship's agent, to whom the ship was consigned, was good service on the owner in respect of matters connected with the ship.⁴

¹ *Ram Sundares v. Surat Sundares*, (1872) 17 W. R., 33.

² *Clark v. Mullick*, (1849) 2 Moo. L. A., 233.

³ *Goculdas v. Guresh Lal*, (1889) 4 Bom., 416.

⁴ *Rajaram v. Brown*, (1879) 7 Bom. H. C., 97.

14 Where in a suit to obtain relief respecting, or compensation for wrong to, immoveable property, service cannot be made on the defendant in person, and the defendant has no agent empowered to accept the service, it may be made on any agent of the defendant in charge of the property.

Service on agent in charge in suits for immoveable property.

Act XIV of 1882, sec 77

This rule applies to H C

In a suit for foreclosure against the mortgagor and two trustees to whom the property had been conveyed, service on the agent of the trustees in charge of the property is sufficient ¹

15 Where in any suit the defendant cannot be found and has no agent empowered to accept service of the summons on his behalf, service may be made on any adult male member of the family of the defendant who is residing with him.

Where service may be on male member of defendant's family

Explanation.—A servant is not a member of the family within the meaning of this rule.

Act XIV of 1882, sec 78

This rule applies to H C and Prov S C C.

16. Where the serving officer delivers or tenders a copy of the summons to the defendant personally, or to an agent or other person on his behalf, he shall require the signature of the person to whom the copy is so delivered or tendered to an acknowledgment of service endorsed on the original summons.

Person served to sign acknowledgment

Act XIV of 1882, sec 79

This rule applies to H C and Prov S C C

Shewing summons—Merely shewing a summons is apparently not sufficient ²

Refusal to sign or receive—Refusing to sign a receipt for a summons,³ or to receive a summons,⁴ is not an offence within the meaning of s 173 or s 180, Indian Penal Code

¹ *Michael v. Amecna*, (1883) 13 C L R., 161. (1883) 9 Cal., 733.

² *Queen v. Karsanlal*, (1867) 5 Bom H C, Cr. Cas., 20. And see *Maruti v. Vitlu*, (1892) 16 Bom., 117.

³ *Bhoobunshwar Datt, in re*, (1878) 3 Cal., 621; *Reg. v. Kalva Bin Fakir*, (1867) 5 Bom H C, Cr., 34; *Queen Empress v. Krisana Govinda*, (1893) 20 Cal., 358.

⁴ *Queen v. Punamalai*, (1882) 5 Mad., 199; *Queen v. Arumuga*, (1882) 5 Mad., 200 note.

17. Where the defendant or his agent or such other person as aforesaid refuses to sign the acknowledgment, or where the serving officer, after using all due and reasonable diligence, cannot find the defendant, and there is no agent empowered to accept service of the summons on his behalf, nor any other person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and shall then return the original to the Court from which it was issued, with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so, and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed.

Act XIV of 1882, sec. 80

This rule applies to H. C. and Prov. S. C. C.

Due diligence.—The words using all due and reasonable diligence are new. The old practice of making three several attempts to serve personally will probably be continued under this Rule.

In the case of *Rajendra v. Hadjee Jan Meah*,¹ Jenkins J. observed "It must be shown that proper efforts were made to find the defendants, as for instance that the serving officer went to the place or places and at the times at which it was reasonable to expect he would be found. Whether or not these conditions are established to the satisfaction of the Court must in each case depend upon its own particular circumstances. These requirements are prescribed by the Code and not by any rule of practice outside the Code. Thus there is no rule of practice that it is necessary to make at least three visits before affixing the summons to the door etc".

The provision that the summons may also be affixed upon some other conspicuous part of the house, that that house may also be the house in which the defendant ordinarily carries on business or personally works for gain; and that the return or report of the serving officer shall specify the name and address of the identifier.

... .. on of previ-
... .. ist proceed
... .. duly served
... .. service be

Refuses to sign—Where the defendant personally refuses to sign, the Court should proceed according to rr. 17, 19 and 20 *post*.² Service is not properly effected, when the signature of the person served is not affixed, and there is no evidence of refusal to sign.³

¹ *Rajendra v. Hadjee Jan Meah*, (1898) 26 Cal., 101; 2 C. W. N., 574.

² *Nasir Mahomed v. Kazbu*, (1886) 10 Bom., 202; *Maruti v. Vithu*, (1892) 10 Bom., 117; *Rajendra v. Hadjee Jan Meah*, (1898) 26 Cal., 101; 2 C. W. N., 574.

³ *Gangadhar v. Ramchandra*, (1901) 17 Bom. L. R., 159.

⁴ *Majhi v. Anbi*, (1896) 8 Bom. L. R., 551.

Cannot find the defendant—If the serving officer finds the defendant absent, but knows where he is, it is not good service if he affixes the summons to the outer door,¹ or other conspicuous part of the house.

A summons or notice is not duly served unless some attempt is made to effect personal service, and such personal service cannot be effected for reasons stated.² It must be shown that proper efforts have been made to serve the defendant personally,³ and that he is keeping out of the way.⁴ There must be reason to believe the defendant is keeping out of the way, or that, for other reasons, the summons cannot be served in the ordinary way. So where defendant's wife said her husband had gone to a specified place, and she did not know when he would return and no further effort was made to serve the summons personally, the substituted service was held not good.⁵

Where a defendant is temporarily absent from house, and is not represented at his house by an agent or male member of his family, the summons should again be sent to the defendant's house to be served upon him, when the enquiries made show that he is likely to be at home.⁶ But when it appeared from the serving-officer's return that according to the information given to him, there was no prospect of his being able to serve the defendant personally within a reasonable time, it was held that he was justified in affixing the summons to the door of the house.⁷

Ordinarily resides—The defendant should reside or carry on business or personally work for gain in the house in such a manner as to make it probable that knowledge of the summons will reach him.⁸ There is no proper service unless the defendant is actually dwelling or carrying on business or personally working for gain in the house upon which the summons is fixed and cannot after diligent search be found.⁹ It is not sufficient to affix a copy of the summons on the defendant's house, if he has left it and the village two years before.¹⁰

Return—The report should be made in the words of the rule "the house in which he ordinarily resides or carries on business or personally works for gain" as the case may be. In *Ram Coomar v. Ram Soondur Singh*¹¹ the word "bati" was held to mean a dwelling-house.

A report that "respondent was not found" is not good; it should state that he could not be found.¹²

Service of summons on servant of a Railway Company or of any local authority—Where the defendant is the servant of a Railway Company or of any local authority, the practice in Bengal is ordinarily to send the summons for

¹ *Nahua v. Gauri*, (1902) 24 All., 302; *Dolce v. Nirhan*, (1873) 20 W. R., 62; *Kali Nataraj Roy v. Bajoo*, (1898) 3 C. W. N., 307.

² *Rakhal v. Secretary of State*, (1886) 12 Cal., 603; *Baroda Kant v. Raj Churn*, (1875) 24 W. R., 381, and see, *Rashichary v. Khettrionath*, (1877) 1 C. L. R., 418.

³ *Cohen v. Nursing*, (1892) 19 Cal., 201; *Rajendra v. Hadjee Jan Meah*, (1898) 26 Cal., 101, 2 C. W. N., 574; *Subramania Pillai v. Subramania Ayyar*, (1898) 21 Mad., 419.

⁴ *Rama Rai v. Sridhur*, (1879) 4 C. L. R., 397.

⁵ *Abraham Pillai v. Smith*, (1906) 29 Mad., 324.

⁶ *Bhoomshetti v. Umabai*, (1897) 21 Bom., 223; *Subramania Pillai v. Subramania Ayyar*, (1898) 21 Mad., 419.

⁷ *Sankaralinga v. Ratnasabhapati*, (1898) 21 Mad., 324, and see case at note (5) *supra*, and note under rule 20, sub rule 2, pp. 475, 476, *post*.

⁸ *Anantha v. Perijana*, (1869) 5 Mad. H. C., 101.

⁹ *Khudeerun v. Chatterdharce*, (1874) 21 W. R., 242; *Rajendra v. Jan Meah*, (1898) 26 Cal., 101, 2 C. W. N., 574.

¹⁰ *Anantha v. Perijana*, (1869) 5 Mad. H. C., 101.

¹¹ *Ram Coomar v. Ram Soondur Singh*, (1872) 17 W. R., 362.

¹² *Sakharam v. Padumakar*, (1906) 30 Bom., 623; 8 Bom. L. R., 757.

service on him to the head of the office in which he is employed, as is done in the case of public officers under rule 27 of this order.

As for service of summons on Corporations and Companies, see order XXIX, rule 2 and in suits against military men, see order XXVIII, rule 1.

The procedure laid down by this rule and by rules 19 and 21 (1) has been applied to the service of notice of appeal on the respondent where the appellant was unable to find the respondent at the place which he described as his place of residence where he brought the suit.¹

18. The serving officer shall, in all cases in which the summons has been served under rule 16, endorse or annex, or cause to be endorsed or annexed, on or to the original summons, a return stating the time when and the manner in which the summons was served, and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of the summons.

Endorsement of time and manner of service.

Act XIV of 1882, sec. 81.

This rule applies to H. C. and Prov. S. C. C.

The name and address of the identifier has now to be stated in the report on return of the serving officer.

The report or return of the Nazir is not sufficient proof of service.²

19. Where a summons is returned under rule 17, the Court shall, if the return under that rule has not been verified by the affidavit of the serving officer, and may, if it has been so verified, examine the serving officer on oath, or cause him to be so examined by another Court, touching his proceedings, and may make such further enquiry in the matter as it thinks fit; and shall either declare that the summons has been duly served or order such service as it thinks fit.

Examination of serving officer.

Act XIV of 1882, sec. 82, para. 1.

This rule applies to H. C. and Prov. S. C. C.

See (foot note 1).

Where a return has been made that the affixing required by rule 17 has been made, service is insufficient until confirmed under this rule.³ The delivery of a summons by post to a person not shown to be the defendant is not good service.⁴

20. (1) Where the Court is satisfied that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service, or that for any other reason the summons

Substituted service

¹ *Radhu v. Ramomalee*, (1869) 11 W. R., 496.

² *Obhise Chunder v. Prabhoo*, (1865) 3 W. R., 11; *Raj Kishore v. Bydonath*, (1869) 12 W. R., 267; *Mugh Lall v. Shub Pershad* (1881) 7 Cal., 35 Com. p. 10; *Mahomed Abdulaziz Amal*, (1882) 16 Cal., 161, at p. 171.

³ *Nazir v. Karbal*, (1886) 10 Bom., 201.

⁴ *Jagan Nath v. Sanyal*, (1881) 14 Bom., 606.

cannot be served in the ordinary way, the Court shall order the summons to be served by affixing a copy thereof in some conspicuous place in the Court house, and also upon some conspicuous part of the house (if any) in which the defendant is known to have last resided or carried on business or personally worked for gain, or in such other manner as the Court thinks fit.

Act XIV of 1882, sec. 82, para. 2.

This sub-rule applies to H. C. and Prov. S. C. C.

See note (1) to rule 17, page 474.

Court is satisfied—No order for substituted service should issue until the Court record that it is satisfied, and the grounds on which it is satisfied, that the defendant is keeping out of the way in order to avoid service.¹ Merely recording that the defendant cannot be found, instead of that the Court is satisfied he was keeping out of the way for the purpose of avoiding service, would not be sufficient.² But in *Raj Narain Ghose v. Tek Lal Shaha*,³ substituted service was allowed on proof that the defendant could not be found and that his uncle and father did not know where he was. The evidence of the serving peon that he had searched for the defendant but could not find him, if believed by the Judge, is perfectly legal evidence of the fact that summons was served.⁴

Evidence—As a rule the return by a competent Court that the summons has been duly served or substituted service effected raises a presumption in favour of service.⁵

Any other reason the summons cannot be served in the ordinary way—In the case of *Warburg, ex parte*,⁶ the Court of appeal granted substituted service, although there was no express provision therefor in the rules of Court, on evidence that it was impossible to serve the debtor personally, and the same procedure was adopted by their lordships of the Privy Council under similar circumstances.⁷

Last resided—The articles of Association of a Company often provide that service on a member at his registered address shall be good service. This convention cannot override the law and make service of legal proceedings at that address good, unless it is also his last residence.⁸

(2) Service substituted by order of the Court shall

be as effectual as if it had been made on the defendant personally.

Effect of substituted service

Act XIV of 1882, sect. 83

This sub-rule applies to H. C., and Prov. S. C. C.,

Effect of substituted service—Substituted service is as good as if the defendant had been served in person

¹ *Rama Rai v. Sillhar*, (1879) 4 C. L. R., 397, following *Bodh Singh Doodhooia v. Guneschund r Sen*, (1873) 19 W. R., P. C., 356 see note under sub rule 2

² *Shewdial v. Griban*, (1866) 6 W. R., C. C., 73, 79

³ *Raj Narain Ghose v. Tek Lal Shaha*, (1896) 1 C. W. N., 104; following *Wolverhampton and Staffordshire Banking Co v. Band*, Ch. Div., 29 W. R., 399.

⁴ *Ram Chohar v. Ram Soodhar*, (1872) 17 W. R., 362, and see *Noor Ali v. Ahsanulla*, (1885) 11 Cal., 608

⁵ *Nusur v. Kazbar*, (1896) 10 Bom., 202

⁶ *Warburg, ex parte*, (1893) 24 C. D., 364

⁷ *Clark v. Mullick*, (1840) 2 Moo., L. A., 263 at p. 263

⁸ *Ex parte Chatteris*, (1875) L. R., 10 Ch. App., 227.

Effect where notice in fact does not reach defendant.—Substituted service having been effected on a defendant, he applied to set aside the decree on the ground of having no notice, and that he had a good defence on the merits; it was held that it could not be set aside.¹

Effectual—Means effectual for proceeding with the suit.²

Object of substituted service.—The object to enable plaintiffs to have relief more promptly, not to relieve them of any difficulty in pleading. Plaintiff, treating a Colonial Government as a corporation, sued it as "The Government of New Zealand," and attempted to proceed upon substituted service on the solicitor for the colony, although the latter stated he had no authority to appear. *Held*, that substituted service could not be applied to a person who there could be (if there were no intended to be allowed plaintiff did not know

Endorsement—An endorsement is required only where personal service has been made, or the summons returned under rule 17, no endorsement is necessary apparently, in cases of substituted service.⁴

(3) Where service is substituted by order of the Court, the Court shall fix such time for the appearance of the defendant as the case may require.

Where service substituted, time for appearance to be fixed.

Act XIV of 1882, sect. 84

This sub-rule applies to H. C. and Prov. S. C. C.

A sufficient time ought to be given for notice of the substituted service to reach the defendant wherever he may be.⁶

21. A summons may be sent by the Court by which it is issued, whether within or without the province, either by one of its officers or by post to any Court (not being the High Court) having jurisdiction in the place where the defendant resides.

Service of summons where defendant resides within jurisdiction of another Court.

Act XIV of 1882, sect. 85.

This rule applies to H. C. and Prov. S. C. C.

Section 85 of Act XIV of 1882 has been entirely recast in form, part being contained in this rule, and part in rule 23, and the power given by it is general and no longer limited to cases where the defendant has no agent resident within the local limits of the Court in which the suit is instituted.

transmitting Court should not act as where the Court serving the process it may be presumed that either personal 17 and 20 or rule 17 has been made. This presumption may be rebutted by the return. Thus, where the return was as follows:—"Read buliff's endorsement on the back of the process, stating that summons has been affixed to the defendant's house on the 22nd of December, 1884, at 9 A.M., and proof of the same having been duly taken by me, it is ordered that the summons be returned":—*held*, insufficient, inasmuch as the Judge had

¹ *Kissur Chattr v. Bhoolunassar, Bourke*, 27.

² *Ally Belance v. Hyder*, (1874) 2 Bom. 449.

³ *Sloan v. Government of New Zealand*, (1876) 1 C. P. D., 367.

⁴ *Dymond v. Coft*, (1876) 3 C. D., 312.

not stated that service was *duly effected*, or that the affixing under rule, 17 had been sanctioned under rule 20¹. It is for the Court from which the summons originally issued to determine whether the service of summons by the Court to which it has been sent for service is sufficient or not². In order to render the service of process prompter and cheaper the Court may, in its discretion, upon the application of the plaintiff, deliver it to him or to such person as may be appointed by him for presentation in the Court having jurisdiction at the place where the defendant resides, such a practice is at present observed in some Courts in Bengal.

Forms—See forms App B, Nos. 7 and 10

22. Where a summons issued by any Court established beyond the limits of the towns of Calcutta, Madras, Bombay and Rangoon is to be served within any such limits, it shall be sent to the Court of Small Causes within whose jurisdiction it is to be served.

Service, within Presidency towns and Rangoon, of summons issued by Courts outside

Act XIV of 1882, sec 86

This rule applies to H C and Prov S C C

The second paragraph of Sec 86 will be found in rule 23

23 The Court to which a summons is sent under rule 21 or rule 22 shall, upon receipt thereof, proceed as if it had been issued by such Court and shall then return the summons to the Court of issue, together with the record (if any) of its proceedings with regard thereto.

Duty of Court to which summons is sent

Act XIV of 1882, Secs 85, 86

This rule applies to H C and Prov S C C

24. Where the defendant is confined in a prison, the summons shall be delivered or sent by post or otherwise to the officer in charge of the prison for service on the defendant.

Service on defendant in prison

Act XIV of 1882, Sec 87, 88

This rule applies to H C and Prov S C C

The second paragraph of Secs 87 is not contained in rule 29 (1)

25. Where the defendant resides out of British India and has no agent in British India empowered to accept service, the summons shall be addressed to the defendant at the place where he is residing and sent to him by post, if there is postal communication between such place and the place where the Court is situate.

Service where defendant resides out of British India and has no agent.

Act XIV of 1882, Sec 89

¹ Nusr v Kazban, (1886) 10 Bom, 202

² Romanath v. Guggodonandan, (1895) 22 Calo, 889.

This rule applies to H. C. and Prov. S. C. C.

Practice.—In practice, the summons is forwarded under a registered cover, and if the party does not appear, a verified statement should be put in to show that he is or has recently been residing in the place to which the summons was sent.¹

Proof of receipt.—It is essential in the case of service under this rule to prove that the summons has not merely been posted but received by the defendant.²

Service in foreign
territory through Poli-
tical Agent or Court,

26. Where—

- (a) in the exercise of any foreign jurisdiction vested in His Majesty or in the Governor General in Council, a Political Agent has been appointed, or a Court has been established or continued, with power to serve a summons issued by a Court under this Code in any foreign territory in which the defendant resides, or
- (b) the Governor General in Council has, by notification in the Gazette of India, declared that any summons so issued may be served by any Court situate in any such territory and not established or continued in the exercise of any such jurisdiction as aforesaid,

the summons may be sent to such Political Agent or Court, by post or otherwise, for the purpose of being served upon the defendant; and, if the Political Agent or Court returns the summons with an endorsement signed by such Political Agent or by the Judge or other officer of the Court that the summons has been served on the defendant in manner hereinbefore directed, such endorsement shall be deemed to be evidence of service.

Act XIV of 1887, Sec. 90

This rule applies to H. C. and Prov. S. C. C.

The rule has been considerably altered in form, (a) and (b) being almost entirely new

- ## 27. Where the defendant is a public officer (not belong- ing to His Majesty's military or naval forces or His Majesty's Indian Marine Service), or is the servant of a railway company or local authority, the Court may, if it appears to it that the summons may be most conveniently so served, send it for service on the defendant

Service on civil pub-
lic officer or on servant
of railway company or
local authority.

¹ *Beetun v. Gopal Chunder*, (1871) 13 W. R., 31.

² *Fakhroddin v. Ghafaruddin*, (1901) 23 All. 99

to the head of the office in which he is employed, together with a copy to be retained by the defendant.

Act XIV of 1852, Sec. 422

This rule applies to H. C. and Prov. S. C. C.

The words "Public officer" are now confined to civilians; in the former Code they were left quite general.

Judicial Officer—By Act XVIII of 1850, no person acting judicially is liable to be sued in the Civil Courts for any act done or ordered by him to be done, in the discharge of his judicial duty, whether or not within the limits of his jurisdiction, provided that he at the time in good faith believed himself to have jurisdiction to do or order the act complained of.

Acts within jurisdiction—No action at all will lie against a judicial officer while acting in the exercise of his jurisdiction.¹

Knowledge of want of jurisdiction—But if a judge has not jurisdiction and has the knowledge, or even if he has the means of knowledge, of his want of jurisdiction, he is liable.²

Honest belief—Unless it appears that he had an honest belief, framed on enquiry and consideration, that he was acting within his powers.³

Nature of acts—This immunity extends not merely in respect of acts in Courts *sedente curia*, but in respect of all acts of a judicial nature, and issuing a warrant of arrest,⁴ adjudicating a penalty under s. 34, Act VI of 1863,⁵ postponing a sale in execution,⁶ are judicial acts.

Good faith immaterial—If on the other hand, the act is within his jurisdiction, he is protected absolutely, and the question of good faith does not arise.⁷ Thus, where a Judge was sued for words spoken, falsely and maliciously, and it appeared that they had been spoken while the Judge was trying a case in which the plaintiff was a party *delit*, no cause of action, on the ground that no action would lie for words spoken or acts done in his judicial capacity in a Court of Justice,⁸ but this immunity is in respect of the character of Judge, which if a man assume knowing that in fact he is not so either in respect of the subject matter or the parties he has no immunity.⁹

No cause of action—A plaint declaring that a Judge knowingly and maliciously issued an illegal order does not disclose a cause of action. Nor is stating that a Judge acted "maliciously and without authority" sufficient.¹⁰

¹ *Prabhu v. Watt*, (1873) 10 Bom. H. C. 316; and see *Venkat v. Armstrong* (1865) 3 Bom. H. C. A. C. 47, *Nachayanga v. Raghunatha*, (1869) 5 Mad. H. C. 345, App. Cas., (1892) p. 64.

² *Calder v. Halket*, (1839) 2 Moo. I. A., 293. *In re, Fox*, 1 Tay and Bell, 219; *Collector of Sea Customs v. Chithambaram*, (1876) 1 Mad. 89; *Amappa v. Mahomed*, (1861) 2 Mad. H. C. 443.

³ *Ragunada v. Nathamuni*, (1870) 6 Mad. H. C. 421, *Taraknath v. Collector of Illoohly*, (1870) 4 B. L. R. 37, *Vinayak v. Bai Itcha*, (1865) 3 Bom. H. C. A. C. J. 36, *Vithaba v. Corichal*, (1865) 3 Bom. H. C. App. I. 1; *Teyen v. Ram Lal* (1899) 12 All. 115.

⁴ *Calder v. Halket*, (1839) 2 Moo. I. A., 293.

⁵ *Collector of Sea Customs v. Chithambaram* (1876) 1 Mad., 89.

⁶ *Meghraj v. Zakir* (1876) 1 All., 280.

⁷ *Meghraj v. Zakir*, (1876) 1 All., 280. *Ousley v. Plowden*, 1 Boulton, 163; *Teyen v. Ram Lal* (1899) 12 All., 115.

⁸ *Scott v. Stanford*, (1867) L. R., 3 Eq., 719, *Allv Kurreem v. Sandys*, 1 Boulton, 1; *Seaman v. Nethercliff*, (1876) 1 C. P. D., 540, 2 C. P. D., 53.

⁹ *Calder v. Halket*, (1839) 2 Moo. I. A., 293.

¹⁰ *Girdharlal v. Jagannath*, (1873) 10 Bom. H. C., 182.

It must not only aver that he had no jurisdiction, but also that he had no reasonable and probable cause for supposing that he had jurisdiction.¹

Municipal Commissioners when acting as Magistrates are entitled to the same privileges.² In Bombay such a suit against a municipality can only be heard by the District Judge.³

Governor and Council of Madras—The Madras High Court has no jurisdiction over the Governor and Council.⁴

Governor and Council of Bombay: Secretary of State—The Governor of Bombay and members of Council are by Statute exempt from the jurisdiction of the High Court so far as acts done in their public capacity are concerned. No action lies against the Secretary of State in respect of such acts. The Secretary of State can only be sued in respect of matters of which the East India Company could be sued, *viz.*, matters for which private individuals could sue those matters for which private individuals could sue against the East India Company, and, therefore, no

Executive Officers—There is no such general protection granted to executive officers and their acts may be questioned.⁵ They are exempted in special cases—Act XVIII, 1850, s. 1; Act V, 1861, s. 43; and where they are allowed any special protection, that protection is not such as to make the law more firmly established that they are acting lawfully than that they are acting unlawfully, although they have done an illegal act.⁷

The following rules were laid down in *Ouseley v. Plowden*.⁸

1st—If an officer is authorized by law to do the act which he does, he is justified in doing it. Whatever his object or intention may be at the time he does it, he is not confined in his defence to the authority which alone he may have produced when he acted, and may resort to any authority which he possessed to justify his proceeding. See, however, *Gasper v. Mytton*.⁹

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Magistrate performing Executive Act—The removal of an obstruction by a Magistrate in the exercise of powers given him under Act VI of 1863 (B. C.), Sch. K, is an executive act, and even the circumstance that a fine has been imposed on the person who set up the obstruction does not protect the Magistrate under Act XVIII of 1850, from an action to try the right of the person to have the obstruction there.¹⁰

The Madras High Court has jurisdiction to try suits against Revenue Officers for acts *ultra vires*, done in their official capacity.¹¹

¹ *Praklad v. Watt*, (1873) 10 Bom. H. C., 316.

² *Habunozamath v. Chairman of Hooghly*, (1870) 13 W. R., 340.

³ *Ahmedabad Municipality v. Mahamad*, (1870) 3 Bom., 140.

⁴ *In re, Wallace*, (1885) 8 Mad., 21.

⁵ *Jehangir v. Secretary of State*, (1903) 27 Bom., 149.

⁶ *R. v. Collins*, 2 Q. B. D., 33; *Sinclair v. Broughton*, (1882) 9 L. A., 152; *Mukund v. Jay Coomtee*, (1861) 1 W. R., 16.

⁷ *Spencer v. Judlow*, (1866) 4 Moo., L. A., 353.

⁸ *Ouseley v. Plowden*, 1 D. & W., 187; and see also *in these rules* *see Trent v. Hurt*, 1 D. & W., 187; *Woodhouse v. Mahon*, 1 D. & W., 187; 2 Ex., 230.

⁹ *Gasper v. Mytton*, 1 D. & W., 187.

¹⁰ *Choudhri Narain v. Hoj*, (1874) 21 W. R., 59.

¹¹ *Collector of Sea Customs v. Chithambaram*, (1876) 1 Mad., 89.

23. Where the defendant is a soldier, the Court shall send the summons for service to his commanding officer together with a copy to be retained by the defendant.

Service on soldiers.

Act XIV of 1882, Sec. 468.

This rule applies to H. C. and Prov. S. C. C.

29. (1) Where a summons is delivered or sent to any person for service under rule 24, rule 27 or rule 28, such person shall be bound to serve it, if possible, and to return it under his signature, with the written acknowledgment of the defendant, and such signature shall be deemed to be evidence of service.

Duty of person to whom summons is delivered or sent for service

(2) Where from any cause service is impossible, the summons shall be returned to the Court with a full statement of such cause and of the steps taken to procure service, and such statement shall be deemed to be evidence of non-service.

Act XIV of 1882, sec. 468, paras 2 and 3. This rule applies to H. C. and Prov. S. C. C.

Proof of Service—A copy of a summons was sent to Secunderabad by post to the commanding officer stationed, and it was returned and with a certificate that of service held, that service

Commanding officer must serve—In a suit to recover money, a summons having been sent by the Court to the Commissary of Ordnance to be served on the defendant, his subordinate, the Commissary of Ordnance returned it unserved and referred to s. 144 of the Army Act, 1881, as his reason for such action. Held, that the Commissary of Ordnance was bound to serve the summons under this rule although the defendant might be entitled to the privilege given by s. 144 of the Army Act.¹

Civil pay of soldier—The Civil pay of a non-commissioned officer in civil employment can be made available in execution.²

30. (1) The Court may, notwithstanding anything hereinafore contained, substitute for a summons a letter signed by the Judge or such officer as he may appoint in this behalf, where the defendant is, in the opinion of the Court, of a rank entitling him to such mark of consideration.

Substitution of letter for summons

(2) A letter substituted under sub-rule (1) shall contain all the particulars required to be stated in a sum-

¹ Harrison v Hope, (1871) 9 B. L. R. App. 43

² Mahomed Saib v. Aggas, (1887) 10 Mad., 319

³ Abraham v. Holmes, (1883) 11 Mad., 475.

⁴ Cohen v. McCarthy, (1870) 14 W. R., 231, 441. See note to sec. 60, p. 230.

mons, and, subject to the provisions of sub-rule (3), shall be treated in all respects as a summons.

(3) A letter so substituted may be sent to the defendant by post or by a special messenger selected by the Court or in any other manner which the Court thinks fit; and where the defendant has an agent empowered to accept service, the letter may be delivered or sent to such agent.

Act. XIV of 1882, Secs. 91 and 92.

This rule applies to H. C. and Prov. S. C. C.

A special messenger cannot be sent to serve a civil process in a foreign territory.¹

¹ *Kasim Ali v. Kasim Mahmood*, (1869) 2 B. L. R., 59; 10 W. R., 349.

ORDER VI.

Pleadings generally.

Pleading. 1. "Pleading" shall mean *plaint or written statement*

2. Every pleading shall contain, and contain only, a statement in a concise form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved, and shall, when necessary, be divided into paragraphs, numbered consecutively. Dates, sums and numbers shall be expressed in figures.

Pleading to state material facts and not evidence.

R. S. O 19, r 4

This rule has been imported bodily from the English orders and it is no doubt intended to introduce so far as is possible the present system of English pleading. The success or failure of this attempt depends in the main upon the judiciary, and upon the manner in which they deal with pleadings under the new state of the law of procedure. The following remarks of the Select Committee are worthy of notice in this the first Edition of the new Code.

"The committee have added a few rules relating to pleadings based upon the system of pleading introduced by the Judicature Acts in England, which is generally admitted to be the best form of pleading in civil suits. In this country outside the Presidency town, the pleadings are seldom artistically drawn. They are neither concise nor precise, but contain vague and general statements from which it is difficult to ascertain definitely the real question in controversy between the parties. The sole object of pleadings is thus frequently

from exercising his discretion, for the amount of detail must necessarily vary with the nature of each suit. It is, however, made clear that there must be particularity sufficient to apprise the Court and the other party of the exact nature of the questions to be tried."

Upon this rule is founded the whole system of pleading as current in the supreme Court in England, it involves the following principles

- (a) Pleadings must state material facts only
- (b) They must state those facts in a concise form.
- (c) They must not state the evidence by which those facts are to be proved.
- (d) They must not state propositions of law

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¹ See Ann. Prac (1908) i. 236, notes to R. S. O 19, r 4. For an extensive treatise on those rules, see Odgers on Pleading, 6th Edition

But the party pleading must state his whole case and set out every material fact, upon which he intends to rely at the hearing, and the general rule has been stated as follows by Cotton L. J.¹

"In my opinion it is absolutely essential that the pleading, not to be embarrassing to the defendants, should state those facts which will put the defendants on their guard and tell them what they have to meet when the case comes on for trial."

The question whether any particular fact should be pleaded as material depends in the main on the peculiar circumstances of each particular case, and these Rules, although stricter than the practice of draftsmen in the Indian Courts both in the Presidency-towns and the Mofussil in 1907, still leave a considerable latitude to the discretion of the pleader.

Conditions Precedent.—See O. VI, r. 6 post.

Contents of Documents.—See O. VI, r. 9 post.

Fraud.—Particulars of fraud, undue influence and similar matters must be fully pleaded, see O. VI, r. 4 post.

Malice.—Or other state of mind, see O. VI, r. 10 post.

Notice.—See O. VI, r. 11 post.

Presumptions of Law.—Need not be pleaded, See O. VI, r. 13 post.

Series of letters or conversations may be pleaded generally—See O. VI, r. 12 post.

There is no necessity to allege any matter of fact as to which the burden of proof lies on the other side; See O. VI, r. 13 post.

The plaintiff need not anticipate the defence as it has been said "like leaping before one comes to the stile"² and similarly the defendant should not plead to causes of action, which are not set out in the plaint.³

Concise Form.—This rule provides that pleadings are to be divided into numbered paragraphs according to the pre-existing practice and that all dates, numbers and sums shall be expressed in figures.

The forms given in Appendix A have been revised and increased and Rule 3 of this Order insists upon their use for future pleadings. All immaterial facts must be omitted and material facts should be pleaded with as little detail as possible.

Documents.—Where a plaintiff sues upon any document in his possession or power he must still file it annexed to his plaint as heretofore—See O. VII, r. 11 post, but other documents upon which he intends to rely as evidence of his claim, are to be merely set out in a list annexed to the plaint—See O. VII, r. 12 (2). This last-mentioned rule merely repeats the provisions of sect. 59 of Act XIV of 1882, which were ignored by practitioners in some Courts, notably on the Original Side of the High Court at Calcutta, where a practice has been established of annexing to plaints originals or copies of evidentiary documents such as Bought and Sold Notes. The words of these rules seem to contemplate the annexure of such documents as Hundies, bills of exchange, promissory notes and mortgages, and of such documents only.

Unless the precise words of a document are material it is sufficient to briefly state their effect—O. VI, r. 9 post.

As already stated no party should plead to any facts which have not become material to his case, even if he anticipates that they will become material at a later stage and he must not plead to facts which are not alleged against him.

Evidence.—Presumptions of law and performance of conditions precedent must not be pleaded. But pleadings must be "precise" and should give all

¹ *Phillips v. Phillips*, (1876) 4 Q. B. D. 1, 139.

² *Sir Ralph Bayley's case*, (1673) Vent. 217.

³ *Rassam v. Bow*, (1893) 1 Q. B. 571; see Ann. Prac. (1906), Vol. 1, note to G. 19, r. 4.

material dates, names and other items to avoid applications by the opposite party for particulars. There is no general rule to guide a draftsman as to which details he should insert and which omit, but the forms given in Appendix "A" will give a strong indication as to the particulars really necessary and Cotton L. J.'s dictum about putting the other side on their guard (p. 483 *supra*) may also be usefully referred to in this connection.¹

Facts not Evidence.—"It is an elementary rule in pleading that, when a state of facts is relied on, it is enough to allege it simply without setting out the subordinate facts which are the means of producing it or the evidence sustaining the allegation."²

furnish further examples of this principle

Facts not Law—Pleadings are intended to be statements of facts only. The draftsman must not be content with pleading the section of the Contract Act or other enactment by force of which he hopes to succeed in his claim or denial, but he must set out the facts which bring his case within that enactment. For example, it would be sufficient to plead that the defendant is the heir of A, plaintiff's relative.

Further, where misrepresentation, fraud and the like are relied upon in avoidance of an agreement the facts supporting those pleas must be fully set out, O VI, r. 4 *post*. A bare denial of the agreement will be held to refer to the *factum* of the agreement only and will bar any defence based upon the legality or sufficiency in law of the agreement O VI, r. 8 *post*. Similarly a simple denial of a debt is not sufficient, the defendant must state the facts showing his non-liability to the plaintiff.³

3. The forms in Appendix A when applicable, and where they are not applicable forms of the like character, as nearly as may be,

shall be used for all pleadings.

R. 5 O 19, r 5

This rule contains an express direction that the forms in the Appendix are to be followed as closely as possible, but in England it has been held under the corresponding rule that the forms need not be rigidly followed and that the pleader must exercise his discretion.⁴

4. In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default, or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid, parti-

¹ On this subject see *Ann. Prac* 1908, Vol. I., 233 et seq. and *Odgers on Pleading*, 6th Ed., p. 108 et seq.

² Per Lord Denman C. J., in *Williams v. Wilcock*, A and E, p. 331 cited in *Ann. Prac.* (1908) (i) 238.

³ Per Brett L. J. in *Philpotts v. Philpotts*, (1878) Q. B. D. at p. 133, cited in *Ann. Prac. supra*.

⁴ See generally *Ann. Prac* (1908) i., 236; and *Odgers on Pleading*, 6th Ed. p. 82.

⁵ See *Ann. Prac.* (1908) i., 241, for other forms see *Odgers on Pleading*, 6th Ed., App. of Precedents.

culars (with dates and items if necessary) shall be stated in the pleading.

R. S. O. 19, r. 6.

Particulars—The same principle applies in the construction of the compliance with this rule as under rule 1 ante. Sufficient detail must be pleaded to apprise the Court and the opposite party of the exact nature of the questions to be tried.¹ The particulars to be stated will depend on the circumstances of each case and the draftsman is given a discretion to be exercised according to ordinary common-sense rules.

When misrepresentation, fraud, negligence, or misconduct are alleged, the facts upon which the allegations are based must be stated with especial particularity and care.² This has been the rule in Indian Courts for years past,³ and the alteration aimed at by these Orders VI and VII is rather to shorten and curtail the existing forms of pleadings. In respect of allegations of this nature, however, very full particulars are still required. In defences to suits for wrongfully done acts of fraud, misrepresentation, alleged incompetency or dishonesty, or of all charges of negligence, want of skill etc.⁴

Thus in suits upon promissory notes, hundies or bonds and the like, where the defence raised is that of fraud or undue influence, the facts supporting those charges must be very fully stated.

This rule is generally understood in India but the following examples from the English books may be useful for reference.

Accident.—Particulars have been ordered of a defence of "inevitable accident".⁵

Adultery.—In matrimonial suits exact particulars of the time and date of each act alleged, whether of adultery or cruelty must be pleaded, the general allegation will not suffice and can only lead to an application by the opposite party under O. VI, r. 5.⁶

Agreement.—The date, and names of parties should be pleaded, also whether verbal or in writing, in the latter case specifying the document or series of documents relied upon.

Damages.—Any special damage alleged must be fully and specifically pleaded. For instance where the plaintiff states that he has been injured in his profession or business and has lost clients or customers, he must set out their names. But particulars of general damage are never required.⁷

Fair Comment.—See *Digby v. The Financial News Ltd*.⁸

Fraud.—The Court will not take notice of any general allegations of fraud. The acts alleged to be fraudulent must be set out and then it must be stated that such acts were done fraudulently.⁹ See note to Order VI, r. 10 post.

Instigation.—Where it was alleged that certain persons had instigated the defendant to do something, particulars of such instigation whether verbal or in writing and the date were ordered to be delivered.¹⁰

¹ Ann. Prac. (1908) i, 241.

² Ann. Prac., (1908) i, 241.

³ See *Bilaji v. Gangadhar*, (1908) 32 Bom., 235.

⁴ Id.

⁵ *Martin v. McTaggart*, (1908) 2 L. R., 120 cited in *Olgers op. cit.* 175.

⁶ *Hartopp v. Hartopp*, L. T., 164. *Bishop v. Bishop*, (1901) 1 L. 325; see *Olgers op. cit.* 174.

⁷ *London Bank v. Newnes*, Times Rep. 433, cited in Ann. Prac. (1908) i, 248.

⁸ *Digby v. The Financial News Ltd*, (1907) 1 K. B., 502.

⁹ Ann. Prac. (1908) i, 243; *Wallingford v. Mutual Society*, 5 App. Cas. 697, 701 and 704.

¹⁰ *British Medical Association v. Britannia Fire Association*, 53 L. T., 888.

Justification—In a suit for damages in respect of a libel or slander, where the defendant pleads justification, he should give the instances of misconduct on which he relies sufficiently clearly to inform the plaintiff of the precise charge made against him.¹

Misrepresentation—The nature and extent of each alleged misrepresentation must be set out² by whom and to whom it was made and whether verbal or in writing, if in writing the document must be specified.³

Negligence—Full particulars of any alleged negligence must be given whether contributory or otherwise.⁴

Payment into Court.—The written statement should always give particulars of such payments where made in addition to the notice under Order XXIV, r. 2 *post*⁵ but in England it has been held that the omission to do so does not make the payment nugatory.⁶

Right of way—In suits to obtain a declaration of right of way, the plaint should set out the exact course and termination of the alleged way.⁷

Slander—The precise words used and the names of the persons to whom they were uttered and the date of publication must be set out in the plaint.⁸

5 A further and better statement of the nature of the claim or defence, or further and better particulars of any matter stated in any pleading, may in all cases be ordered, upon such terms, as to costs and otherwise, as may be just.

R S O 19, r 7

under this rule will be settled by the Rules
h applications are made upon summons to
in chambers.⁹

The general rule seems to be that further particulars should be ordered whenever it is apparent that the applicant will not otherwise know what his opponent means to try and prove against him at the trial of the suit.¹⁰ He is not entitled to the names of the other side's witnesses nor to other particulars of their evidence, but even these cannot be withheld if the information sought for is necessary to enable the applicant to properly prepare for trial.¹¹ In England particulars are not ordered of immaterial allegations nor of allegations as to which the burden of proof lies on the applicant.¹²

Leave to Amend—A party is bound by his particulars and ought not to be allowed at the hearing to go into matters not included therein except by special leave of the Court granted upon terms.¹³ If therefore a party discovers new matter as to which he desires to give evidence at the hearing, he should apply

¹ *Thompson v. Great Eastern Ry. Co.* (1893) 3 Q. B. 593; *Ziegenberg v. Labouchere*, (1893)

² *ibid.*
³ *ibid.*
⁴ *ibid.* rac (1908) 1, 246
and Odgers *op. cit.* pp. 77,

⁵ *Ann. Prac.* (1908), 1, 246

⁶ *ibid.*

⁷ *ibid.*
⁸ *ibid.* Odgers on Libel and Slander, *

⁹ *ibid.*

¹⁰ See *Ann. Prac.* (1908) 1, 249

¹¹ *ibid.*, 251.

¹² *Wheatley v. Chamberlain* (1896) 17 Q. B. D., 154, 161; *Ziegenberg v. Labou-*
¹³ *Ann. Prac.* (1908) 1, 250.

¹⁴ *ibid.*

¹⁵ *ibid.*

for leave to amend or add to his pleadings.¹ This should be done in good time so as not to prejudice the other party in the preparation of his case and applications for leave to amend particulars at the time has generally been refused in England.²

6. Any condition precedent, the performance or occurrence of which is intended to be contested shall be distinctly specified in his pleading by the plaintiff or defendant, as the case may be; and, subject thereto, an averment of the performance or occurrence of all conditions precedent necessary for the case of the plaintiff or defendant shall be implied in his pleading.

Condition precedent.

R. S. O. 19, r. 14.

In terms this rule covers conditions precedent of every kind and it would at first appear to be technically correct to omit all reference to those of which due performance will be alleged at the trial. But it has been held under a similar rule in England that allegations which really form part of the cause of action should be set out.³ The best example is that of the notice of dishonor, required by the Negotiable Instruments Act to support certain actions upon bills of exchange and hundies. This should always be alleged and so should demands and offers of settlement.

Defendant desires to raise the point of notice he may do so in his written statement, but the plaintiff can wait until he does so specifically. See O. VIII, r. 2 *post*.

7. No pleading shall, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same.

Departure.

R. S. O. 19, r. 16.

This merely lays down a rule which would be followed by every cautious pleader as a matter of course. If necessity arises, through the discovery of fresh information or otherwise, to put forward a new claim or defence different from that already raised the best and now the only course is to apply for leave to amend the original pleading.

8. Where a contract is alleged in any pleading, a bar or denial of the same by the opposite party shall be construed only as a denial in fact of the express contract alleged or of the matters of fact from which the same may be implied, and not as a denial of the legality or sufficiency in law of such contract.

Denial of contract.

R. S. O. 19, r. 20.

This rule is in effect an example of the principle laid down in r. 2, *supra*. If a party desires to avoid an agreement he must clearly state upon what

¹ See *Yorkshire Permanent Co. v. Gillert*, (1925) 2 Q. B., 149; and other cases cited in Ann. Prac. (1918), i, 252.

² Ann. Prac. (1918) i, 252.

³ See Ann. Prac. (1918), i, 250.

ground he means to contest it, whether he denies that he ever entered into it at all or whether he was induced to do so by fraud, misrepresentation or mistake *etc.* See also O. VIII, r. 2. *post.*

9. Wherever the contents of any document are material, it shall be sufficient in any pleading to state the effect thereof as briefly as possible, without setting out the whole or any part thereof, unless the precise words of the document or any part thereof are material.

R. S. 19, r. 21.

In suits for damages for Libel, the precise words are material, and where the construction of a Will or other document is asked for the exact wording, when material, should be set out in the pleadings.¹

10. Wherever it is material to allege malice, fraudul-
Malice, knowledge, lent intention, knowledge or other con-
dition of the mind of any person, it shall
be sufficient to allege the same as a fact without setting out
the circumstances from which the same is to be inferred.

R. S. O. 19, r. 22.

This rule, is an application of the general principle that material facts only and not the evidence by which they are to be proved should be pleaded.

Fraud—Must be distinctly alleged. The acts alleged to be fraudulent must be stated, and then it will be sufficient to aver that they were done fraudulently.²

Knowledge—It is sufficient to plead "as the defendant well knew at all times material to this suit" or "whereof the defendant had notice" without setting out when, where and how that knowledge was acquired or notice given.³

11. Wherever it is material to allege notice to any
person of any fact, matter or thing, it
shall be sufficient to allege such notice
as a fact, unless the form or the precise terms of such notice,
or the circumstances from which such notice is to be inferred,
are material.

R. S. O. 19, r. 23.

This rule is no doubt intended to put an end to the former practice of setting out in pleadings the entire letter or memorandum containing the notice.

12. Whenever any contract or any relation between
any persons is to be implied from a series
of letters or conversations or otherwise
from a number of circumstances, it shall be sufficient to allege
such contract or relation as a fact, and to refer generally to
such letters, conversation or circumstances without setting

¹ *Darbyshire v. Leigh*, (1896) 1 Q. B., 553, 559. See Ann. Prac. (1903) i, 264.

² *Redgrave v. Hurd*, (1881) 20 C. D., 1; and Ann. Prac. (1903) i, 264, and other cases there cited.

³ *Id.* 265, and cases there cited.

them out in detail. And if in such case the person so pleading desires to rely in the alternative upon more contracts or relations than one as to be implied from such circumstances, he may state the same in the alternative.

R. S. O. 19, r. 24

13. Neither party need in any pleading allege any matter of fact which the law presumes in his favour or as to which the burden of proof lies upon the other side unless the same has first been specifically denied, (*e.g.*, consideration for a bill of exchange where the plaintiff sues only on the bill, and not for the consideration as a substantive ground of claim.)

Presumptions of law.

R. S. O. 19, r. 25

These two rules are also intended to shorten pleadings and are taken direct from the English rules

14. Every pleading shall be signed by the party and his pleader (if any): Provided that where a party pleading is, by reason of absence or for other good cause, unable to sign the pleading, it may be signed by any person duly authorized by him to sign the same or to sue or defend on his behalf.

Pleading to be signed.

Act XIV of 1882, sec. 51. This rule applies to H. C. and Prov. S. C. C.

Signed—The mere fact that the plaint has not been signed by the plaintiff or by his authorised agent will not necessarily make the plaint absolutely void. Such a defect may be cured by amendment at any stage of the suit.¹

As to Corporations and Companies, see O. XXIX, *post*.

15. (1) Save as otherwise provided by any law for the time being in force, every pleading shall be verified at the foot by the party or by one of the parties pleading or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case.

Verification of pleadings.

(2) The person verifying shall specify, by reference to the numbered paragraphs of the pleading, what he verifies of his own knowledge and what he verifies upon information received and believed to be true.

(3) The verification shall be signed by the person making it and shall state the date on which and the place at which it was signed.

Act XIV of 1882, sects. 51 and 52 This rule applies to H. C. and Prov. S. C. C.

¹ *Basdeo v. Smelt*, (1904) 22 All. 55. As to the signature of illiterate persons, see *Changulhar v. Basdeo*, (1905) 14 Bom. 506.

Who should verify—It has long been the rule that the Courts are bound to see that plaints are verified by the plaintiffs, unless the latter are unable to do so by reason of absence or any good cause, when they may be allowed to be verified by competent persons,¹ and if a plaintiff charges fraud on facts known to him he should verify.² A co-plaintiff added must verify the plaint, unless the facts are admitted.³ Where a plaint is subscribed and verified by a person other than the plaintiff notice should be given to the defendant, nothing more formal need be done by way of notice to support an application for the admission of the plaint, if the person verifying it is in other respects qualified.⁴ The Administrator-General as a public officer is exempted from verifying otherwise than by his signature any petition presented by him under the provisions of Act 11 of 1874.⁵ A guardian mother having on behalf of her minor son brought a suit in a Munsif's Court, *held*, that the pleader appointed by her could sign and verify the plaint.⁶

Practice—Exceptions in favour of persons unable to verify should be pleaded, considered, and decided in each case.⁷ Where a plaint has been verified by a person who has not shown the Court that he is competent to verify it, the Court has removed it from the file,⁸ but if once verification by an agent has been sanctioned, the Court, it seems, cannot of its own motion object to it afterwards,⁹ but the appellate Court may require the omission to be supplied.¹⁰

Appeal—Under this Code an order rejecting a plaint is treated as a decree. See Sec. 2 (2) *ante*. See *Devas and Order*, p. 2, *ante*.

Form of Verification—Para (2) embodies the case law on this subject.¹¹

The substantial portion of a plaint consisting of the statement of the claim of the plaintiffs and the prayer was written on two sheets of plain paper and verified by the plaintiffs. Subsequently to the affixing of the plaintiffs' signatures, a front sheet consisting of a piece of stamped paper with the name of the Court and the names and addresses of the parties was added, and the plaint thus composed filed in Court; *held*, that the verification was defective, but the plaintiffs should have been allowed to amend the plaint by making a proper verification.¹²

Acquainted with the facts—When the plaint is verified by a person other than the plaintiff, the Court must be satisfied that he is acquainted with the facts of the case, but in the case of a person holding a general power-of-attorney, or of any other recognised agent, the Court will not insist on any

¹ *Kenoo Singh v Eshan Chunder*, (1866) 6 W. R., 213; *Leelanund Singh*, petitioner, (1867) 7 W. R., 163.

² *Jardine, Skinner & Co v. Shurno Moyee*, (1875) 24 W. R., 215; *Raja of Tomkuhi v. Braidwood*, (1887) 9 All., 505.

³ *Mohan Lal v. Bishnu Chandra*, (1868) 1 B. L. R., 100. But see *Mohini Mohun v. Bunge*, (1890) 17 Cal., 580.

⁴ *Puldomokey Dossee v. Shama Churn Chuckerbutty*, (1866) 1 Ind. Jur., N. S., 226.

⁵ *Aydall*, in the goods of, (1899) 26 Cal., 404. See also *McComiskey*, in the goods of, (1893) 29 Cal., 879.

⁶ *Saifulla v. Haji Miya*, (1900) 24 Bom., 238.

⁷ *Muhessur Buksh*, petitioner, (1866) 5 W. R., 313; 33; *Mohessur Buksh v. Sheo Narain*, (1866) 6 W. R. Mis., 59.

⁸ *Orwell Garnay & Co v. Steel*, (1865) 1 Ind. Jur. N. S., 33.

⁹ *Sutto Churn v. Suroop Chunder*, (1869) 12 W. R., 465.

¹⁰ *Raja of Tomkuhi v. Braidwood*, (1887) 9 All., 505.

¹¹ *Upendra Lal Bose*, in the matter of, (1891) 6 Cal., 673; *Solomon v. Abdulool Aziz*, (1879) 4 C. L. R., 366.

¹² *Fateh Chand v. Mansah Rai*, (1893) 20 All., 442; *Ganga Sahai v. Muhammad Ali*, (1893) 20 All., 444, note; *Fakir Chand v. Mohesh Das*, (1898) 20 All., 415, note.

extreme stringency of proof.¹ Where a plaintiff sets up a case of a fraud resting merely on his personal knowledge, he should verify the plaint.² In order to constitute a proper verification of a plaint, it is necessary for the person verifying, if all the facts are within his knowledge, to state distinctly that they

plaint⁴ are true to the best of my knowledge and belief,"—is in substantial compliance with the provisions of this rule.⁴

Where verified.—The rule does not require the verification of a plaint to be made in the presence of an officer of the Court; but having regard to the fact that the plaintiff, who is desirous that a Court of the Court, undispensing with his attendance.⁵

Objections when taken.—Objections to verification should be taken before the settlement of issues; after that, the case should be disposed of on the merits, and not dismissed for insufficient verification.⁶ If the verification of a plaint is discovered to be defective at any time whilst the suit is before the Court of first instance, the plaint may be amended by the Court. If such defect be not discovered until the suit comes on appeal before an appellate Court, such Court may, if it think fit, return the plaint to the Court of first instance to be amended by it. But when the defect is such that it is covered by the provisions of s. 97, there is no necessity for the appellate Court to take any steps to procure the amendment of the plaint. In any event a defect in the verification of a plaint will not of necessity result in the dismissal of the suit.⁷

16. The Court may at any stage of the proceedings striking out plea. order to be struck out or amended any thing. matter in any pleading which may be unnecessary or scandalous or which may tend to prejudice, embarrass or delay the fair trial of the suit.

R. S. O. 19, r. 22

Under this provision the Courts can enforce the rules of pleading contained in this order.

¹ *Kastolino v. Rustomji*, (1880) 4 Bom., 463.

² *Protap Chunder v. Kristo Kishore*, (1832) 8 Cal., 885; *Raja of Tonkuhi v. Brandwood*, (1887) 9 All., 505.

³ *Girdhari v. Kanhaiya Lal*, (1893) 13 All., 59.

⁴ *Rajit Ram v. Katesar Nath*, (1896) 18 All., 396.

⁵ *Kastolino v. Rustomji*, (1880) 4 Bom., 463.

⁶ *Shama Soondaree v. Rahmooddeen*, (1875) 21 W. R., 71, O VI, r. 17, *infra*.

⁷ *Rajit Ram v. Katesar Nath*, (1896) 18 All., 396.

⁸ *Heap v. Morris*, (1876) 2 Q. B. D., 639; and other cases cited in Ann. Prac. (1898) i, 267.

by the trial the Court may act; and it is essential therefore upon an application on this ground to show some prejudice or embarrassment.¹

If the unnecessary matter contains any charge of misconduct or bad faith against the opposite party or indeed against any one else the Court will order it to be struck out as scandalous.²

Scandalous—Allegations of dishonesty and outrageous conduct are not scandalous if relevant to the issues of the case.³ But if degrading charges be made, which are irrelevant, or even if relevant, and unnecessary details be given, the pleading becomes scandalous.⁴

Tends to prejudice &c.—Where a pleading is defective merely in that it does not contain all the particulars which should be given, it is not embarrassing within the meaning of this rule but an application should be made for a further and better statement under O VI, r. 5.⁵

17 The Court may at any stage of the proceedings
 Amendment of pleadings⁶ allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.

Act XIV of 1882, Sect. 53 R. S. O. 28, r. 1.

Amendments of pleadings are divided by Dr. Blake Odgers K. C. into three classes

- 1 Amendments in an opponent's pleadings against his will.
- 2 Amendments by the Court of its own motion in order to determine the real questions in controversy between the parties.
- 3 Amendments by a party in his own pleadings

This rule deals only with the second and third classes, and the first kind of amendments have been considered under rule 16 of this order.

General rule—Leave to amend should be given in all cases where it can be granted without injustice to the other side, and even if expense and delay will be occasioned by the order for amendment it should be made whenever that expense and delay can be recompensed by costs.⁷ "There is no injustice if the other side can be compensated by costs."⁸

Subject to this rule an amendment should always be allowed if thereby "the real substantial question can be raised between the parties" and multiplicity of legal proceedings avoided,⁹ and however negligent or careless may have been the

¹ Knowles v. Roberts, 39 Ch. D. p. 270 Ann. Prac. (1903), i, 267; Rassam v. Budge, (1897) 1 Q. B., 571. A mass of evidence inserted in the pleadings may be struck out, United Telephone Co. v. Thacker, 59 L. T., 852.

² Lamb v. Beaumont, 49 L. T., 772; Murray v. Epworth Local Board, (1897) 1 Ch., 35. See Ann. Prac. (1905) i, 3263; Odgers Op. Cit. 172.

³ Millington v. Loring, (1890) 6 Q. B. D., 190; Fisher v. Owen (1878) 8 C. D. at p. 653; Christie v. Christie, (1873) L. R., 8 Ch. 499.

⁴ Blake v. Allion Assurance Society 45 L. J. C. P. 663; and other cases cited in Ann. Prac. (1908) i, 268.

⁵ Davis v. James, (1884) 26 C. D. 778 Ann. Prac. (1905) i, 269.

⁶ Australian S. N. Co. v. Smith, (1889) 14 App. Cas. at p. 320.

⁷ Per Brett M. R., Clarapedia v. Commercial Union Association, 32 W. R., p. 261. See Ann. Prac. (1903), i, 353. "There is one panacea which heals every sore in litigation and that is costs" per Bowen L. J., in Cropper v. Smith, 26 C. D., at p. 711.

⁸ Jud. Act, 1873, sect. 24. Kurtz v. Spence, (1887) 36 C. D., 774 Ann. Prac. (1903) i, 353.

first omission, and however late the proposed amendment, it should still be allowed if an order for costs will recompense the other side.¹

Not allowed—But an amendment should not be allowed save when the plaintiff has an honest case, and, by some mistake or misapprehension, has failed to state his case before the Court² nor if it will affect the rights of third parties if action are added.³ So a suit for recovery of property by inserting a clause that even if the new defence places the plaintiff in a different position from that in which he would have been, if the defendant had pleaded properly at first.⁴

A claim for rent on contract cannot be changed into one for use and occupation of the land,⁵ unless there be an alternative claim to that effect,⁶ nor can a claim by a co-sharer landlord for his fractional share of the rent into one for the recovery of full rent,⁷ for hire of cargo boats, to a suit for accounts as agent,⁸ for account as

of the other heirs.⁹ Nor can a suit for dower on a written agreement be changed to a suit for dower on custom.¹⁰ The plaint of a suit for a declaration of title cannot be amended on appeal by the addition of a prayer for possession.¹¹ A suit for recovery of money due on a contract cannot be altered into one making the defendant liable in tort for misrepresentation,¹² nor a suit brought on the ground of fraud into one for redemption.¹³

Specific performance—A suit for specific performance cannot be changed into one to cancel the contract and retain a deposit, even if the defendant says he is unwilling to complete,¹⁴ otherwise, if plaintiff had pleaded in the alternative.¹⁵

¹ *Clarapado v. Commercial Union Association*, 33 W. R., p. 263. and an order may of course be made for security as in *Northampton Coal Co. v. Midland Wagon Co.*, 7 C. D., 500.

² *Bhyro v. Lekhiranee*, (1871) 16 W. R., 123; *Makhoda v. Ram Churn*, (1882) 8 Cal., 871; *Beddington v. Atlee*, (1887) 35 C. D., 317, p. 329.

³ *Rughoon undun v. Gopal Chund*, (1873) 29 W. R., 17.

⁴ *Narayan v. Hari*, (1899) 13 Bom., 664.

⁵ *Damodar v. Purmanandas*, (1883) 7 Bom., 155.

⁶ *Steward v. North Met. Tram. Co.*, (1886) 16 Q. B. D., 536. *Elevain v. Cohen*, (1889) 41 C. D., 563 *Ain Prac.* (1908) 1, 353.

⁷ *Luchmeput v. Enaet Ali*, (1874) 22 W. R., 346; *Lakhee Kant v. Sumerooddin*, 21 W. R., 208; *Surendra Narain Singh v. Bhai Lal Bhakur*, (1895) 22 Cal., 752.

⁸ *Rachhea Singh v. Upendra Chundra*, (1900) 27 Cal., 239.

⁹ *Ram Saran v. Nera Naram*, (1901) 6 Cal. W. N., 326.

¹⁰ *Shibkrishno v. Abdool*, (1880) 5 Cal., 602; 5 C. L. R., 455.

¹¹ *Hanulton v. Land Mortgage Bank*, (1883) 5 All., 456.

¹² *Umbuka Churn v. Nadir*, (1869) 11 W. R., 133.

¹³ *Gopes Lall v. Chundraolee*, (1873) 19 W. R., 12 (P. C.); L. R. I. A., Sup. Vol. 331.

¹⁴ *Sree Pershad v. Trumbuck Nath*, (1870) 14 W. R., 386.

¹⁵ *Mahomed Asghur v. Manija*, (1887) 14 Cal., 420.

¹⁶ *Narayana v. Shankuni*, (1892) 15 Mad., 255. But see, *Abdulkadar v. Mahomed*, (1902) 15 Mad., 15.

¹⁷ *Mohendra Nath Mookerjee*, (1868) 9 W. R., 206.

¹⁸ *Ram Das v. Indromini Dasi*, (1898) 3 Cal. W. N., 325.

¹⁹ *Stone v. Smith*, (1887) 35 C. D., 184.

²⁰ *Kingdon v. Kirk*, (1887) 37 C. D., 141.

Possession of land—A claim to land as *mirasdar* cannot be turned into one as an occupancy-tyot (not in the alternative,) ² a suit for possession and mesne

and generally though a person in a suit based on dispossession need not state his title yet if he does, he ought not to succeed on a perfectly different one ³. In a suit for possession based on a *lobala*, the Privy Council refused to make the defendant repay advances, though the real transaction was a mortgage ⁴. Where A sued for property as devisee under a will, he could not set up a want of title in the testator to devise the estate; ⁵ and where A sued as a mortgagee, asserting that she had advanced the money out of her own moneys, their lordships declined to hear it urged that the money came from her reputed husband, and that transaction was by way of gift or provision for her, ⁶ and a claim to redeem one mortgage cannot be changed into a claim to redeem another. ⁷ In a suit for *khas* possession on the ground of forfeiture, the plaintiff failing to prove that the defendant was a tenant under him, was not afterwards allowed to succeed on the ground that the defendant was a trespasser. ¹⁰

Immaterial amendments—An inconsistent or useless amendment will not be allowed ¹¹ and if at the hearing it appears that an amendment has been made uselessly, the party who applied for it will have to pay the costs occasioned thereby ¹².

² *Golund Mohapatra v. Madhub Persad*, (1866) 6 W. R., 211; B. L. R., F. D., 551.

³ *Nolan Chunder v. Mohesh Chunder*, (1869) 12 W. R., 69; see, however, *Wahid Alam v. Safat Alam*, (1890) 12 All., 556.

⁴ *Nila v. Sonu*, (1874) 21 W. R., 422; *Kishen Chunder v. Kaleenath*, (1872) 18 W. R., 507. But see, *Fukeer Dass v. Gopal*, (1869) 12 W. R., 107; nor a claim for possession upon a *mokarari* title into one for recovery of possession by previous occupation.—*Byrja Debia v. Bydonath*, (1875) 24 W. R., 444.

⁵ *H. S. v. S. v. S.*, (1869) 11 W. R., 550; see also *Ganga Lal*.

Hakim, (1876) 1 All., 567.

⁶ *Perhlad Sein v. Budhoo Singh*, (1867) 12 Moo. I. A., 275; and see *Murugasari v. De Soyza*, App. Cas., 1891, p. 69; *Salig Ram v. Har Charan*, (1890) 12 All., 548.

⁷ *Mylapore v. Yeo Kay*, (1886) L. R., 14 I. A., 168; 14 Cal., 801.

⁸ *Bhowan Dass v. Mahomed Hossein*, (1869) 13 Moo. I. A., p. 352.

⁹ *Gobindrav v. Ragho*, (1884) 8 Bom., 543. And see, *Ramanadan v. Pulikutti* (1893) 21 Mad., 288.

¹⁰ *Laljee Singh v. Bunwary Lal*, (1876) 25 W. R., 448.

¹¹ *Sinclair v. James*, (1894) 3 Ch. at p. 357; See Ann. Prac. (1908), i, 354.

¹² *Litchfield v. Dreyfus*, (1906) I. K. B. at p. 590.

Limitation.—A plaintiff will not be allowed to amend by setting up fresh claims on causes of action which have become barred since the filing of his plaint.¹

Changing the character of the suit.—An amendment entirely altering the points of contention between the parties;² converting the suit into one of a different character;³ or inconsistent with the case on which the plaintiff came to Court,⁴ should not be allowed.⁵ The Courts of this country are to decide according to equity and good conscience, and the substance and merits of the case are to be kept in view, not merely the wording of the plaint but the issues settled for trial.⁶ The substance and not the mere literal wording of the issues is to be regarded; and if, from inadvertence or other cause, the recorded issues do not enable the Court to try the whole case on the merits, an opportunity should be afforded by amendment, and if need be by adjournment, for the decision of the real points in dispute;⁷ but the amendment must be either involved in the pleadings, or consistent with the case as originally laid, and the state of facts and the equities and ground of relief originally alleged and pleaded should not be departed from,⁸ and acting on this principle, the Courts of this country have allowed the plaint and issues to be amended in special appeal;⁹ and where, on the face of the plaint, no relevant case was made against certain defendants, as where the suit was on a money bond executed by A, and against A

the character of the suit.¹¹ It is the intention of the legislature that all matters in dispute should be disposed of in the same suit. It is not intended to prevent an alternative case being set up.¹² So, in a suit for enhancement of rent on a *kubuliat*, which is not proved, the plaint may be amended by adding an alternative claim for rent at the old rate.¹³ The amendment of the plaint is in the discretion of the Judge and not the right of the suitor. It is not enough for the plaintiff

But
for
it a

¹ See *Weldon v Neal*, 19 Q. B. D., 394, Aun. Prac. 1909, i. 353. But see *Barkatunnissa v Mahanmal Asad*, (1895) 17 All., 288, and cases cited in O'Kinealy Civil Procedure Code, 6th Ed., p. 192.

² *Narayanray v. Javherlaluy*, (1898) 12 Bom., 431.

³ *Musorie Bank v. Barlow*, (1887) 9 All., 198.

⁴ *Nritto Lal v. Rajendro*, (1895) 22 Calc., 562.

⁵ See also *Rinissim Ayra v. Ramu Mupan*, (1866) 3 Mad. H. C., 372; *Releigh v. Goschan*, (1893) 1 Ch., 81.

⁶ *Rup Singh v. Baisni*, (1893) L. R., 11 I. A., 149, p. 155; 7 All., 1.

⁷ *Hunoominpersad v. Daboojee*, (1849) 6 Moo. I. A., 393.

⁸ *Eshenchunder v. Shama Churn*, (1866) 11 Moo. I. A., 7; *Ameeeroonnissa v. Abdulomiss*, (1871) 1 W. R., 100.

⁹ *Ram Doyal Khan v. Ojoodhia Ram Khan*, (1876) 25 W. R., 425; *Mahomed Zahoor v. Rutta Koer*, (1866) 11 Moo. I. A., 468; 9 W. R., (P. C.) 9; *Dhaniram Shaha v. Bhagurath Saha*, (1895) 22 Calc., 592.

¹⁰ *Mohammed Zahoor v. Rutta Koer*, (1866) 11 Moo. I. A., 468; also *Indur Chunder v. Radha Kishore*, (1892) 19 Calc., 507; L. R., 19 I. A., 90.

¹¹ *Kasioath Das v. Saksiv Patnaik*, (1893) 20 Calc., 808.

¹² *Saral Chand Mitter v. Mohun*, (1898) 25 Calc., 371; 2 Calc. W. N., 201.

¹³ *Roushan Bibee v. Hurray Kristo*, (1892) 8 Calc., 926.

¹⁴ *Tajiram v. Sadu*, (1897) 21 Bom., 670.

¹⁵ *Proomano Chander v. Gourree*, (1867) 7 W. R., 478.

partition cannot be amended by making it a suit for partition without entirely changing its character.¹ But the plaint in a suit by a partner for exclusive title to partnership property was allowed to be amended by converting the suit into one for a dissolution of partnership and an account.² Where the object of an amendment of a plaint is merely to seek relief ancillary to the principal prayer of the plaint, such amendment does not alter the character of the suit.³ A mortgagee asking for a decree for sale or any other relief, may relinquish his claim for sale and pray for a simple money decree.⁴ A suit for possession may sometimes be converted into one for redemption.⁵

The addition to the plaintiff's name of a description of him as an administrator does not alter the character of a suit.⁶

Fraud. It is the universal practice except in the most exceptional circumstances not to allow an amendment for the purpose of adding a plea of fraud where fraud has not been pleaded in the first instance.⁷ The charge of fraud must be substantially proved as laid, and when one kind of fraud has been charged, another kind of fraud cannot be substituted for it.⁸ A plea of fraud which contains general allegations but no specific instances of fraud cannot be amended in second appeal.⁹ Charges of fraud must be substantiated at the hearing of the case, and cannot be reserved and proved in the course of taking accounts.¹⁰ A plaintiff failing to prove charges of fraud and collusion will not be allowed to change his case in appeal.¹¹

Wrong title. The general rule is that a party must be limited to the case which he puts forward in his plaint; he may, indeed, from the commencement of the suit, put forward in his plaint an alternative case, and the defendant will have notice that he has more than one case to meet, and will not be taken by surprise. Where the plaintiff has not put forward an alternative case, he may have leave to amend his plaint and to state his case therein correctly, if the Court, thinks that he has rested his claim upon wrong grounds, from misinformation, ignorance of law or fact, mistake or misconstruction of documents. The Court will then make such an order as may seem to it just regarding the adjournment of the hearing and costs; but, as a general rule, a plaintiff must abide by his

¹ *Gavrilshankar v. Atmarani*, (1891) 18 Bom., 611.

² *Karimbhai v. Conservator of Forests*, (1890) 4 Bom., 222.

³ *Peari Mohan v. Nandimra Krishna*, (1900) 5 Cal. W. N., 273.

⁴ *Sukhldeo v. Lachman Singh*, (1902) 24 All., 456.

⁵ *Kokilawari v. Mohunt* (1887) 5 Cal., L. J., 527.

⁶ *Gopaldas v. Bhadradas* (1906) 33 Cal., 657. See *Ram v. Karami*, (1906) 4 Cal. L. J., 36. *Misri Jan v. Abdul*, (1907) A. W. N., 203.

⁷ *Per Lord Esher M. R.*, in *Bentley v. Black*, 9 Times Rep. 580; *Ann Prac.* 1904, 1, 355.

⁸ *Abdul Hossein v. Turner*, (1886) L. R., 14 I. A., 111; 11 Bom., 620. *Kunhamel v. Kutti*, (1891) 14 Mad., 167.

⁹ *Krishnaji v. Wamanaji*, (1894) 18 Bom., 144.

¹⁰ *Advocate-General of Bombay v. Punjabee*, (1894) 18 Bom., 551.

¹¹ *Dursun Sibho v. Prayag Ram*, (1877) 2 C. L. R., 539. See also *Ram Dao Mondal v. Indronomi*, (1898) 3 Cal. W. N., 325.

¹² *Krishna Churn v. Protal Chunder*, (1881) 7 Cal., 560; but see *Sundari v. Mudhoo*, (1887) 14 Cal., 592, where the plaintiff was allowed to succeed on a

strictly, for in a case in which a plaintiff claimed an easement by prescription, their lordships of the Privy Council dealing with the case as a special appeal

where plaintiff sued on custom and tried to prove it, he succeeded on the general law;³ and in Bombay, a suit for partition as co-parcener can be amended by adding a claim on the general law to one on the basis of a compromise.⁴ A plaintiff cannot allege that the defendant is his tenant and, failing to prove this, succeed on the ground that the defendant has not proved twelve years' adverse possession.⁵ A plaintiff may set up two proprietary rights in the alternative.⁶ A tenant cannot deny his landlord's title and sue to recover

variance between a plaintiff's title and the defendant's title, if the plaintiff has not been misled thereby or if the defendant's title should not be dismissed. The proprietor of a certain building and had leased a part of it to the defendant, who refused to pay the rent agreed on, and sued to eject him, it was held that, even though he had failed to make out his case as to the letting, he was entitled to a decree on his title.⁷

Mode of proof—The doctrine that a party must prove the particular title he alleges. Thus, if a person sues on a title and fails to prove it, and changing the title, succeeds, unless he proves the allegations in his plaint, or if some of them are untrue.¹¹

Amendment allowed—Amendments have been allowed in India in the following cases.—In an action on promissory notes brought under Act V, 1866, defendant got leave to appear and defend, and the suit was dismissed on the ground that part of the consideration for the notes was illegal; the plaint was amended in appeal so as to recover so much of the consideration as was not illegal.¹² A suit for khas possession of a one-third share was allowed

³ *Dass Chunder v Issur Chunder Nath*, (1878) 3 Calo., 221, *Goluck Chunder v.*

³ *Rup Singh v. Bajant*, (1885) 7 All., 1; L. R., 11 I. A., 155.

⁴ *Becharji v. Pujari*, (1890) 14 Bom., 31, p. 47.

⁵ *Haji Khan v. Baldeo Das*, (1902) 21 All., 90.

⁶ *Uma Churn Ghose v. Dithwa Nath Ghose*, (1893) 3 Calo. W. N., cxlii.

⁷ *Lalu Gagal v. Motan*, (1893) 17 Bom., 631.

⁸ *Ranchordas v. Maneklal*, (1893) 17 Bom., 618.

⁹ *Balmakund v. Dalu*, (1903) 23 All., 493.

¹⁰ *Rash Beharce v. Nobaye*, (1869) 11 W. R., 465.

¹¹ *Lakshman v. Hari Dinkar*, (1880) 4 Bom., 681.

¹² *Joseph v. Solano*, (1872) 18 W. R., 424; following *Mohammud Zahoor v. Rutta Koer*, (1866) 11 Moo. L. A., 469; and see *Proby v. Bell*, (1873) 20 W. R., 6.

to be changed into one for joint possession ;¹ a claim of rent in kind to rent in money.² In a suit for a declaration of title it appeared in the course of the trial that the defendant was in possession of part of the property. The plaintiff was permitted to pay additional stamp duty, and amend the plaint by adding a prayer for possession.³ In a suit for specific performance of a contract, it was held that amendment of the plaint so as to make it include a claim for a refund of the earnest-money should have been allowed, although not asked for till a late stage of the case.⁴ In case of a defective verification, the plaintiffs should be allowed an opportunity of amending the plaint by making a proper verification.⁵ An amendment by striking off the names of some of the raiyats of a village, who had been joined as co-plaintiffs in a suit brought by a person to restrain interference with a right vested in him severally as well as jointly with the other raiyats, was allowed.⁶ In a suit for collision originally filed against the owner of a ship, the plaint was allowed to be amended by adding the ship as a party defendant.⁷

Relief claimed.—(The relief claimed in a plaint is not altered, if it cannot be altered, and if it is not altered, it cannot be altered.)⁸ It is irrelevant to the relief claimed⁹ where a reversioner sued to have it declared that certain alienations made by a Hindu widow were not binding, and pending appeal the widow died, it was held that he could not be allowed to claim possession.¹⁰ But when the plaintiff sued for a declaration that the defendants had no right to certain land and when pending the proceedings he purchased the land, it was held that he was not disentitled to the declaratory decree prayed for.¹¹ In a suit for confirmation of possession and to set aside deeds, although the confirmation was refused, the deeds were set aside;¹² and a plaintiff who has been dispossessed after filing a suit for confirmation of possession, may add a prayer for possession.¹³

Agreement.—In a suit on settlement of account and an agreement to pay if the agreement is denied, plaintiff can fall back on the current account,¹⁴ and where in a suit for maintenance an agreement is put in and it is asserted that the suit must lie on the agreement and stand or fall by it, otherwise it should not be used in evidence, the objection must be taken in the Court of first appeal.¹⁵

Confirmation of possession.—A suit for confirmation of possession has been changed into one for recovery of possession.¹⁶

¹ *Raj Kishore v. Huree Mohun*, (1873) 19 W. R., 195 (disapproving *Bejoynath v. Luckhee Monoo Deba*, (1869) 12 W. R., 248; but see *Nila v. Sonai*, (1874) 21 W. R., 422 above.)

² *Bibee Jan v. Bhapl*, (1874) 21 W. R., 433.

³ *Abulqadar v. Mahomed*, (1892) 15 Mad., 15.

⁴ *Ibrahimdad v. Fletcher*, (1897) 21 Bom., 327.

⁵ *Fatch Chand v. Mansab Rai*, (1898) 21 All., 412.

⁶ *Venkatachala v. Kuppu Sami*, (1898) 11 Mad., 42.

⁷ *Bombay and Persia Steam Navigation Co. v. Shepherd*, (1888) 12 Bom., 237.

⁸ *Pulamada v. Ravuthu*, (1888) 11 Mad., 94.

⁹ *Ramchandra v. Vasudev*, (1886) 10 Bom., 451.

¹⁰ *Ram Singh v. Depy. Commr. of Bara Banki*, (1889) L. R., 17 I. A., 54; 17 Cal., 444.

¹¹ *Covinda v. Peramdevi*, (1889) 12 Mad., 130.

¹² *Wamanrao v. Rustomji*, (1897) 21 Bom., 701. See "SPECIFIC PERFORMANCE."

¹³ *Thakoordeen v. Ali Hossein*, (1873) L. R., 1 I. A., 192; 13 B. L. R., 427.

¹⁴ *Mellus v. Vicar of Malabar*, (1878) 2 Mad., 295.

¹⁵ *Sheopershad v. Juggernath*, (1882) L. R., 10 I. A., 74; 13 C. L. R., 266.

¹⁶ *Ahmed Hossein v. Nihaluddin Khan*, (1883) 9 Cal., 945; L. R., 10 I. A., 45.

¹⁷ *Abdoolah v. Mufseeooddeen*, (1871) 16 W. R., 27; *Amir Hossein v. Imambandi*, (1882) 11 C. L. R., 443; *Champu v. Ums*, (1882) 11 C. L. R., 431; *Rash*

Possession, Foreclosure, Redemption.—A suit for possession has been changed into a suit for foreclosure,¹ a suit for possession into one for redemption.² So, a suit for interest due on a mortgage debt payable on demand, into one for an account and payment of what remains due on the mortgage as to the filing of the plaint;³ a suit by a mortgagee for possession of his mortgagor's share in the family property into a suit for partition;⁴ a suit by a mortgagor to enforce his lien on the mortgaged property into one for compensation for breach of contract.⁵ As a rule, in a claim for confirmation of possession under a certain title, the title cannot be changed. Otherwise, when the claim is for possession, when he can succeed on proof of adverse possession alone,⁶ and the plaintiff is bound to prove the title set up affirmatively;⁷ but 12 years' adverse possession is sufficient for a declaration to hold rent free.⁸

Wrong parties.—Amendment should be allowed where the defendant is wrongly described,⁹ or parties are changed.¹⁰

Retrait.—A suit under Act VIII B. C., 1864, could be changed into an ordinary civil suit.¹¹

Special appeal.—Amendment is a matter within the discretion of the Court, and its refusal is no ground for special appeal.¹²

18. If a party who has obtained an order for leave to

amend does not amend accordingly within

Failure to amend after
order.

the time limited for that purpose by the
order, or if no time is thereby limited

then within fourteen days from the date of the order, he shall
not be permitted to amend after the expiration of such

Whitson v. Nuthoo, (1873) 34 W. R., 301; *Kydeo Nath v. Mohesh Chunder*, (1870) 35 W. R., 104; *Abdul Kader v. Mahomed*, (1892) 13 Mad., 13; not so, in *Abdullah v. Mujumdar*, (1870) 13 W. R., 286, and *Sansar v. Indrasun*, (1870) 35 W. R., 6; *Vinayput v. Sukerson*, (1879) 4 Cal., 46; *Narayana v. Bhankumant*, (1892) 13 Mad., 233.

¹ *Hupelund v. Kachitras*, (1882) 8 Bom., 423; *Kasamunumias v. Nitratas*, (1882) 8 Cal., 70; *Nitikan v. Anesh*, (1886) 12 Cal., 414; L. R., 12 I. A., 171; *Dallabuldas v. Lakshmin Das*, (1886) 10 Bom., 88; but see *Murugiser v. De Soysa*, (1891) App. Cas., p. 69.

² *Railabai v. Shyamrao*, (1881) 5 Bom., 168; *Sakany v. Virupakshipa*, (1883) 7 Bom., 140; but see *Dingopal v. Belskeo*, (1880) 5 Cal., 269.

³ *Annapa v. Ganapati*, (1881) 3 Bom., 181.

⁴ *Krishnaji v. Sitarani*, (1881) 5 Bom., 496.

⁵ *Mahesh Singh v. Chauharia Singh*, (1882) 4 All., 213; *Sheonarain v. Jai Gobind*, (1882) 4 All., 281.

⁶ *Man Gobind v. Umbika*, (1871) 16 W. R., 218; *Das Chunder v. Jesur Chunder*, (1878) 3 Cal., 221; *Jagrani v. Ganeshi*, (1880) 3 All., 435.

⁷ *Toral Ally v. Mahomed Tukkee*, (1873) 19 W. R., 1; *Goluck Chunder v. Nando Coomarr*, (1879) 4 Cal., 699, and his possession—*Takoordeen v. Ali Hossein*, (1873) L. R., 1 I. A., 192; 13 B. L. R., 437; *Terietput v. Sudersan*, (1879) 4 Cal., 40.

⁸ *Alday Churan v. Kally Pershad*, (1880) 5 Cal., 919. See cases under "SPECIFIC TITLE," O. VI. r. 17 and O. VII. r. 11.

⁹ *Maharaja of Vizianagram v. Lakshmi Challaya*, (1873) 12 B. L. R., 443.

¹⁰ *Kelarnauth v. Protap Chunder*, (1881) Cal., 626; *Delhi Bank v. Miller*, (1871) 7 B. L. R., App., 63; *Muhammad Yusuf v. Himalaya Bank, Ltd.*, (1896) 18 All., 193.

¹¹ *Hand Chunder v. Bykuntanath*, (1873) 19 W. R., 61.

¹² *son & Co. v. Nulho Digwar*, (1893) 10 W. R., 87.

limited time as aforesaid or of such fourteen days, as the case may be, unless the time is extended by the Court.

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If a party makes amendments other than those ordered stringent orders as to Costs may be made¹

¹ See *Blackmore v. Blackmore* W. N., (1879) 175; *Boxers v. Colter*, 50 L. T. 321. *Ann. Prac.* (1908) i. 363

ORDER VII

Plaint

Particulars to be contained in plaint

1. The plaint shall contain the following particulars :—

- (a) the name of the Court in which the suit is brought ;
- (b) the name, description and place of residence of the plaintiff ;
- (c) the name, description and place of residence of the defendant, so far as they can be ascertained ;
- (d) where the plaintiff or the defendant is a minor or a person of unsound mind, a statement to that effect ;
- (e) the facts constituting the cause of action and when it arose ;
- (f) the facts showing that the Court has jurisdiction ;
- (g) the relief which the plaintiff claims ;
- (h) where the plaintiff has allowed a set-off or relinquished a portion of his claim, the amount so allowed or relinquished ; and
- (i) a statement of the value of the subject-matter of the suit for the purposes of jurisdiction and of court-fees, so far as the case admits.

Act XIV of 1882, sect. 50 This rule applies to H. C. and Prov S. C. C.

Plaintiff Corporation—Suits by or against Corporations are provided for under Order XXIX post, but it does not seem to be stated anywhere in this Code as to what companies or associations are to be regarded as "Corporations" within the meaning of these Rules. Presumably associations registered under the Indian Companies Act or other Indian Statutes may be so regarded, and

Case does not say so in as many words, this has for very many years been the practice.¹

On the other hand an unregistered or unincorporated company must disclose the names of its members when suing.²

¹ But see *Campbell v. Jackson*, (1883) 12 Cal. 41; the report of the judgment of Yield J. in this case is a little difficult to follow.

² *Ram. v. Doss Gera v. Stephenson*, (1868) 10 W. R. 366.

³ *Koijl v. Chundler v. Illis*, (1867) 9 W. R. 45 and see notes to O. XXIX post.

Firms—See O XXX *fest*

Description—To describe the plaintiff as "A B, an infant, residing in Chupre Road in the Town of Calcutta," is not a sufficient description of his place of abode nor is it sufficient under this section to describe the defendant as "formerly of Calcutta," without alleging that the plaintiff has been unable to ascertain his place of residence more definitely.¹ Giving the initials of the parties is not a sufficient compliance with this rule.² In a plaint the Manager of M Bank began thus—"George Henry Webb, Manager of the above named plaintiff's business, states as follows," and verified it thus:—"For the M Bank, Limited G H Webb, Manager" *Held*, the Bank and not Webb was plaintiff.³

Agent—When a person sues on behalf of his principal under a power of attorney, the principal's name should appear as plaintiff.⁴

Official Liquidator—In a plaint, the plaintiff was described as "The Official Liquidator, Himalaya Bank, Limited, in liquidation." It was subsequently amended so as to read—"The Himalaya Bank, Limited, in liquidation, plaintiff" *Held*, by the Full Bench, overruling *Ghulam Muhammad v. Himalaya Bank*,⁵ that the plaint as originally filed was valid in law.⁶

Idol—A suit relating to property alleged to belong to a temple cannot be brought in the name of the idol of the temple.⁷

Defendants—The description contemplated by the Code includes all the

: Manca Sultan Bahadur
seek to amend, but did not.
Court, that with the excep-
natter of description than
Council, the Judge was
it on non compliance, as

Corporation—A corporate body should be sued in its corporate name. A suit against "A B," agent of the Corporation, is bad.⁸

Unincorporated Company.—In the case of an unincorporated or unregistered company, the names of the persons composing it must be set forth as a rule,⁹ but if the plaintiff cannot find out the names, he may sue the company in the name in which they are carrying on business, stating his inability to give a better description.¹¹

¹ *Soloman v. Abdool Aziz*, (1879) 4 C L R, 366.

² *Marks v. Tellico*, (1900) 5 Cal. W. N., 1211.

³ *Mussoorie Bank v. Barlow*, (1887) 9 All, 183.

⁴ *Choonce Sookul v. Hur Pershad*, (1869) 1 All. H. C, 193.

⁵ *Ghulam Muhammad v. Himalaya Bank*, (1895) 17 All., 292.

⁶ *Muhammad Yusuf v. Himalaya Bank*, (1896) 18 All., 193.

⁷ *Thakur Raghunathji v. Shah Lal Chand*, (1897) 19 All., 330.

⁸ *See* —

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⁹ *Nubeen Chunder v. Stephenson*, (1871) 15 W. R., 534; *Mohendronath Mookerjee, Overseer*, (1868) 9 W. R., 206.

¹⁰ *Pulin Behari v. Watson*, (1864) B. L R., (F. B.) 904, p. 966.

¹¹ *Koylash Chunder v. Ellis*, (1867) 8 W. R., 45; *Cannon v. Koylash Chunder*, (1876) 23 W. R., 117. But it was held otherwise in *Ganesha Singh v. Mundi Forest Co*, (1899) 21 All, 346. As to Foreign Companies see *supra* p. 502.

Cause of action.—The plaint must include all the existing grounds on which the plaintiff can succeed.¹ The different titles should be set forth in the alternative, otherwise the title which has been put forward will alone be put in issue, and if the plaintiff is not successful, a second suit will be barred.² And when in an action in ejectment against a tenant holding over, the owner failed to prove the lease, and he did not amend; *held*, he could not fall back on his general title, and the suit was dismissed.³

A defendant is entitled at the earliest stage of the hearing to obtain the declaration of the Court upon the question whether the plaint discloses a cause of action.⁴

Inconsistent claims.—A claim in the plaint to set aside a document as a forgery cannot be combined with a subsequent claim to set it aside on the ground that no consideration passed or undue influence or fraud had been practised on the executant,⁵ and where an adoption was denied in the first Court, the plea that the adoption, if any, was only conditional was not allowed.⁶

Partition.—As to when it is not necessary to ask for partition of the whole family property, see *Subbarazu v. Verkataratnam*.⁷

Pre-emption.—The omission in a plaint, in a suit to enforce the right of pre-emption, of any allegation that the plaintiff is ready and willing to pay any price fixed by the Court is fatal to the suit, and the Court is not bound to allow an amendment of the plaint after the suit is finally disposed of.⁸

Declaratory decree.—In a suit for a declaratory decree, the title and the circumstances requiring the declaration should be set forth.⁹ Such a suit is maintainable, even though the land in question is not properly described.¹⁰

Where and when it arose.—In the case of *Perihad Sen v. Rajendra Kishore Sing*¹¹ their lordships of the Privy Council would be justified in compelling the action was not barred and see *Sulu* O. VII r 11 are imperative, and the ground of limitation at any stage. Where a plaint discloses no cause of action, a Court is justified in examining the pleadings on both sides, and from their examina-

¹ *Premannud v. Ram Charn*, (1873) 20 W. R., 182; *Denobundhoo v. Kristomonee*, (1877) 2 Cal., 152.

² *Kalidhan v. Shiba Nath*, (1882) 8 Cal., 493, p. 501; but see *Decharji v. Pujaji*, (1890) 14 Bom., 31; *Jibunt v. Shib Nath*, (1892) 8 Cal., 819; *Amanat v. Imdad Hussain*, (1887) L. R., 15 I. A., 106, 15 Cal., 800.

³ *Ramchandra v. Vasudev*, (1886) 10 Bom., 451. But see *Bajmakund v. Dalu*, (1903) 25 All., 127; action alleged by 403. See also *M. v. Ishan Chunder* 12 W. R., 245.

⁴ *Umamoyee Dassee v. Rajkrishna Nundun*, (1893) 3 Cal. W. N., 220.

⁵ *Mahomed Buksh v. Hossein*, (1887) L. R., 15 I. A., 86, 15 Cal., 684; *Iyyappa v. Ramalakshamma*, (1890) 13 Mad., 549.

⁶ *Narayanasami v. Ramasami*, (1891) 14 Mad., 172; but see *Owen v. Morgan*, 35 O. L., 492; *Howe v. Smith*, 27 C. D., 89, p. 96.

⁷ (1892) 13 Mad., 234.

⁸ *Durga Prashad v. Nawazish Ali*, (1876) 1 All., 591.

⁹ *Khadim Ali v. Nazee Begum*, (1871) 3 All. H. C., 262.

¹⁰ *Rajnarain v. Shamaumula*, (1879) 26 Cal., 845; 4 Cal. W. N., 162. See also *Azimuddin Khan v. Zia ul-mulla*, (1882) 6 Bom., 329, concerning the setting aside a sale on the ground of misrepresentation.

¹¹ *Perihad Sen v. Rajendar Kishore Sing*, (1867) 12 Moo. I. A., 292; 12 W. R., 18.

¹² *Saluji Kesraji v. Rajanji*, (1864) 2 Bom. H. C., 162 [approved of in *Balava v. Shudgouda*, (1870) 7 Bom. H. C., 101].

tion eliciting and fixing the real issue and determining the case on the trial of such issue.¹ The date and place of the accrual of a cause of action must be inserted in a plaint.²

Effect of statement in plaint—A statement in a plaint that the plaintiff is insane is not evidence that he was excluded from inheritance by reason of insanity.³

Objections to description—Objections for want of description should apparently be taken at the earliest opportunity and before first hearing.⁴

Valuation—The valuation of a suit must be taken from the plaint, even if it be found that a particular item has been improperly claimed so as to oust the plaintiff in favour of another.⁵

Forms of plaint—See Schedule I App. A.

2 Where the plaintiff seeks the recovery of money, the plaint shall state the precise amount claimed.
In money suits

But where the plaintiff sues for mesne profits, or for an amount which will be found due to him on taking unsettled accounts between him and the defendant, the plaint shall state approximately the amount sued for.

Act XIV of 1882, Sect. 30 This rule applies to H. C. and Prov. S. C. C.

3 Where the subject-matter of the suit is immovable property, the plaint shall contain a description of the property sufficient to identify it, and, in case such property can be identified by boundaries or numbers in a record of settlement or survey, the plaint shall specify such boundaries or numbers.
When the subject-matter of the suit is immovable property

Act XIV of 1882, Sect. 30 This rule applies to H. C. and Prov. S. C. C.

Boundary—A suit to fix a boundary should show that the boundary has been transgressed.⁶ It has been held that a suit cannot be dismissed on the ground that the land in dispute, as described in the plaint, cannot be identified,⁷ or that the plaint does not contain a specification of the land in defendant's possession.⁸

¹ *Man Gobind v. Umbika's* Monce, (1871) 16 W. R., 218. See also *Secretary of State v. Vissu Rayan*, (1886) 9 M. L., 175; *Motu v. Gopal*, (1878) 2 Bom., 120; *Parmanand v. Shihab Ali*, (1849) 11 All. 453; *Jafar Husain v. Mashur*, (1892) 14 All., 193; *Kachmath v. Shendhu*, (1892) 16 Bom., 343.

² *Ram Prosad v. Sital Das*, (1901) 6 Calc. W. N., 533.

³ *Rau Bijai v. Jagatpal*, (1891) 18 Calc., 111; and see *Narappa v. Gajappa*, (1901) 2 Bom. H. C., 311.

⁴ *Rajnaram v. Universal Life Assurance Co.*, (1891) 7 Calc., 534, p. 602.

⁵ *Hamidunnessa v. Gopal Chandra*, (1896) 1 Calc. W. N., 536.

⁶ *Amceronunnessa v. Gopal*, (1874) 22 W. R., 131.

⁷ *Kazem Shiek v. Dinesh Shiek*, (1893) 1 Calc. W. N., 574.

⁸ *Razi Ali v. Purnanand*, (1870) 6 B. L. R. App., 81; 14 W. R., 474. See also *Jonab Ali v. Galam Assad*, (1874) 21 W. R., 187.

4. Where the plaintiff sues in a representative character, the plaintiff shall show not only that he has an actual existing interest in the subject-matter, but that he has taken the steps (if any) necessary to enable him to institute a suit concerning it.

Act XIV of 1882, sect. 50. This rule applies to H. C and Prov. S. C. C.

Representative capacity—If a Hindu sues as representing a joint family, he should state it in his plaint.¹ So, if a widow is sued as representative of her deceased husband, she should be so described,² and this is the general rule where a person is sued as a representative,³ unless he is the manager, and the debt is a family debt.⁴ Mahomedan executors need not take out probate before suing, unless there are several, and one wishes to sue alone; and the same rule applies to executors of Hindu wills since the passing of Act V of 1881.⁵ A suit against defendant described as Mrs Sarah G. Barlow, Mus-soorie, and stating in the body that she was executrix of the debtor, is a suit against her as executrix.⁶

Certificate of heirship—See s. 4, Act VII of 1889. The assignee of a deceased creditor cannot sue for the debt assigned without a certificate of heirship.⁷ A certificate may be granted for the collection of a specified debt or of specified debts;⁸ but not for the collection of part only of a debt.⁹ The Succession Certificate Act applies to suits in a Village Munsif's Court in Madras.¹⁰ A certificate is not required when the proceedings were instituted before the Succession Certificate Act came into operation.¹¹ An unliquidated claim sought by a widow who is the sole executrix of a debt due thereto, of heirship did not dis-
Curators' Act (XIX) of
No certificates requir-

¹ Gan Sarant v. Narayan, (1893) 7 Bom., 467.

² Girjharal v. Bai Shri, (1884) 8 Bom., 309; Loka Mahto v. Aghoree, (1890) 5 Cal., 144.

³ Sankaran v. Parvathi, (1889) 12 Mad., p. 437.

⁴ Hari Vithal v. Jaiaram (1890) 14 Bom., 597.

⁵ Krishna Kinkur v. Bai Mohun (1887) 14 Cal., 37; Krishna Kinkur v. Pan-
churam, (1890) 17 Cal., 272; Kashaya Lal v. Munni, (1896) 18 All., 260.
But see Fatawa v. Fatawa, (1883) 7 Bom., 298, in which it has been ruled that
an executor of a will of a deceased Mahomedan, since the date on which Act
V of 1881 has come into operation, cannot claim to represent the estate
of the testator, until taken out probate—otherwise with a Hindu
executor under the Wills Act—Munna v. Fatawa, (1894) 8 Bom., 241.
But see Bhagwan v. a Hindu, (1882) 6 Bom., 73. Where the executors
of a Hindu added, the heirs should be
represented in their
L. R., (1871) 8 B.
7 Cal., 594.

⁶ 9 All., 183.

⁷ Mad., 419.

⁸ 15 All., 45.

⁹ 19 All., 129.

¹⁰ Jay-chi, (1894) 21 Mad., 115.

¹¹ (1897) 16 Mad., 61; Fatch Chand v. Muhammad

279

22 Mad., 139

levamma, (1897) 20 Mad., 162; L. R., 24 L. A., 73.

20 Bom., 477

ed when the applicant's claim is for family property by right of survivorship,¹ or for a debt due to a family jointly,² or for debts falling due *after* the death of a deceased person.³ If rent sued for became due after the death of a deceased, it formed no part of his estate and no succession certificate is necessary.⁴ But in Bengal, rent is not a debt within the meaning of s. 4 of the Succession Certificate Act.⁵ A decree was given for the sale of certain mortgaged property, *held*, that this was not a decree against a debtor for payment of his debt, and that no certificate was required, and that it was doubtful whether the Act would apply in the case of a plaintiff substituted for a plaintiff, who having taken out a certificate had died.⁶ The legal representative of a deceased plaintiff may continue the suit without taking out any certificate of administration. All that the defendant can insist on in such a case is that representation shall be complete before decree.⁷

Hindu widow.—A Hindu widow may represent a son adopted during the litigation but not brought on the record,⁸ but on the death of one member of a joint Hindu family subject to Mitakshara law, his widow cannot represent him so as to make the joint property liable to his debts.⁹

5. The plaintiff shall show that the defendant is or Defendant's interest and liability to be shown claims to be interested in the subject-matter, and that he is liable to be called upon to answer the plaintiff's demand.

Act XIV of 1882, Sect. 50. This rule applies to II C and Prov. S. C. C.

The following illustration was given to explain this provision in the former Code

A dies leaving B his executor, C his legatee and D a debtor to A's estate. C sues D to compel him to pay his debt in satisfaction of C's legacy. The plaintiff must shew that B has causelessly refused to sue D, or that B and D have colluded for the purpose of defrauding C, or other such circumstances rendering D liable to C.

Compare the provision as to condition precedents and the pleading thereof in Order VI, r. 6.

It has been held that no suit is maintainable when instituted by a person in his capacity as the administrator of the Estate of a deceased person unless and until Letters of administration are issued to him to entitle him to sue in such representative capacity;¹⁰ but at the time of going to press the appeal against this decision is still pending.

¹ Jagmohanlal v. Alla Maria, (1895) 19 Bom., 338; Pateeluri v. Bhagwati Prasad, (1895) 17 All., 578; Pallamaraju v. Bapanna, (1899) 22 Mad., 380.

² Subramanian v. Rakku Servai, (1897) 20 Mad., 232; Venka-taramanna v. Venkayya, (1891) 14 Mad., 377; Beejraj v. Bhyra Persaud, (1896) 23 Cal., 912; Bissen Chand v. Chatrapat Singh (1896) 1 Cal. W. N., 32.

³ Nemdhari v. Bressary, (1897) 2 Cal. W. N., 591.

⁴ Ranehordas v. Bhagubhai, (1894) 18 Bom., 391.

⁵ Nagendra Nath v. Satadalbanshi, (1899) 26 Cal., 536; 3 Cal. W. N., 204.

⁶ Baidnath v. Shamasund, (1893) 22 Cal., 143.

⁷ Torregrosa v. Pragji, (1892) 16 Bom., 519.

⁸ Hari Saran v. Bhulaneswari, (1889) 16 Cal., 40; L. R., 15 L. A., 195.

⁹ Phoolbas Krouwar v. Lalla Jegeshur (1876) 1 Cal., 226; L. R., 3 L. A., 7. As to who represents property left by a widow, see Jamna v. Bhaishankar, (1892) 16 Bom., 233, p. 247; Ram Kishore v. Kally Kanto, (1881) 6 Cal., 479.

¹⁰ Adm. Genl. of Bengal v. Lalit Mohan Roy, (1908) 12 Cal. W. N., 738.

6. Where the suit is instituted after the expiration of the period ordinarily prescribed by the law of limitation, the plaintiff shall show the ground upon which exemption from such law is claimed.

Act XIV of 1882, sect. 50 This rule applies to H. C. and Prov. S. C. C.

Limitation —This rule is imperative. A plaintiff is bound to show on the face of the plaint that the cause of action accrued within the period of limitation,¹ and cannot take advantage of any ground of exemption from limitation which he has not pleaded.²

7. Every plaint shall state specifically the relief which the plaintiff claims either simply or in the alternative, and it shall not be necessary to ask for general or other relief which may always be given as the Court may think just to the same extent as if it had been asked for. And the same rule shall apply to any relief claimed by the defendant in his written statement.

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This rule introduces the English practice in respect of the relief to be prayed for in a plaint. It is no longer necessary or proper to insert claims for "further and other" general relief. The Courts will now grant such other or general relief as the plaintiff may be entitled to upon the facts proved always provided that it is not inconsistent with the relief expressly asked for.³

This last proviso has long been given effect to in the Courts of India.⁴ Relief not founded on the pleadings should not as a rule be granted. But where substantial matters which constituted the title of all the parties are touched in the issue and have been fully put in evidence and formed the main subject of discussion in the Court, this case does not come within the rule and a declaration of the rights of the parties, though not founded on the pleadings, may be given.⁵

Alternative reliefs —The fact that a plaintiff claims two alternative reliefs, inconsistent with each other, is no ground in itself for the dismissal of his suit.⁶ Whenever alternative reliefs are prayed for, the facts belonging to each should be separately set out.⁷

¹ *Brooke v. Giddon*, (1874) 21 W. R., 17.

² *Jagdishwar Roy v. Bajiram Mitter*, (1901) 31 Cal., 195, 8 Cal. W. N., 171. See also *Benode Bhary Mookerjee v. Raj Narain Mitter*, (1903) 30 Cal., 699; 7 Cal. W. N., 631.

³ *Cargil v. Power*, 19 C. D. p. 593; Ann. Prac., 1902, i, 276. See *Hira Lal v. Moti Lal* (1879) 5 B. L. R., 682.

⁴ *Kristo Mulaney v. Kally Pro-onno*, (1881) 6 Cal., 495; *Cockrell v. Dicken* 5, 2 Moo. L. A., 323. *Nodhar Chand v. Prannith* (1874) 21 W. R., 8.

⁵ *Gulab Rao v. Sitaram Kesho*, (1897) 2 Cal. W. N., 641, L. R., 25 I. A., 103. See also *Rasul Jehan v. Ram Narain* (1895) 22 Cal., 589.

⁶ *Jinn v. Mann* (1875) 14 All., 125. See *Narasappa v. Shesappa* (1893) 19 Bom., 323; *Phillips v. Phillips*, 4 Q. B. D. at p. 131, *re Morgan* 35 C. D., 492.

⁷ *Dary v. Garret*, 7 C. D., at p. 189, and see next rule.

8 Where the plaintiff seeks relief in respect of several distinct claims or causes of action founded upon separate and distinct grounds, they shall be stated as far as may be separately and distinctly. And the same rule shall apply where the defendant relies upon several distinct grounds of defence or set-off founded upon separate and distinct facts

R S O 20 r 7

See notes to r 7 *ante*

9. (1) The plaintiff shall endorse on the plaint, or annex thereto, a list of the documents (if any) which he has produced along with it; and, if the plaint is admitted, shall present as many copies on plain paper of the plaint as there are defendants, unless the Court by reason of the length of the plaint or the number of the defendants, or for any other sufficient reason, permits him to present a like number of concise statements of the nature of the claim made, or of the relief claimed in the suit, in which case he shall present such statements.

(2) Where the plaintiff sues, or the defendant or any of the defendants is sued, in a representative capacity, such statements shall show in what capacity the plaintiff or defendant sues or is sued.

(3) The plaintiff may, by leave of the Court, amend such statements so as to make them correspond with the plaint.

(4) The chief ministerial officer of the Court shall sign such memorandum and copies or statements if, on examination, he finds them to be correct.

Act XIV of 1882, sect. 58. This rule applies to H. C. and Prov. S. C. C.

List of documents—See O. VII rr. 14 and 15 *post*.

10. (1) The plaint shall at any stage of the suit be returned to be presented to the Court in which the suit should have been instituted.

(2) On returning a plaint the Judge shall endorse thereon the date of its presentation and return, the name of the party presenting it, and a brief statement of the reasons for returning it.

Act XIV of 1882, sect. 57. This rule applies to Prov. S. C. C. and to H. C. but not in the exercise of its ordinary or extraordinary original civil jurisdiction. See O XLII *r* 3 *post*

Appellate Court—Where an appellate Court decides that the lower Court has no jurisdiction to entertain a suit, it should return the plaint to the plaintiff, in order that it may be presented to the proper Court ¹

Appeal—Under Act XIV of 1882 The order of a Munsif returning a plaint on the ground that the subject-matter of the suit was beyond his jurisdiction was liable to revision ² it was not a decree³ though appealable as an order at last until the plaintiff filed it in the other Courts as directed ⁴ An order under this rule is now made expressly appealable under O XLIII *post*

Practice—In Bombay the practice under the former Code was not settled. On the appellate side and in the mofussil the plaint was returned, if the Court had not jurisdiction, even after the trial had been concluded ⁵ and even in second appeal ⁶ but otherwise on the original side ⁷ The Court ought not to dismiss a suit which is within this rule⁸ In Madras, the practice was the same as that in the Bombay Mofussil Courts ⁹ even if the Court of proper presentation is a Revenue Court ¹⁰ The decisions in Calcutta are to the same effect.¹¹ This seems also to have been the practice in the North-West Provinces ¹² A plaint praying for a declaration that a certain tax was illegal and also for damages for illegal entry into the plaintiff's house was presented to a first class Subordinate Judge The Judge amended the plaint by striking out the portion "regarding the relief other than the relief for damages" and returned the plaint for presentation to the Court of Small Causes *held*, that the Subordinate Judge was not justified in returning the plaint at that stage The shape in which the suit was originally instituted is the test of jurisdiction.¹³

Limitation—The date of suit must be taken to be that on which the plaint was originally filed.¹⁴

Rejection of plaint. **11** The plaint shall be rejected in the following cases:—

(a) where it does not disclose a cause of action :

(b) where the relief claimed is undervalued, and the plaintiff, on being required by the Court to

¹ *Daimahkor v. Bulakhi Chaku*, (1876) 1 Bom. 518. See also *Shurut Soonduree v. Khemkince*, (1866) 5 W. R., Act X. 87; *Malhab Churul v. Damooder*, W. R., (1864), 65.

² *Badami Kuar v. Dima Rai*, (1886) 8, All., 112.

³ *Mahabir Singh v. Behari Lal*, (1891) 13 All., 323.

⁴ *Bani Madhab Dass v. Jitendra Mohon Tagore*, (1907) 5 Cal. L. J., 580.

⁵ *Prabhakarbhat v. Vishwambhar*, (1894) 8 Bom., 313.

⁶ *Babaji v. Lakshminarai*, (1885) 9 Bom., 266.

⁷ *Anril v. Haridhar*, (1894) 8 Bom., 230.

⁸ *Partappa v. Nirbaladrappa*, (1903) 7 Bom. L. R., 393.

⁹ *Jivraju v. Salpurushotam*, (1884) 7 Mad., 171; *Kanda v. Konda*, (1885) 8 Mad., 62; *Chandu v. Kombu*, (1886) 9 Mad., 203; *Nagamma v. Subba*, (1888) 11 Mad., 197.

¹⁰ *Muttirulandi v. Kottayan*, (1887) 10 Mad., 211.

¹¹ *Prosad Dass Mullick v. Russek Lall Mullick*, (1891) 7 Cal., 157; *Bhadeshwar v. Gaurikant*, (1892) 8 Cal., 831; *Moshingim v. Mozari*, (1886) 12 Cal., 271; *Jaynath v. Lall Bahadur*, (1892) 8 Cal., 126; 10 C. L. R., 146.

¹² *Abdul Samad v. Hajimdro*, (1879) 2 All., 357.

¹³ *Motabhai v. Surat City Municipality*, (1896) 20 Bom., 675. But it was held otherwise in Madras *Krishnan v. Ravi Varma*, (1883) 8 Mad., 384.

¹⁴ *Kheilat Chandra v. Naraschunni-sa*, (1871) 16, W. R., 47.

correct the valuation within a time to be fixed by the Court, fails to do so.

- (c) where the relief claimed is properly valued, but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so;

- (d) where the suit appears from the statement in the plaint to be barred by any law.

Act XIV of 1857, sect 54. This rule applies to H. C. and Prov. S. C. C., but clauses (b) and (c) do not apply to H. C. in the exercise of its ordinary or extraordinary original civil jurisdiction. O. XLIX *post*.

For the purposes of suits relating to land in the Bombay Presidency, the following clause has been added to the Code of Civil Procedure by s. 10 (2) of the Bombay Record of Rights Act, 1903: "IV of 1903), viz—' (c) In any suit to which s. 10 of the Bombay Land Record of Rights Act, 1903, applies, if the certified copy therein mentioned is not annexed to the plaint and the plaintiff on being required by the Court, fails to do so within the time allowed by the Court."

Insufficient stamp—*Quere*, if this covers a case where there is no stamp at all on the document.¹

Can reject—A Judge can reject a plaint under this rule² at any stage of the suit.³

Not rejected—A plaint should not be rejected because a wrong date is given for the cause of action, provided the action is not barred,—it should be rejected if the plaintiff fails to supply the stamp required; nor should it be rejected if the Government order, was not granted and also sought for the position of a *mustagir* and to set aside the executive orders of the Commissioner and the Deputy Commissioner, held, reversing the order of the Lower Court that upon the allegations made in the plaint, the suit ought to have been tried and the plaint could not be rejected on the ground of the suit being barred by any positive rule of law.⁴

Rejected—A Judge, in considering whether he should admit a plaint or reject it as showing no cause of action, should not refer to documents or facts not stated in or annexed to it, nor interrogate the plaintiff; but should confine himself to the plaint itself.⁵

¹ *Bishnath v. Jagannath*, (1891) 13 All., 305.

² *Valiya Kesava v. Suppannair*, (1878) 2 Mad., 308.

³ *Keshava Sankar v. S. Sankar Sankar*, (1890) 10 All. 100.

⁴ *Sheoraj Singh v. Nur Khan*, (1873) 7 All. H. C., 334.

⁵ *Patuck v. Ramsoomrun*, (1869) 1 All. H. C., 17.

⁶ *Prabhakarabhat v. Vishwambhar, Roy Nandepur*, (1875) 23 W. R., 263; *W. R.*, 335; but see *Tufani Singh*,

⁷ *Rayachaul*, (1864) 2 Bom., H. C., 369.

⁸ *Nawab Singh v. Charan Rana*, (1901) 6 Calc. W. N., 411.

⁹ *Girdharlal v. Jagannath*, (1873) 10 Bom. H. C., 182.

No cause of action—A plaint should be rejected and not returned, if it does not disclose a cause of action;¹ but where a cause of action exists, the plaint should be amended, in case it is mis-stated,² or not sufficiently disclosed;³ but an appellate Court cannot reverse a decree solely on this ground without being satisfied that no such cause of action was established by the evidence.⁴ In a suit for contribution, which was decreed by the first Court but dismissed by the lower appellate Court, on the ground that the plaint did not specify the amount each defendant was liable to contribute, held, that the Judge should have tried to ascertain that from the evidence before dismissing the suit.⁵ So, if a plaint is presented by a person not authorised to do so, it should be rejected.⁶ When a plaint in a Civil Court alleges facts, which if true, would show that dispute or matter involved in the suit was one to which s. 93 or s. 95, Act XII of 1881 (the N. W. P. Rent Act) would rule (c), or possibly in some cases is different from suit sanctioned of 1863), the plaint should be rejected.⁷

Form of order—Rejection, not dismissal, of the suit is the proper order to pass.⁸ A plaint cannot be rejected in part.⁹

Imperfect description of land—This rule does not authorize the dismissal of a suit on the ground that the land in dispute as described in the plaint cannot be identified.¹⁰

Appeal under-stamped.—The procedure of this rule has been followed in appeals, and where an appeal unduly stamped was filed, it was held that the Judge should not have dismissed the suit at once, but should have allowed the appellant an opportunity of filing the proper stamp.¹¹

Time fixed by the Court—When a Court fixes a time under cl. (b) or cl. (c) it must be a time within limitation. This rule does not give a Court any power to extend the ordinarily prescribed time of limitation for suits.¹² If the

¹ *Nagar Mal v. Macpherson*, (1880) 3 All., 766.

² *Daboujhi v. Lomghy* (1869) 11 W. R., 223.

³ *Luckhee Pree v. Brindaban*, (1869) 12 W. R., 313.

⁴ *Shah Ahmed v. Tarek Bai*, (1881) 7 Cal., 313. Followed in *Saibultra v. Karali*, (1907) 2 Cal., L. J., 535.

⁵ *Dhano v. Pallan*, (1869) 11 W. R., 131.

⁶ *Venkatray v. Madhavray*, (1887) 11 Bom., 53.

⁷ *Tarupit v. Ram Itatan*, (1893) 15 All., 357.

⁸ *Sridhansa v. Venkata*, (1888) 11 Mad., 118.

⁹ *Muhammad Salik v. Muhammad Jan*, (1889) 11 All., 91; *Balantrao v. Balmasbharai*, (1889) 13 Bom., 517; *Shridhar Hari v. Chima*, (1873) 10 Bom., H. C. 17; but see *Joynti v. Lall Bihadur*, (1882) 8 Cal., 126; and compare *Gingga Narain v. Tuluckram*, (1887) L. R., 15 L. A., 119; 15 Cal., 533.

¹⁰ *Raghubans v. Jyoti*, (1907) 29 All., 225.

¹¹ *Razem v. Danesh*, (1896) 1 Cal., W. N., 561; *Jaladhar Mandal v. Kuno Mandal*, (1896) 1 Cal., W. N., cxxxix. See also *Durga Churn v. Kala Chaml*, (1902) W. N., 615.

¹² *Nasrutt Ali v. Mahomed Kuno*, (1869) 11 W. R., 541; *Parshotam Lal v. Lachman*, (1887) 9 All., 252; *Chenappa v. Rajanathi*, (1892) 15 Mad., 29; *Govind v. Balkaran Rai v. Golend Nath*, (1896) 12 All., 129.

¹³ *Jahid Prasad v. Bhoon Singh*, (1893) 15 All., 67. See also *Venkatra Mayya v. Kishnaya*, (1897) 20 Mad., 319; *Durga Singh v. Bisheshwar*, (1902) 24 All., 718; *Govind*, *Hari Mohan v. Naimuddin*, (1903) 20 Cal., 41; *Surendra Kumar v. Kuno Bishary*, (1900) 27 Cal., 811; 4 Cal., W. N., 818; *Raj-kishori Madan Mohan Singh*, (1901) 31 Cal., 75.

deficit court-fees are not paid within the time fixed by the Court, the plaint even though registered must be rejected.¹

Court Fees Act—By s. 12 of the Court Fees Act, every question relating to valuation for the purpose of determining the amount of fee chargeable on a plaint or memorandum of appeal shall be determined by the Court in which the document is filed and the decision is final subject to revision.²

Appeal—This does not prevent an appeal to determine the class of suits in which a particular suit ranks—in Madras;³ or in Calcutta.⁴ Otherwise, in Bombay.⁵

Excess and additional stamps—Where excess stamps have been filed in consequence of an overvaluation, they should be returned;⁶ and when a plaint is returned in order that it may be presented in the proper Court no additional Court-fees are payable.⁷

Appeal—An appeal lies from orders passed under this rule as they come within the definition of a decree; see sect. 2 *ante* and such orders appear to be subject to revision.⁸ An error in valuation not affecting jurisdiction is not one on which to base an appeal;⁹ but where it affects the jurisdiction of the first Court, the appellate Court may dismiss the suit, and return the plaint.¹⁰ When the suit was valued at Rs. 130, it was held the appeal from an order rejecting the plaint lay to the District Judge and not to the High Court.¹¹

12 Where a plaint is rejected the Judge shall record all order to that effect with the reasons for such order.

Procedure on rejecting plaint

Act XIV of 1882, Sect. 55. This rule applies to H. C. and Prov. S. C. C.

An officer of the Court cannot reject a plaint, it must be done by the Court.¹²

13 The rejection of the plaint on any of the grounds hereinafter mentioned shall not of its own force preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action.

Where rejection of plaint does not preclude presentation of fresh plaint

¹ *Brahmamoyi Dasi v. Andri St.*, (1900) 27 Cal., 376. It has held that the Court fixed has expired—*Bhagat v. Bhat*, (1900) 27 Cal., 376. *See contra*, *Mahammad v. Poll in Chatai Pal v. Safatulla* (1905) 9 Cal., 421, (1906) 4 Cal. L. J., 421.

² *Annammalai Chetti v. Cloete*, (1892) 4 Mad., 204; *Kanaram v. Komappan*, (1891) 14 Mad., 169.

³ *Omrao v. Jones*, (1892) 12 C. L. R., 148; and *North West-China v. Ram Dial*, (1876) 1 All., 360; *Bilkaran v. Gobind Nath*, (1890) 12 All., 129.

⁴ *Anope v. Mulehand*, (1895) 9 Bom., 355. But see *Kashinath v. Govinda*, (1891) 15 Bom., 82; *Balvantrao v. Bhima-bankar*, (1899) 13 Bom., 517.

⁵ *Grant*, in the matter of, (1870) 14 W. R., 47.

⁶ *Prabhakaribhat v. Vishwambhar*, (1884) 8 Bom., 313.

⁷ *Vithal Krishna v. Balkrishna*, (1886) 10 Bom., 610.

⁸ *Kaladdin v. Raghoy*, (1862) 1 Bom. H. C., 62.

⁹ *Joynath v. Lall Bahadur*, (1892) 8 Cal., 126. As to the difference between this clause and s. 10 of the Court Fees Act, see the case of *Valiya Kesava v. Suppannair*, (1878) 2 Mad., 303.

¹⁰ *Amba v. Pranjivan Das*, (1895) 19 Bom., 199.

¹¹ *O'Kinealy C. P. C. 6th Ed. 202*

corresponding section covered every document used in evidence, but in the case of *Kamenee Dossee v. Hurromoney Dossee*,¹ it was decided that the prohibition only extended to promissory-notes and bills-of-exchange which are in their nature the essence of the action, and on which the plaint is founded. In that case, which was to recover certain jewels, the defendant objected to the admission of a list of the jewels on the ground that it should have been filed with the plaint; the objection was overruled.

Not produced with plaint.—But the omission to produce a document when instituting a suit is no ground for rejecting the plaint.²

Received in evidence.—Merely giving a document to a witness to refresh his memory is not receiving it in evidence.³

Appeal.—The reception of evidence afterwards with leave of the Court is not a ground of appeal,⁴ it does not affect the merits of the case;⁵ but the refusal to receive it may be a good ground.⁶ An appellate Court has no right to refuse to admit on technical grounds a document which has been received and read in the Court below without objection.⁷

¹ *Kamenee Dossee v. Hurromoney Dossee*, Coryton, 151.

² *Rayachand, ex parte*, (1864) 2 Bom. H. C., 369; *Gopal v. Vishnu*, (1893) 22 Bom., 971.

³ *Ramji v. Rangayya*, (1862) 1 Mad. H. C., 164.

⁴ *Tota Ram v. Bickmune*, (1869) 13 Moo. L. A., 77; 3 B. L. R., P. C., 34.

⁵ *Ram Chunder v. Chunder Coomar*, (1869) 13 Moo. L. A., 181, p. 198; *Minakshi v. Velu*, (1855) 8 Mad., 373.

⁶ *Mahadevappa v. Srinivasa*, (1842) 4 Mad., 417; *Devadas v. Pirjada*, (1884) 8 Bom., 377.

⁷ *Akbar Ali v. Bhyra Lal*, (1881) 6 Cal., 668.

ORDER VIII.

Written Statement and Set-off.

1. The defendant may and if so required, by the Court, shall at or before the first hearing or within such time as the Court may permit, present a written statement of his defence.

Written statement

Act XIV of 1882, sec. 110

This rule applies to II C and Prov S C C

The defendant—A written statement cannot be received from one who is not a party.¹

Presumption of authenticity.—*Prima facie* credit must be given that a pleading proceeds from a person properly qualified to represent the person on whose behalf it is filed,² and the mention of a person in pleadings purporting to be filed by him is evidence that he was a party to the suit.³

Time of presentation.—Written statements should not be received after the first hearing (which should be fixed so as to give the parties due and reasonable time to prepare them),⁴ except under the circumstances described in rules 6 and 9 and in answer to written statements required by the Court. In a suit for wrongful dismissal, if a defendant wishes to give evidence of a specific transaction in justification for dismissing the plaintiff, which he becomes aware of after he has filed his written statement, he should (before first hearing) file a supplementary written statement setting it forth.⁵

A defendant may plead his own fraud—In a suit for possession on a registered deed of sale, the defendant pleaded that the deed was a sham deed without consideration, and executed to save the land from his creditors; *held*, that the plea was good, and that it was open to the defendant to show that the real transaction between himself and the plaintiffs was to defraud, either a third party or his creditors generally,⁶ but he cannot set up as a defence an agreement the object of which, being to stifle a prosecution, is bad in law.⁷

Written statements when not allowed—Except in the case of a set-off under rule 6 of this order no written statement may be received by a Presidency Small Cause Court unless required by the Court itself.—Act XV of 1882, s. 24. But see notes to s. 7 p. 33 and s. 8, p. 34. In suits for recovery of rent in Bengal, a written statement may not be filed without the leave of the Court,—Act VIII of 1885, s. 148 (c).

2. The defendant must raise by his pleading all matters which show the suit not to be maintainable, or that the transaction is either

New facts must be specially pleaded.

¹ *Surnomoyee v. Bykunt*, (1876) 25 W. R., 17.

² *Soorendronath v. Heeromonee*, (1864) 10 W. R., P. C., 35.

³ *Radha Parshad v. Lal Saha*, (1899) 17 I. A., 150; 13 All., 53.

⁴ *Lokhenath v. Sobanath*, (1866) 5 W. R., Act X., 39; *Munchershaw v. New Dhurumsey Co.*, (1880) 4 Bom., 576.

⁵ *Munchershaw v. New Dhurumsey Co.*, (1880) 4 Bom., 576 *supra*; and see rule 8 *post*.

⁶ *Babaji v. Krishna*, (1894) 18 Bom., 372; *Preonath Koer v. Kazi*, (1903) 8 Calc. W. N., 620.

⁷ *Dalsukhran v. De Bretton*, (1904) 23 Bom., 326.

void or voidable in point of law, and all such grounds of defence as, if not raised, would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the plaint, as, for instance, fraud, limitation, release, payment, performance, or facts showing illegality.

This rule as well as rules 3, 4, 5 (except the proviso) and 7 are taken from the English Rules and Orders. They correspond almost word for word with rules 15, 17, 19 and 13 respectively of (English) Order XIX, which is an Order relating to 'Pleading generally' and rule 7 of this order corresponds exactly with the latter half of rule 7 of (English) Order XX which is an order relating to 'Statement of claim'. It was laid down in India many years ago that the object of written statements is to state facts, not the legal points in dispute between

Heretofore the only Code have been those laid down by sections 114, 115, and 116 of Act XIV of 1862, that it should be brief and not argumentative and should contain only a statement of the material facts (section 114) that a writ or contained irrelevant matter that it should be verified in sections no longer find a place provision is to be found in Order VI rr 2, 3, 14, 15, and 16 under which the matter has already been dealt with

A schedule of forms has been annexed to the new Code. these hardly differ in any single particular from the forms to be found in the Schedule to the old Code; but it can hardly be suggested that in the mofussil at least, much, or any attention has been paid to those forms which were apparently framed with a view to the adoption of the English rules of pleading

It will now be necessary for every written statement to be drawn up more or less upon the lines laid down by the English rules. By O VI, r 3 the use of the forms in the schedule is rendered imperative, and no doubt the Courts in India will consider applications to strike out (O VI r. 16) pleadings drawn in any other form and so contrary to the provisions of that rule.

Facts to be specially pleaded.—It has already been provided by Order VI r. 2 that the written statement must contain a statement of the material facts relied upon for the defence. This may be sufficient for a case where the defence is a simple denial of the truth of the allegations in the plaint but there are many cases where that is not sufficient. It may be that the allegations contained in the plaint, or some of them, are true but their effect may be destroyed by additional facts not alleged in the plaint, or there may be some reason in law e.g. arising

the practice, which was formerly in vogue in the High Courts and gives a definite legislative sanction thereto.

*Must raise all matters—as for instance :—*The instances appear to relate to the whole of the rule and are not confined only to matters which would raise issues not arising out of the plaint

Fraud—It has been held that where fraud is alleged in a plaint, it must be alleged definitely and with particularity.*

* *Anand v. Wasmess*, 1 Hjd 117.

* *Alal Hossain v. Turner*, [1887] 14 L. A., 111; 11 Bom., 620; and further on this matter see notes under Sec. 9 and O. VII, rr. 1 to 6 and r. 17.

Limitation—Section 4 of the Limitation Act, V of 1877, provides that every suit instituted after the prescribed period of limitation shall be dismissed, although limitation has not been set up as a defence, and this provision is repeated in the New Limitation Act. This seems to be directly at variance with the provision of this rule that limitation must be pleaded in order that the defendant may have a decision in his favour on the point.

Illegality—Where any Act is relied upon as a bar to the suit, it should be specially pleaded.¹

3. It shall not be sufficient for a defendant in his written statement to deny generally the grounds alleged by the plaintiff, but the defendant must deal specifically with each allegation of fact of which he does not admit the truth, except damages.

R. S. O. XIX r. 17

A special instance is given in (English) Order XXI rr. 1, 12 of some denials that frequently occur in practice showing very plainly what this rule intends. R. S. O. XXI rule 1 says that in actions for a debt or liquidated demand in money, a mere denial of the debt shall be inadmissible, and rule 2, that in actions upon bills of exchange and a defence in denial must deny some matter of fact, e.g. the drawing, endorsing, accepting, presenting or notice of dishonor of the bill.

Similarly rule 3 of Order XXI provides that in actions for goods bargained and sold or sold and delivered, the defence must deny the order or contract, the delivery or the amount claimed. This is well illustrated by the case of *Copley v. Jackson*.²

4. Where a defendant denies an allegation of fact in the plaint, he must not do so evasively, but answer the point of substance. Thus, if it is alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum or any part thereof, or else set out how much he received. And if an allegation is made with divers circumstances, it shall not be sufficient to deny it along with those circumstances.

R. S. O. XIX r. 19

does not mean that, he should say that there were no terms of arrangement come to except the following terms, and then state what the terms were.

But if a defendant alleges that the defendant offered

¹ See *Colborne v. Stockdale*, 1 Str., 493; and other cases considered in the notes to order XIX, r. 15 in the *Annual Practice*, 1903, p. 235.

² *Copley v. Jackson*, 1884, W. N. 39.

³ *Thorp v. Holdsworth* 3 C. D., 641. *Annual Practice*, 1903 p. 263

void or voidable in point of law, and all such grounds of defence as, if not raised, would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the plaint, as, for instance, fraud, limitation, release, payment, performance, or facts showing illegality.

This rule as well as rules 3, 4, 5 (except the proviso) and 7 are taken from the English Rules and Orders. They correspond almost word for word with rules 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

brief and not argumentative and should contain a concise statement of the material facts (section 114) that a writ or contained irrelevant matter that it should be verified in sections no longer find a place provision is to be found in (matter has already been dealt with

A schedule of forms has been annexed to the new Code these hardly differ in any single particular from the forms to be found in the Schedule to the old Code; but it can hardly be suggested that in the mofussil at least, much, or any attention has been paid to those forms which were apparently framed with a view to the adoption of the English rules of pleading

It will now be necessary for every written statement to be drawn up more or less upon the lines laid down by the English rules. By O VI, r. 3 the use of the forms in the schedule is rendered imperative, and no doubt the Courts in India will consider applications to strike out (O VI r. 16) pleadings drawn in any other form and so contrary to the provisions of that rule.

Facts to be specially pleaded.—It has already been provided by Order VI r. 2 that the written statement must contain a statement of the material facts relied upon for the defence. This may be sufficient for a case where the defence is a simple denial of the truth of the allegations in the plaint. but there are many cases where that is not sufficient. It may be that the allegations contained in the plaint, or some of them, are true but their effect may be destroyed by additional facts not alleged in the plaint, or there may be some reason in law e.g. arising

legislative sanction thereto.

Must raise all matters—as for instance.—The instances appear to relate to the whole of the rule and are not confined only to matters which would raise issues not arising out of the plaint.

Fraud.—It has been held that where fraud is alleged in a plaint, it must be alleged definitely and with particularity.*

* Anand v. Wasmess, 11 Hyd 117.

* Abdul Hossain v. Turner, (1887) 14 L. A. 111; 11 Bom., 620; and further on this matter see notes under Sec. 9 and O. VII, rr. 1 to 6 and r. 17.

(3) The rules relating to a written statement by a defendant apply to a written statement in answer to a claim of set-off.

Illustrations

(a) A bequeaths Rs. 2,000 to B and appoints C his executor and residuary legatee. B dies and D takes out administration to B's effects. C pays Rs. 1,000 as surety for D, then D sues C for the legacy. C cannot set off the debt of Rs. 1,000 against the legacy, for neither C nor D fills the same character with respect to the legacy as they fill with respect to the payment of the Rs. 1,000.

(b) A dies intestate and in debt to B. C takes out administration to A's effects and B buys part of the effects from C. In a suit for the purchase-money by C against B, the latter cannot set off the debt against the price, for C fills two different characters, one as the vendor to B, in which he sues B, and the other as representative to A.

(c) A sues B on a bill of exchange, B alleges that A has wrongfully neglected to insure B's goods and is liable to him in compensation which he claims to set off. The amount not being ascertained cannot be set off.

(d) A sues B on a bill of exchange for Rs. 500. B holds a judgment against A for Rs. 1,000. The two claims being both definite pecuniary demands may be set off.

(e) A sues B for compensation on account of trespass. B holds a promissory note for Rs. 1,000 from A and claims to set off that amount against any sum that A may recover in the suit. B may do so, for, as soon as A recovers, both sums are definite pecuniary demands.

(f) A and B sue C for Rs. 1,000. C cannot set off a debt due to him by A alone.

(g) A sues B and C for Rs. 1,000. B cannot set off a debt due to him alone by A.

(h) A owes the partnership firm of B and C Rs. 1,000. B dies, leaving C surviving. A sues C for a debt of Rs. 1,500 due in his separate character. C may set off the debt of Rs. 1,000.

Act XIV of 1882 Sec., 111.

This rule applies to H. C. and Prov. S. C. C. Sub-rules 1 and 2 make no alteration in the effect of the rule.

Issue to be framed—In a recent suit against two defendants for money alleged to have been obtained by one of them by fraud, the other defendant claimed a set off; no issue was framed or pronouncement made thereon by the lower Court. It was held that an issue should have been framed and decided and that this rule applied.¹

¹ Ahmedabad & Spinning Co. v. Lakshmishanker, [1903] 3 Bom. L. R. 216; (1906) 30 Bom. 173.

Set-off, at law.—*Set-off, at law*, is founded on Statute, and to prevent controversy. It was not intended to give new rights, except to the extent of giving facilities for the enforcing of rights which were already enforceable in an action; and it has accordingly always been held, that a set-off can only be successfully pleaded when an action can have been maintained for the same debt.¹

Defendant claiming set off is for that purpose plaintiff.—When a defendant raises a claim of set-off, on the trial of that issue he must be considered as plaintiff.²

If set off claimed written statement must be tendered.—Defendant desirous of a set-off is bound to tender a written statement containing the particulars of his demand.³

No new law enacted.—This rule is not intended to enact a new law as to what is or is not the subject of set-off. It merely lays down the rules as to the way in which subjects of set-off can be made available.⁴ It premises two things, viz., (1) that the matter of set-off must be an ascertained sum legally recoverable by the defendant from the plaintiff, and (2) that the character in which the debt is claimed by, and from, the plaintiff must be the same.⁵

Opposing but not mutual debts cannot be set-off.—It is essential to the validity of a set-off that the debts should be mutual, due from and to the same parties and in the same right.⁶ Rights merely opposing but not mutual between the parties, cannot be set-off.⁷

Time of pleading.—Where defendant did not raise an issue in regard to set-off in the first Court, their lordships of the Privy Council declined to entertain it.⁸

Equitable set-off.—The Madras High Court, in referring to the corresponding sections of Act VIII, 1859, said:—“These are provisions of a Code regulating procedure only, and whilst we think that the language used has not the effect of enlarging the right of set-off, we ought at the same time to say that, according to our present opinion, the Procedure Code was not intended to take away any right of set-off, whether legal or equitable, which parties would have independently of its provisions. It seems to us that the right of set-off will be found to exist not only in cases of mutual debts and credits, but also where the cross-demands arise out of one and the same transaction, or are so connected in their nature and circumstances as to make it inequitable that the plaintiff should recover and the defendant be driven to a cross-suit;”⁹ it is not opposed to the intention of the parties.¹⁰

Set off of damages.—And when A sued on a contract to recover the price of wood supplied, a set-off of damages for breach was allowed, on the ground that the contract contained a clause indemnifying the defendants against loss

¹ *Rawly v. Rawly*, 1 Q. B. D., 459, and see *Winterfield v. Bradburn*, 3 Q. B. D., 324.

² *Jogelamba v. Grob*, (1870) 5 B. L. R., 639.

³ *Pooria Chandra v. Bharce*, (1870) 14 W. R., 473.

⁴ *Bookmy v. Mulk*, (1853) 9 Cal., 914.

⁵ *Chenappa v. Raghu Natha*, (1893) 15 Mad., 29, p. 33.

⁶ *Bhorub v. Hafeezunnissa*, (1878) 2 C. L. R., 414.

⁷ *Huree Kishore v. Hur Kishore*, (1875) 23 W. R., 134.

⁸ *Nan Karay v. Ko Hlaw*, (1886) 13 I. A., 48, p. 56; 13 Cal., 124.

⁹ *Clark v. Ruthinsvaloo*, (1855) 2 Mad. H. C., 296; followed in *Bhagbat v. Bamleh*, (1885) 11 Cal., 557; *Chisholm v. Gopal*, (1889) 16 Cal., 711; *Kishorchand v. Madhooji*, (1890) 4 Bom., 407; *Pragi Lal v. Maxwell*, (1893) 7 All., 284; *Brojendra v. Budge Budge Co.*, (1893) 20 Cal., 527.

¹⁰ *Kistnasamy v. Municipal Commissioners for Madras*, (1893) 4 Mad. H. C., 129.

arising from failure to fulfil.¹ And so it has been held that where the right of set-off arises out of one and the same transaction, it would not be equitable to drive a party to a regular suit where the claim could be dealt with in execution of a decree.²

Set-off of rent against mortgagee in possession—In a suit for account by a mortgagor against a mortgagee in possession under a *suripeshgi* lease, the rents unpaid by the mortgagee, though barred by limitation, were set-off against the mortgage debt,³ a usufructuary mortgagee may set-off rent (though barred by limitation) due from the mortgagor for part of the mortgaged property against the surplus accumulating in the mortgagee's hands.⁴

The plaintiff sold a mortgage decree to the defendants and took a deposit receipt instead of cash. At the time of the sale the decree had already been attached, so that the defendants had to pay off the sum for which it was attached. In a suit on the deposit receipt it was held the defendants could set-off the amount so paid.⁵

The plaintiffs sued as brokers for commission on a sale effected by them for the defendants. It was held that the defendants might claim by way of equitable set-off, the loss occasioned by the plaintiffs' negligence in not carrying out the defendants' instructions regarding the sale.⁶

And as to set-off of arrears of rent against improvements on redemption, even if the right of the person making them has been pledged, see *Achutha v. Kali*.⁷

Cross-demand must arise out of same transaction—The right to set-off does not exist when the cross-demand relates to a different transaction.⁸ Under the Civil Procedure Code, a cross-claim made by defendant against a plaintiff cannot, in ordinary cases, be set up as a defence, except when it arises out of the very transaction sued upon and is in the nature of a set-off, but the special cross-claim provided for by s. 491, now section 95 of Act V of 1908 viz., a claim for compensation for arrest on insufficient grounds, may under this section be taken into account in any suit—and the amount awarded as compensation be awarded in the decree, and thus *pro tanto* be a defence to the plaintiff's claim in the suit.⁹ In a suit brought by the trustees of a religious endowment called *chinchwad*

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¹ *Pragi v. Maxwell*, (1895) 7 All., 284; and see *Kishorechand v. Madhoyji*, (1890) 4 Bom., 407.

² *Radha Ram v. James*, (1873) 20 W. R., 410; and see further on this subject the following cases—*Middlton v. Pollock*, L. R., 20 Eq., 515; *Vullamy v. Noble*, 3 Ves., 465; *Lord La R.*, 30; *c. Moo. I.*, 597, Pe. Bom., 1; *Beer*, 18 199; *St. State v.*

³ *Nursingh Narain v. Lukputty*, (1880) 5 Cal., 333.

⁴ *Sheo Saran v. Mohabir*, (1905) 32 Cal., 576.

⁵ *Khetivas v. Shib Narayan*, (1905) 9 Cal. W. N., 178.

⁶ *Nand Ram v. Ram Prasad*, (1905) 27 All., 145.

⁷ (1884) 7 Mad., 545.

⁸ *Ram Deo v. Pokhram*, (1891) 21 Cal., 419; *Fakir Chandra v. Gisborne*, (1904) 8 Cal. W. N., 174.

⁹ *Roulet v. Fetterle*, (1894) 18 Bom., 717.

restore to him certain private property belonging to his adoptive father which he had given up; it was held that the defendant could not claim as a set-off or equitable defence, the private property in question, there being nothing in the compromise to show that there was any exchange of private for trust property.¹ When in a suit for the costs of the preparation of a trust-deed, the defendants claim damages for the non-delivery of machinery, it was held that they were not entitled to set-off this claim, as it was not a claim for an ascertained sum of money and there were no equitable grounds for admitting the counter claim as there would be great delay in investigating it, and there was no reason why plaintiffs should wait so long for money they were legally entitled to.² In a suit in 1888 to recover principal and interest due on a usufructuary mortgage executed on the 15th June, 1870, which contained a covenant for repayment of the secured debt on 15th June, 1878, the defendant pleaded and proved that the mortgagee had permitted certain buildings on the mortgage premises to fall into a ruinous condition, and it appeared that the mortgagee had remained in possession after June, 1878, it was held that the defendant was entitled to have the amount of the loss occasioned by the plaintiffs failure to make repairs brought into the mortgage accounts and a separate suit by him for that purpose was unnecessary.³ The plaintiffs agreed to purchase from the defendant certain timber. They paid part of the price in advance and took delivery of some part of the timber, but refused to take delivery of the rest, and subsequently, sued the defendant to recover part of the price paid alleging that the portion of which they had taken delivery was not of the quality contracted for; it was held that in such a suit the defendant might claim by way of set-off compensation for the loss which he had incurred in the re-sale of that portion of the timber the subject of the contract of which the plaintiff had failed to take delivery.⁴

In a suit for rent, a set-off for costs of a previous rent suit instituted by the Landlord's benamidar was not allowed.⁵

The defendant deposited money with a company for twelve months and being unable to withdraw it, he obtained a loan from the company on security of the deposit. Later on all creditors of the company were restrained by injunction from suing the company. In a suit by the liquidator of the company or the amount of the loan, it was held that the defendant could set-off the deposit.⁶

Not payment. A claim to set-off a cross-demand should not be confounded with a plea of payment. A sued B for arrears of rent. B stated that his tenure has been mingled for some time by the Collector, who, in addition to other demands, had realised the rent. It was held a plea of payment and not of set-off.⁷

For money.—Under Act VIII, 1859, the suit must have been for a debt.⁸ It is not so under the present law, see *illustration (c)*, though the result of the claim and set-off must be a pecuniary liability.⁹ *Quære*, if a suit for an account falls within the section,¹⁰ but a suit for dissolution of partnership with a prayer that the balance due should be paid is within the section.¹¹

¹ Dhundraj v. Ganesh, (1891) 18 Bom., 721.

² Dobson v. Bengal Spinning Co., (1897) 21 Bom., 127.

³ Shiv v. Jaru, (1892) 15 Mad., 200.

⁴ Neaz v. Durga, (1893) 15 All., 9.

⁵ Tiluk v. Jasida, (1907) 11 Cal. W. N., 215.

⁶ Reference under Presidency Small Cause Courts Act, (1903) 28 Mad., 240.

⁷ Koonjo Behari v. Nilmoney, (1879) 4 C. I. R., 296.

⁸ Rotee v. Greeja, (1866) 5 W. R., 160.

⁹ See *Libby's Hotels Co. v. Jones*, 18 Q. B. D., 430; *Moller v. National Bank*, (1892) 10 Cal., 116.

¹⁰ *Nan Karay v. Ko Hlaw*, (1886) 13 I. A., 43, p. 56; 13 Cal., 124.

¹¹ *Ramjiwan v. Chandmal*, (1894) 10 All., 587.

The same character — In a suit by a Hindu widow for a debt, the defendant can set-off a debt due from her deceased husband.¹ But in a suit by a widow administering her husband's estate to recover certain moveable property appropriated by her son, a claim of the defendant against his father was not allowed to be set-off.² And in a suit by the son of a deceased Hindu as his heir on a promissory-note, a set-off was allowed of debts due by the deceased to the defendant.³ But an amount due as manager cannot be set off against a personal liability.⁴ A separate debt cannot be set off against a joint and several debt and directors cannot set-off money due from the Company to them against sums which they might be ordered to refund to the liquidator.⁵ A took a loan from C under a bond pledging the shares of himself, his minor brother and cousin, and, covenanting that the interest should be credited to the rent of the shares pledged, let in firm to C. In a suit for rent by A and the others, C pleaded a set-off of the interest. The Court found the bond proved as against A only and allowed a set-off as regards him, but not as regards the others.⁶ But A cannot set-off against a claim made by B in respect of separate dealings between him and A, a debt due from a firm consisting of a father and two sons, one of whom is B,⁷ unless B was sole beneficial owner of the assets of the firm and could compel his father and brother to transfer them into his name alone;⁸ and, in an action against A for money he cannot set-off his share of a debt due to him and others.⁹ Plaintiff, one of several co-sharers, sued a lessee of a portion of an estate for his share of the rent; the claim was admitted. The defendant pleaded (as a set-off) that he had paid money on account of the plaintiff's share of arrears of the Government revenue for the same period; it was held that this was not admissible as a set-off under s. 121 of Act VIII of 1859, but was the subject of a separate suit in which other sharers should be joined. It was never the intention of s. 121 that suits entirely different in character should be tried together.¹⁰ An arrear of Government revenue paid by a lumbarदार out of the collections of subsequent years without reference to the co-sharers may be set-off in a suit against him by a co-sharer for his share of the profits for such subsequent years.¹¹ Three undivided brothers mortgaged certain land to the defendant. Two of them redeemed their respective shares after separation and partition, paying over and above what was due on the mortgage the third's share of this assessment alleged to have been the whole of the lands comprised in the mortgage, which remained in mortgage the amount that was paid by the other two mortgagors in payment of the alleged assessment was not allowed to be deducted from the amount due on the mortgage, on the ground that the plaintiff's right to redeem was perfectly distinct from the redemption by the other two mortgagors, and there was no longer any joint account in which the sums previously paid could be credited.¹² In the case of *benamidars* there being no mutuality this principle is not applicable.¹³

¹ *Watson v. Brojo*, (1871) 16 W. R., 224; *Grish Chunder v. Koomaree*, (1864) 1 W. R., 318, 23.

² *Manly v. Manly*, (1870) 14 W. R., 136.

³ *Chenappa v. Raghunatha*, (1892) 15 Mad., 29.

⁴ *Abul Hasan v. Zohra*, (1883) 5 All., 292.

⁵ *New Fleming Co. v. Kessowp*, (1895) 9 Bom., 373.

⁶ *Futteh Narain v. Deen Dyna*, (1871) 15 W. R., 37; see *Lalit v. Scrimbas*, (1886) 13 Cal., 331.

⁷ *Dhuput v. Forbes*, 1 Ind. Jur., N. S., 354.

⁸ *Morier, ex parte* 12 C. D., 491.

⁹ *Bowyear v. Pawsan*, 6 Q. B. D., 540.

¹⁰ *Hossena v. Smith*, (1874) 22 W. R., 15; 13 B. L. R., 440.

¹¹ *Udu v. Jagannath*, (1876) 1 All., 135.

¹² *Lakshumar v. Madhab*, (1891) 15 Bom., 186.

¹³ *Tilak Chandra v. Jasoda Kumar*, (1906) 10 Cal. W. N., cclvii.

Assignees.—Purchasers and assignees with notice represent their vendors and assignors. Thus, where A by a deed of *sur-i-peshgi* lets certain lands to B to secure a debt, and B covenanted to pay a certain sum annually; on failure by B, A obtained a decree for the amount due. Subsequently, C, in execution of a decree, bought B's interest in the sum lent, and sued A to recover the same; it

a right of retainer.³

Promissory note—As a general rule, it would be no answer to a suit in the Small Cause Court on a promissory note, for the defendant to say that the claim is a matter of account. But, if subsequently a suit is instituted in the High Court by the defendant in which all transactions between the parties can be dealt with, then it is desirable that there should not be a separate proceeding in respect of the promissory suit, though *prima facie* it does not constitute an item in a running account between the parties.⁴ Where a promissory-note has been endorsed when overdue, and a suit is brought by the endorsee against the maker, the latter cannot set-off a debt due to him by the payee of the note.⁵

Rent—In a suit for rent by a putnidar purchaser, against a darputnidar, the latter can set-off money paid by him to prevent the sale of the patni tenure for its own arrears, although the arrears, may have been for a period previous to the putnidar's purchase,⁶ but the claims must be between the same parties.⁷ In a due to the defendant after kind to the plaintiff should of a decree obtained by

Insolvent—Where a debt is due by an insolvent, prior to insolvency, to a person who owes a debt to the former, they may be set-off in a suit by the Official Assignee.¹⁰

Legally recoverable—The sum must be legally recoverable.¹¹ A defendant cannot claim to set-off a sum expended in repairing a house without authority,¹² or in respect of a demand already dismissed,¹³ or barred by limitation;¹⁴ or an infant's debt;¹⁵ or a demand based on a decree incapable of being enforced.¹⁶

A contributory cannot set-off a debt due to him from the Company against calls made in winding up.¹⁷

¹ Bhagawani v. Baljnath, (1865) 2 B. L. R., 84.

² See Lee and Chapman's case, 30 C. D., 216.

³ Webb v. Smith, 30 C. D., 192, p. 199.

⁴ Issur Singh v. Bergmann, (1903) 30 Calc., 627.

⁵ Swan, *ex parte* L. R., 6 Eq., 359.

⁶ Lalit Mohun v. Srinibas, (1886) 13 Calc., 331.

⁷ Bhoirub v. Hafeezunnissa, (1878) 2 C. L. R., 414; and illustration (g) *supra*.

⁸ Roy Nandeeput v. Stewart, (1875) 23 W. R., 20.

⁹ Bharath Prasad Sahi v. Rameshwar, (1903) 30 Calc., 1066; 8 Calc. W. N., 118.

¹⁰ Miller v. Beer, (1880) 6 C. L. R., 291.

¹¹ Rukhmuni v. Mulk Jemania, (1883) 12 C. L. R., 534; 9 Calc., 914.

¹² Zammeerunnissa v. Gayer, (1866) 6 W. R., Ref., 26.

¹³ Alkoolah v. Sreekunto, (1871) 15 W. R., 252.

¹⁴ Heeralal v. Bishen, (1864) 1 W. R., 297; but see Nursingh v. Lalaputty, (1860) 5 Calc., 333.

¹⁵ Rowley v. Rowley, 1 Q. B. D., 400.

¹⁶ Huro Pershad v. Fool Kishoree, (1871) 16 W. R., 308.

¹⁷ Whitehouse, *in re*, 9 C. D., 595; General Works Co., *in re*, 12 C. D., 755.

Ascertained sums.—The sum sought to be set off under this rule must be a sum ascertained, that is, liquidated and not damages undetermined;¹ something in the nature of a debt: such as a liquidated amount due under a bond;² but not a claim for contribution, the amount of which remains to be determined;³ nor money deposited with plaintiff, unless such money was due and payable at the time of the institution of the suit;⁴ nor for costs not awarded.⁵ In a suit on bills-of-exchange, a set-off arising from a claim to damages sustained by reason of the plaintiff's failing to insure goods unconnected with the hoondees was not allowed;⁶ nor even a claim for damages by reason of the goods pledged to secure the bills having been sold in violation of an agreement between the parties,⁷ nor in a suit for money lent on a usufructuary mortgage will a claim for damages on account of waste of the mortgaged property be allowed.⁸ In a suit for money claimed on account of the carriage of goods, a claim for damages sustained in relation to the goods was not allowed.⁹ In a suit pleaded a set-off on account of certain goods, which he had paid for, it was held that the Court must enquire into each disputed item of the demand;¹⁰ but otherwise, where the claim was not for debts ascertained, but for the balance of a separate account as yet undetermined.¹¹ In this last case, some stress seems to have been laid on the fact that the claims were altogether of another nature, but looking at *illustration (c)*, that by itself would hardly be a valid objection under this Code. See, however *Abul Hasan v. Zohra*.¹²

But this limitation (as to ascertained sums) does not apply to equitable set-off, or where it has also been agreed upon.¹³

Jurisdiction—The set-off, must be, as to its nature and amount, within the cognizance of the Court.¹⁴ Where a suit was brought under the Small Cause Court jurisdiction of a Subordinate Judge and the defendant claimed a set-off above that, but within his ordinary jurisdiction, it was held that he could under the law then in force try the set-off.¹⁵ But this is not the present law.¹⁶

By ss 89, 90 of the Judicature Act, 1873, a Court of limited jurisdiction can entertain a claim by way of counter-claim, although it is in respect of matters which arise beyond its local jurisdiction and which could not be put forward in an original action¹⁷. No such power is given under this Code.

Set off of a lesser amount — It is no defence to a claim of set-off that it will not amount to the plaintiff's claim.¹⁸

¹ *Prager v. Maxwell*, (1893) 7 All., 284.

* Watson & Brojo, (1871) 16 W. R., 224

² *Hoyden v. Smith*, (1874) 22 W. R., 15, 13 B. L. R., 440.

⁴ *Goolool Coomar v Bhichook*, (1874) 22 W. R., 1.

⁶ *Muro Perahadi v Fool Kishoree*, (1871) 16 W. R., 308.

* *Clark v. Ruthmarston*, (1865) 2 Mad. H. C., 226.

⁷ *Ram Dyal v. Ram Dhun*, (1868) 3 Agra., 43.

* *Raghu Nath v. Ashrat*, (1878) 2 All., 232, contra *Shiva Devi v. Jaru*, (1892) 15 Mad., 290.

* Scanlan v Herrold, (1868) 10 W. R., 295.

¹⁰ *Gauri Sahai v Ram Sahai*, (1915) 7 All H C., 157.

¹¹ *Kalee Koomar v. Huro Chunder*, (1872) 17 W. R., 177.

¹² (1893) 5 All., 299, p. 301.

address, (1869) 4 Mad. H. C., 120;

114; Heeralal v. Bishen, (1864)
All, 401; Brojendra v. Budge

¹² *Barote Ganga v Sepoy Pannu*, (1890) 14 Bom., 371.

¹⁷ *Davis v. Flag Staff Silver Co.*, 3 C. P. D., 228.

¹⁸ *Mostyn v. West Mostyn Co.*, 1 C. P. D., 145.

Set-off arising after plaint filed—It is no defence to a claim of set-off that it arose after the date of the plaint.¹

Written statement to be treated as plaint in a cross-suit.—The claim is to be treated as a plaint in a cross-suit and is chargeable with a Court-fee payable on a plaint of that nature.² Thus, a defendant may deny plaintiff's claim, plead a set-off and get a decree for it, though no sum has been found due to the plaintiff.³ And the appeal will lie to the same Court as if the sum had been demanded in a separate suit O. XX, r 18.⁴ The final judgment should determine both the original and the cross-claim; but the decree shall only be for the recovery of the balance O. XX, r 18.⁵ In a suit in which the plaintiff sued as son of a deceased vakil to recover the amount of a promissory-note and bond executed by the defendant to his deceased father, the defendant alleged in his written statement that the plaintiff's father had collected funds belonging to

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Appeal—If the memorandum of appeal is not sufficiently stamped the Court can levy the stamp duty.⁷

Costs—The parties should get costs as on independent actions.⁸

Attorney's lien—Plaintiff in a redemption suit, is entitled to set-off the amount of his taxed costs against the mortgage-money notwithstanding any claim which the defendant's attorney may have against the defendant in respect of the costs of the suit;⁹ and the general rule is that the right of set-off is not affected by the solicitor's ordinary lien for costs.¹⁰ The second clause of para 2 of the rule seems to have been intended to give effect to these rulings, but it does not do so correctly. Where a solicitor is discharged by his client, he holds papers entrusted to him subject to his lien for costs, and he has the same lien upon translations made by the Court-interpreter (at the solicitor's expense) as upon other documents, and he will not be compelled to produce them.¹¹

Execution of decree—As to set-off of decree against purchase money—see *Gopal Singh v. Bannaree Lal*,¹² against mortgage money—see *Brijnath v. Jaggernath*,¹³ in favour of a pre-emptor—*Ishri v. Gopal Saran*,¹⁴

¹ *Ellis v. Munsin*, 33 L. T., 585; but see *Hartlepool Collieries Co v. Gibb* 5 C. D., 713.

² *Rai Shri Mijiraybai v. Naritam*, (1897) 13 Bom., 672; *Amir Zama v. Nathu* (1886) 8 All., 393; *Chennappa v. Raghunatha* (1892) 15 Mad., 29; *Guise v. Ananta Ram*, (1906) 10 Cal. W. N., 199; but see contra—*Fakir Chandra v. Gisborne*, (1904) 8 Cal. W. N., 174.

³ *Hayathka v. Abdulakha* (1869) 6 Bom. H. C., 151; but see *Huro Sooduree v. Bungshie*, (1866) 5 W. R., Mis., 32.

⁴ *Ram Lal v. Lancaster*, (1871) 3 All. H. C., 111; overruling *Masooma v. Nazur*, (1869) 1 All. H. C., 223.

⁵ *Potter v. Chambers*, 4 C. P. D., 72.

⁶ *Chennappa v. Raghunatha*, (1892) 15 Mad., 29.

⁷ *Chennappa v. Raghunatha*, (1892) 15 Mad., 29.

⁸ *Shrapnel v. Loring*, 2 Q. B. D., 311.

⁹ *Brijnath v. Jaggernath*, (1879) 4 Cal., 742.

¹⁰ *Pringle v. Glogz*, 10 C. D., 676; but see *Edwards v. Hope*, 4 Q. B. D., 922.

¹¹ *Keserbi v. Narraji*, (1887) 4 Bom., 353.

¹² (1887) 5 S. C. L. R., 181.

¹³ (1879) 4 Cal., 712.

¹⁴ (1881) 6 All., 351.

Purchaser for value—As to what is sufficient to raise the question of a bona fide purchaser for value, see *Kishory Mohun v. Mahomed* ¹

7. Where the defendant relies upon several distinct grounds of defence or set-off founded upon separate and distinct facts they shall be stated, as far as may be, separately and distinctly.

R. S. O. XX, r. 7

This rule is taken from the English Order XX relating to statement of claim

8. Any ground of defence which has arisen after the institution of the suit or the presentation of a written statement claiming a set-off may be raised by the defendant or plaintiff, as the case may be, in his written statement.

This is an entirely new provision, and has no counter part among the English or former Indian rules, it is merely declaratory of existing rights. Under the English rules, it has been held that it is no defence to a claim of set-off that the claim did not arise before the date of the plaint ²

9 No pleading subsequent to the written statement of a defendant other than by way of defence to a set-off shall be presented except by the leave of the Court and upon such terms as the Court thinks fit, but the Court may at any time require a written statement or additional written statement from any of the parties and fix a time for presenting the same.

Act XIV of 1882, sec. 112

This rule applies to H. C. and Prov. S. C. C.

Additional written statement—In a suit for wrongful dismissal defendant is not allowed to give evidence of a transaction, involving instances of misconduct not set forth in defendant's written statement. He should file a supplemental written statement and this must be done before the first hearing ³. The object of an additional written statement is to supply what may have been omitted in the first and not to contradict it ⁴.

Within a fixed time—If a written statement is filed after the time fixed by the Court, it will not be struck out of the record unless the other side applies quickly ⁵.

Court may require—The practice in the Calcutta High Court is when one of the parties neglects to file a written statement, to examine him as to the grounds of his defence and confine him to that statement unless a written state-

¹ *Kishory Mohun v. Mahomed*, (1891) 18 Cal., 188

² *Ellis v. Munson*, 35 L. T., 545; but see *Hartlepool Colliery Co. v. Gibb*, 5 C. D., 713

³ *Munshershaw v. New Dhutumsey Co.*, (1880) 4 Bom., 576.

⁴ *Douglas v. Collector of Benares*, (1851) 5 Moo. I. A., 271, p. 290.

⁵ *New Fleming Co. v. Kessowji*, (1883) 9 Bom., 373, p. 381.

ment seems desirable, when the case will be adjourned for that purpose at his expense.¹

The word "require," does not prevent a Court from allowing an additional written statement being filed on motion made. In the case of *Dasimani Dasi v. Srinath Ghosh*,² on an application by the defendant to be allowed to file an additional written statement, two objections were raised—(1) it was not called for by the Court, and (2) it was inconsistent with the original written statement. The Court admitted it on payment of the costs of the application, at the same time intimating that such an additional statement would not have been accepted from the plaintiff. A Court should not require a written statement inconsistent with the plaint, but it is justified in calling for one, not with the object of adding to, or varying plaintiff's claim, but to supply omissions in the plaint,³ and where a plaintiff claimed land under an amicable arrangement subsequent to a deed of sale, and the defendant denied the sale and the arrangement, an additional statement was taken with the deed of sale, as plaintiff asserted he could not anticipate that the defendant would deny his right altogether.⁴ The mere irregularity of the Court calling for a written statement without any sufficient cause is not a good ground of special appeal; the appellant must also be prejudiced thereby.⁵

Appellate Court.—A Court of Appeal cannot call for a written statement.⁶

10. Where any party from whom a written statement is so required fails to present the same within the time fixed by the Court, the Court may pronounce judgment against him, or make such order in relation to the suit as it thinks fit.

Procedure when party fails to present written statement called for by Court.

Act XIV of 1882, Sec. 113.

This rule applies to H. C. and Prov. S. C. C.

Defendant remained in Calcutta one month after it was ordered he should put in a written statement, and then went on a pilgrimage. His son applied for leave to file a written statement, and his application was refused, as no cause was shewn why his father had not filed it before he left Calcutta.⁷

¹ *Ramratton v. Oriental Steam Navigation Co.*, 2 Hyde., 89.

² *Dasimani Dasi v. Srinath Ghosh*, (1869) 3 N. L. R., appx., 1t.

³ *Jahangeer v. Bhuckaree*, (1869) 11 W. R., 71.

⁴ *Lall Mahomed v. Dhroode Ram*, (1874) 22 W. R., 377.

⁵ *Lall Mahomed v. Dhroode Ram*, (1874) 22 W. R., 377.

⁶ *Juggesoor v. Gopee Kishan*, (1866) 5 W. R., 50.

⁷ *Denomoye v. Tarachurn*, 1 Bourke., 135.

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Defendant's statement, C. P. Code, 1908, s. 151.

¹ *Ramrutton v. Oriental Steam Navigation Co.*, 2 Hyde, 89.

² *Dasimani Dasi v. Srinath Ghosh*, (1869) 3 B. L. R., appx., 11.

³ *Jahangir v. Bhickaree*, (1869) 11 W. R., 71.

⁴ *Lall Mahomed v. Dhoolie Ram*, (1874) 22 W. R., 377.

⁵ *Lall Mahomed v. Dhoolie Ram*, (1874) 22 W. R., 377.

⁶ *Juggesoor v. Gopse Kishen*, (1866) 5 W. R., 50.

⁷ *Duomoye v. Tarachurn*, 1 Bourke., 135.

Court for a fresh summons, or file a new suit under rule 4,¹ but in no case should the case be disposed of before the day fixed for hearing.²

Arrest—If a defendant is arrested, he has a right to appear, though no summoned.³

Appeal.—The order is not appealable.⁴

3. Where neither party appears when the suit is called on for hearing, the Court may make an order that the suit be dismissed.

Where neither party appears, suit to be dismissed.

Act XIV of 1882 sec 95

This rule applies to H C and Prov S C C

Application of rule—This rule only refers to cases in which both parties are absent on the date fixed for the hearing. It does not apply where a party is present, but has omitted to serve a notice as required by the Court.⁵ It applies to miscellaneous proceedings,⁶ and proceedings in execution.⁷ As to remanded cases, see *Raghoonath v Ram Coomars*.⁸

Form of order—The order should be an order of dismissal. Ordering the case to be struck off the file is improper.⁹

Appeal.—There is no appeal from an order under this rule¹⁰ see O. XLIII.

Reasons—On the first day appointed for the hearing the plaintiff and his witness appeared but the defendant did not. On the day to which the hearing was adjourned neither the plaintiff's witness nor the defendant appeared and the suit was dismissed. It was held that this was not a proper exercise of discretion.¹¹

4 Where a suit is dismissed under rule 2 or rule 3, the plaintiff may (subject to the law of limitation) bring a fresh suit; or he may apply for an order to set the dismissal aside and if he satisfies the Court that there was sufficient cause for his not paying the court-fee and postal charges (if any) required within the time fixed before the issue of the summons, or for his non-appearance, as the case may be, the Court shall make an order setting aside the dismissal and shall appoint a day for proceeding with the suit.

Plaintiff may bring fresh suit or Court may restore suit to its file.

¹ *Abas v. Ibrahimji*, (1869) 5 Bom. H. C., 118.

² *Golab v. Jiwan*, (1878) 2 All., 318.

³ *Syed Ali v. Adib*, (1891) 15 Bom., 160.

⁴ *Lucky Charan v. Budurrunnessa*, (1883) 9 Cal., 627; 12 C.L.R., 484. see O. XLIII.

⁵ *Haradhun v. Protap*, (1870) 14 W. R., 401; *Alwar v. Seshammal*, (1887) 10 Mad., 270.

⁶ *Rajpal v. Chooramun*, (1872) 4 All. H. C., 10.

⁷ *Gour Mohan v. Tarachand*, (1869) 3 B. L. R., App., 17. But see *Dhonkal v. Phakkar*, (1893) 15 All., 84; and *Akrannissa v. Valinulnissa*, (1894) 18 Bom., 430.

⁸ *Raghoonath v. Ram Coomars*, (1870) 14 W. R., 81.

⁹ *Alwar v. Seshammal*, (1887) 10 Mad., 270.

¹⁰ *Alwar v. Seshammal*, (1887) 10 Mad., 270; but compare *Alwar v. Seshammal*, (1887) 10 Mad., 29.

¹¹ *Collector of Jampur v. Tabruk*, (1903) A. W., N., 920.

Act XIV of 1882, sec. 99.

This rule applies to H. C. and Prov. S. C. C.

Some verbal alterations have been made from sec. 96, former Code, and an addition has been made as to the 'postal charges.'

Application of rule.—This rule applies to miscellaneous proceedings in execution.¹

Sufficient cause.—In order to satisfy the Court "that the plaintiff was prevented by any sufficient cause from appearing," it is enough that he should shew that there has been a *bona fide* mistake which is not unreasonable.²

" " missed before the day fixed for
ularity on the part of the Judge
a new suit under this rule.³

Cost.—The Judge when restoring a case to the file under this rule, has no jurisdiction to pass at that time any order as to the general costs of the suit.⁴

Appeal.—No appeal lies from an order to restore.⁵ See O. XLIII.

Review.—When a suit has been dismissed for default under this rule and the plaintiff neglected to make an application within 30 days to get the suit restored to the file, there can be no review of judgment under sec. 114, sec. O. XLVII, r. 1.⁶

5. (1) Where, after a summons has been issued to the defendant, or to one of several defendants, and returned unserved, the plaintiff fails for a period of one year from the date of the return made to the Court by the officer ordinarily certifying to the Court returns made by the serving officers, to apply for the issue of a fresh summons and to satisfy the Court that he has used his best endeavours to discover the residence of the defendant who has not been served, or that such defendant is avoiding service of process, the Court may make an order that the suit be dismissed as against such defendant.

(2) In such case the plaintiff may (subject to the law of limitation) bring a fresh suit.

Act XIV of 1882, sec. 99A

This rule applies to H. C. and Prov. S. C. C. No alteration of substance has been made.

The meaning of the rule was discussed in the under noted case.⁷

¹ *Rajpal v. Chooramun*, (1872) 4 All. H. C., 10; *Gour Mohun v. Tarachand*, (1869) 3 B. L. R., App., 17; but see *Dhonkal v. Phakkar*, (1893) 15 All., 84; and *Akrumunissa v. Valulunissa*, (1891) 18 Bom., 430; and acc., 139.

² *Hardatal v. Bullion Association*, (1863) 3 Bom. H. C., 60.

³ *Gulab v. Giwan*, (1878) 2 All., 318.

⁴ *Krishna v. Ganesh*, (1902) 26 Bom., 201.

⁵ *Alwar v. Seshammal*, (1887) 10 Mad., 270; id., 290.

⁶ *Kailash v. Nabadwip*, (1894) 2 Calc. W. N., 318.

⁷ *Jugalprasad v. Biswas* (1905) 7 Bom. L. R., 928.

Issue of second summons—The issue of a second summons ought not to be ordered after the lapse of the limitation period for such a suit from the previous summons, unless the plaintiff has in the meantime done what he could to prosecute his suit with proper diligence.¹

From such return.—Time runs from the date of the return by the Nazir.²

Dismiss the suit—This does not discharge the defendant, and plaintiff may bring a new suit.³

The dismissal of a suit against three defendants, because one of them was not served, is no bar to a fresh suit against all three defendants.⁴

6 (1) Where the plaintiff appears and the defendant does not appear when the suit is called on for hearing, then—

Procedure when only plaintiff appears.

When summons duly served.

ex parte;

(a) if it is proved that the summons was duly served, the Court may proceed

When summons not duly served

defendant;

(b) if it is not proved that the summons was duly served, the Court shall direct a second summons to be issued and served on the

When summons served but not in due time.

(c) if it is proved that the summons was served on the defendant, but not in sufficient time to enable him to appear and answer on the day fixed in the summons, the Court shall postpone the hearing of the suit to a future day to be fixed by the Court, and shall direct notice of such day to be given to the defendant.

(2) Where it is owing to the plaintiff's default that the summons was not duly served or was not served in sufficient time, the Court shall order the plaintiff to pay the costs occasioned by the postponement.

Act XIV of 1882, Sec., 100.

This rule applies to H. C. and Prov. S. C. C.

First Hearing. Quare—Is this rule limited to the day fixed for first hearing?⁵

¹ Ramkissen v. Luckhynarain, (1878) 3 Cal., 312. See Gerender v. Jaggadamba (1880) 5 Cal., 126; and compare Smallpage v. Tonge, 17 Q. B. D., 644.

² Paratam v. Abdul, (1899) 13 Bom., 500.

³ Ali v. Mahomed, (1890) 14 Bom., 267.

⁴ Sita Ram v. Pakhlal, (1905) 23 All., 749; A. W. N., 233.

⁵ Doyal v. Kupoor (1879) 4 Cal., 318; Hera Bai v. Hera Lal, (1885) 7 All., 538; and compare Shio Churan v. Heera Lal, (1882) 11 C. L. R., 537; Jonardan v. Namathone, (1896) 23 Cal., 738; and note to order IX, r. 13, post p. 542.

Application of rule. When the plaintiff appears and the defendant does not appear, this rule must be followed, whether the defendant has been summoned only to appear and answer the claim or has in addition been summoned to attend and give evidence.¹

Proof of service.—The cause should not be tried *ex parte*, unless service of summons has been satisfactorily proved;² but it is not necessary that all the processes for procuring the attendance of defendant as a witness should be exhausted. Proof of service of summons is sufficient, and if this was given, the Judge should follow one or other of the courses laid down in cls (b) and (c);³ but unless there is a decision or some evidence of service of summons on the record, a decree *ex parte* has no legal effect.⁴ The mere absence of the defendant does not justify the presumption that the suit is true; the Court is bound to see that at least a *prima facie* case is made out.⁵ Where a defendant against whom an *ex parte* decree has been given in appeals, it is sufficient in the first instance to establish that in the Court which passed the *ex parte* decree, the defendant was not of British descent and was at the time of service of the summons posted, but there must be some evidence of its having been received by the defendant.⁶

not be rejected owing
; rule enables a Court to

Clause (c)—If the summons has not been served in sufficient time to enable the defendant to appear, the Court is bound to postpone the hearing to a future date, and on this principle it has been held, in a case in which the defendant was served at 10 o'clock in the morning to appear at 12 o'clock in the afternoon, that the Court is not bound to grant an adjournment.⁷ If the defendant is insane, and the Judge is satisfied that the defendant is incapable of conducting the suit, the Court may, on application, appoint a guardian of the property of the defendant, and ought to have

Remedies.—The defendant can apply to the Court for an order within the time prescribed by the rule for the review of the case within the word "review" in the rule. The Court may also pass an order under this rule in an appeal from the

ex parte decree.¹²

The Dekhan Ryots Act, (XVII of 1879).—This rule is affected by Act XVII of 1879.¹³

¹ Taruck v. Jeamat, (1880) 5 Cal., 353.

² (1875) 23 W. R., Civ. Cir. 4; Suresh Chunder v. Jugut, (1887) 14 Cal., 204.

³ Taruck v. Jeamat, (1880) 5 Cal., 353.

⁴ Ram Lochun v. Nityakalee, (1869) 12 W. R., 211.

⁵ Amrit Nath v. Dhunputsing, (1871) 15 W. R., 503; 8 B. L. R., 44.

⁶ Fakhruddin v. Ghafuruddin, (1901) 23 All. 99; and see "Appearance" p. 531.

⁷ Lallubhai Vajaram v. Magangavri, (1891) 18 Bom., 59.

⁸ Awlad v. Alkooli, (1872) 18 W. R., 141.

⁹ Moorut Koonwar v. Dhurm Naran, (1865) 2 W. R., 114, 7.

¹⁰ Mewa v. Bhujhun, (1874) 22 W. R., 213; Dishaen Perknsh v. Ruttungeer (1873) 20 W. R., 3.

¹¹ Khoob Lall v. Kadir, (1871) 15 W. R., 431.

¹² See Appeal under O. IX. r. 8 p. 539; and sec. 66.

¹³ Dulichand v. Dhorai, (1881) 5 Bom., 194.

7. Where the Court has adjourned the hearing of the suit *ex parte*, and the defendant, at or before such hearing, appears and assigns good cause for his previous non-appearance, he may, upon such terms as the Court directs as to costs or otherwise, be heard in answer to the suit as if he had appeared on the day fixed for his appearance.

Act XIV of 1852, Sec., 101

This rule applies to H. C. and Prov. S. C. C.

Alternative procedure under rule 13. The mere fact that an order under this rule (s. 101, former Code) has been made against a defendant and not appealed against, is no objection to an application being made by him under O. IX r. 13 (s. 103, former Code).¹

8. Where the defendant appears and the plaintiff does not appear when the suit is called on for hearing, the Court shall make an order that the suit be dismissed, unless the defendant admits the claim, or part thereof, in which case the Court shall pass a decree against the defendant upon such admission, and, where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder.

Act XIV of 1852, sec. 102.

This rule applies to H. C. and Prov. S. C. C.

Application of rule.—Under the former Code an order dismissing a suit at an adjourned hearing for non-appearance of the plaintiff and his pleader was held to be an order under Order XVII r. 2, and this rule, not Order XVII r. 3, and to be appealable.²

In construing an order alleged by one side and denied by the other to be an order under this rule the order will be considered as one under this rule if the real meaning and substance of the Court's action is that it dismissed the suit on the view that the plaintiff appears and the defendant does not appear.³ Where plaintiff failed to pay in Commissioner's fees—no time being granted—and the suit was dismissed, the order was not considered as passed under this rule.⁴

Where an application for apportionment of compensation awarded under sec. 13 of the Land Acquisition Act (I of 1894) is struck off for default of appearance, a subsequent suit for the same matter will be dismissed as regards the persons who previously applied, but not as regards others jointly interested with them, who did not apply.⁵ The rule applies to an appeal where the respondent appears and the appellant does not and the Court has no power to hear the appeal.⁶ The rule does not apply where plaintiff has adduced all his evidence and does not attend a subsequent hearing.⁷

¹ *Sankara Iyengar v. Ratnasabhapati*, (1899) 21 Mad., 324.

² *Shrinant Sagajirao v. Smith*, (1896) 20 Bom., 736; *Mariannissa v. Ramkalpa*, (1907) 34 Cal., 235; 5 Calo. L. J., 260, but see p. 538 *infra* r. 8.

³ *Lalta Prasad v. Nand Kishor*, (1900) 22 All., 66.

⁴ *Saheb v. Mahomed*, (1899) 13 Mad., 510.

⁵ *Bhandi v. Ramadhin*, (1906) 10 Cal. W. N., 991.

⁶ *Sakharam v. Naro*, (1905) 7 Bom. L. R., 933.

⁷ *Mujappa v. Gondappa*, (1905) 7 Bom. L. R., 261.

Does not appear.—The refusal of the plaintiffs pleader to go on is within these words, although the plaintiff himself is in Court.¹

Non-attendance of witnesses—A suit cannot be dismissed under this rule for non-attendance of witnesses.² And if a suit is dismissed for want of evidence, the decision is a decision on the merits, and not under this rule.³

Judgment.—The suit should be either dismissed or decreed; “struck off” is not a proper mode of disposing of the case, and has no legal effect. Thus where defendant pleaded that a previous suit on the same cause of action had been dismissed under this provision, and the final order was “number khary,” it was held that no judgment had been passed, and the plea of *res judicata* must fail,⁴ but where an appellate Court “struck off” a case, instead of using the correct expression, the Court held that, practically as regards procedure, the case had been decided *ex parte*.⁵

Res judicata.—The dismissal of a suit under this rule does not amount to *res judicata*.⁶

also sec 2 v. decree.

Review.—When a suit was dismissed for default under this provision and an application for review of judgment was made by the plaintiff without a previous application to have the order of dismissal set aside: *held*, that the application for review could be entertained.⁷

9 (1) Where a suit is wholly or partly dismissed under rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for his non-appearance when the suit was called on for hearing, the Court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.

¹ *Gopala v. Maria*, (1907) 30 Mad., 274.

² *Mahomed Azeemoolah v. Ali Buksh*, (1873) 5 All. H. C., 74.

³ *Kartick Chandra v. Sridhar*, (1896) 12 Cal., 563.

⁴ *Khoob Lall v. Toolsee*, (1872) 17 W. R., 219.

⁵ *Beejoy Gobind v. Radha Benole*, (1868) 10 W. R., 318; and see *Ganesh Rat v. Kalka*, (1884) 5 All., 593; *Kudrat v. Duan*, (1887) 9 All., 155; *Alwar v. Seshammal*, (1887) 19 Mad., 270.

⁶ *Chand Kour v. Partab Singh*, (1889) L. R., 15 I. A., 156; 16 Cal., 69; *Shankar v. Daya*, (1889) L. R., 15 I. A., 66; 15 Cal., 422; *Saheb v. Mahomed*, (1890) 13 Mad., 510.

⁷ *Ashruffunnissa v. Lehareaux*, (1882) 8 Cal., 272; *Luckmidas v. Ebrahim*, (1879) 2 Bom., 611; *Karuppan v. Ayyathurai*, (1886) 9 Mad., 445; *Ablakh v. Bhagirathi*, (1887) 9 All., 427; and see s 50 (s. 510 of Act XIV of 1882 as amended by Act VII of 1889).

⁸ *Gulkinson v. Subramania Ayyar*, (1899) 22 Mad., 221. *Contra*—*Gosto Behary v. Hari Mohan* (1901) 8 Cal. W. N., 313.

⁹ *Raj Narain v. Ananga Mohan*, (1899) 26 Cal., 598; and see “REVIEW,” under O IX, r. 13, post.

(2) No order shall be made under this rule unless notice of the application has been served on the opposite party.

Act XIV of 1882, Sec. 103.

This rule applies to H. C. and Prov. S. C. C.

No alteration of substance has been made; a party applying must now show sufficient cause, instead of reasonable cause, for his non-appearance.

Same cause of action—See note "CAUSE OF ACTION," p. 141. When the plaintiff prayed that he might, on payment of a mortgage, be put in possession as under-proprietor, and subsequently sued to be put in as superior proprietor, it was held that the causes of action were the same, as the claim to be put in as proprietor or sub-proprietor only referred to the manner in which the mortgage should be redeemed.¹

A suit brought to recover rent and dismissed for default, does not bar a suit for possession.² A sued, as purchaser of the equity of redemption to redeem the mortgagee in possession. His suit was dismissed under rule 8. Subsequently, A sued the mortgagor and mortgagee for possession of the land on the ground that the mortgagor had agreed to sell the equity of redemption and to redeem the mortgagee, and the latter had afterwards purchased the mortgagor's interest with notice. *held*, they were different causes of action.³

Application of rule—This rule applies to a reference under sec. 30 Land Acquisition Act (I of 1894)⁴ to miscellaneous proceedings;⁵ to rent cases under Act VIII of 1869 (H. C.)⁶ to proceedings under s. 9. of the Specific Relief Act.⁷ See the special procedure in hearing appeals laid down in O. XL, r. 16, *et seq.* By O. XVII r. 2, the present procedure applies to any day to which the hearing of the suit may be adjourned, but not to the case of a person obtaining time to do some act and making default. That falls under O. XVII r. 3.⁸ This rule applies where there has only been an application to declare the plaintiff to a suit an insolvent and a vesting order made, but the proceedings are subsequently annulled and the party is not declared either a bankrupt or insolvent, and the suit is dismissed for the non-appearance of the plaintiff or the official assignee on the date fixed for hearing.⁹ The provisions of this rule do not imply that an application for restoration cannot be granted unless sufficient cause is shown.¹⁰

Does not apply—This rule does not apply to default of appearance in execution proceedings,¹¹ nor to an appeal dismissed for default but to original proceedings only.¹² It does not apply to suits dismissed for any other reason than non-appearance and includes suits dealt with under O. XVII]

¹ *Shankar v. Daya*, (1888) L. R., 15 I. A., 66; 15 Cal., 422.

² *Gobind Chander v. Afzul*, (1883) 9 Cal., 426; 12 C. L. R., 29.

³ *Ramechandra v. Khatal*, (1896) 10 Bom., 28.

⁴ *Behary v. Nanda*, (1907) 11 Cal. W. N., 430.

⁵ *Seetul v. Mahomed Kureem*, (1873) 5 All. H. C., 164; *Kaleo Kristo v. Mahomed Kader*, (1869) 12 W. R., 428.

⁶ *Ojilwant Mahtoon v. Bidheezhund*, (1872) 18 W. R., 207.

⁷ *Anthony v. Dupont*, (1882) 4 Mad., 217; *Sheo Prasad v. Kastura*, (1888) 10 All., 119.

⁸ *Ramaya v. Rangaya*, (1884) 7 Mad., 41.

⁹ *Amrita Lal Mukerjee v. Rakhal Das*, (1900) 27 Cal., 217; 4 Cal. W. N., 294.

¹⁰ *Somayya v. Subbamma*, (1903) 26 Mad., 599.

¹¹ *Madan v. Baikanta*, (1906) 10 Cal. W. N., 430.

¹² *Ram Lal v. Sardaree*, W. R., 1864, 21; anonymous case 1 Ind. Jur., O. S. 68; *Onda v. Acowrie*, (1867) 7 W. R., 425; *Kali Kishore v. Dhunwanjoy*, (1878) 3 Cal., 228.

r. 2 but not those disposed of under O. XVII r. 3. When the first hearing of the

dismissed, because neither plaintiff nor his pleader appeared on the day fixed for hearing the arguments, it was held this rule did not apply.⁵ It does not apply to a partition suit dismissed for default.⁶

Review.—In such cases no review can be granted under this rule but only under the ordinary law for review of judgment.⁶

Sufficient cause.—As to sufficient cause, see *Manilal v. Ghulam*.⁶ When a plaintiff's suit came on for hearing, his counsel applied for a postponement and not obtaining it left the Court, the suit was then dismissed. Subsequently, the plaintiff made an application under s. 103, former Code, i. e. under this rule; *held*,—that there was no sufficient cause for the plaintiff's not appearing. But in another suit of the same plaintiff similarly dealt with, where the plaintiff urged that a defendant was dead, and that he had not had time to ascertain who were his representatives, this was held to be sufficient cause for his not appearing.⁷ Where his suit having been dismissed under rule 8 the plaintiff applies for its restoration, the defendant cannot contest the application *in limine* as one which cannot be entertained under rule 9 by showing that at the time of the dismissal there was an appearance by the plaintiff in fact or in law but as an answer to the application on the merits, the defendant can raise the contention that the plaintiff was not prevented from appearing because in fact he did appear.⁸

Presidency Small Cause Courts Act.—S. 38 of Act XV of 1882 does not preclude a plaintiff whose suit has been dismissed for default from applying under this rule to have the order of dismissal set aside.⁹

Fraud.—Gross negligence on the part of a next friend in the conduct of a suit brought on behalf of a person under a disability, prevents the effect of the bar contained in this rule to the institution of a fresh suit by such person when the disability has ceased.¹⁰

Limitation.—The period of limitation for an application under this rule is 30 days. See art. 163, Sch. II, Act XV of 1877. A notice that an application will be made on a future date does not prevent limitation running.¹¹

⁵ *Comlammal v. Rungasawmy*, (1869) 4 Mad. H. C., 56; *Mahomed Azeemoolah v. Ali Buksh*, (1873) 5 All. H. C., 74; *Kashi Parshad v. Devi Das*, (1875) 7 All. H. C., 77.

⁶ *Ram Sundar v. Ram Bandhan*, (1875) 7 All. H. C., 120; and see *Saheb v. Mahomed*, (1890) 13 Mad., 510.

⁷ *Rai Chand v. Mathura Prasad*, (1880) 3 All., 292.

⁸ *Bisheshar v. Ram Prasad*, (1903) 23 All., 627; *fol.* *Nasratullah v. Najibullah*, (1891) 13 All., 309.

⁹ *Ram Sundar v. Ram Bandhan*, (1875) 7 All. H. C., 120.

¹⁰ *Manilal v. Ghulam*, (1889) 13 Bom., 12.

¹¹ *Ram Pertab Mull v. Jukeeram Agurwalth*, (1896) 23 Cal., 691.

¹² *Lalla Prasad v. Nand Kishore*, (1900) 22 All., 66.

¹³ *Soonder Lal v. Gorr Prasad*, (1929) 23 Bom., 414; see also *Tooley Money Dassie v. Prowal Money Dassie*, (1893) 2 Cal. W. N., 490.

¹⁴ *Shoo Churn v. Ram Nanlan*, (1893) 22 Cal., 8.

¹⁵ *Hinga v. Mauna*, (1901) 31 Cal., 120; 8 Cal. W. N., 97; and see *Rhetter Mohan v. Kassy Nath*, (1903) 29 Cal., 899.

Appeal—An appeal lies from a suit which is itself open to appeal or directing a suit to be re-admitted;¹

Suit—It has, however, been held that although this rule applies to execution proceeding, still OXLIII r 1 (c) is confined to suits and does not give an appeal when an application under O. XXI r 90 is rejected². But see the meaning of suit in *Bheefendro v Baroda*³.

10. Where there are more plaintiffs than one, and one or more of them appear, and the others do not appear, the Court may, at the instance of the plaintiff or plaintiffs appearing, permit the suit to proceed in the same way as if all the plaintiffs had appeared, or make such order as it thinks fit.

Act XIV of 1882, Sec. 103

This rule applies to H. C. and Prov. S. C. C.

11. Where there are more defendants than one, and one or more of them appear and the others do not appear, the suit shall proceed, and the Court shall, at the time of pronouncing judgment, make such order as it thinks fit with respect to the defendants who do not appear.

Act XIV of 1882, Sec. 106

This rule applies to H. C. and Prov. S. C. C.

Decree on common ground—When all the defendants did not appear, and, the case proceeding, an ordinary decree was given against them on a ground common to them all, it was held that the decree was not an *ex parte* decree against the absent defendants⁴. There is nothing in this rule which conflicts with or limits the operation of rule 13⁵.

12. Where a plaintiff or defendant, who has been ordered to appear in person, does not appear in person, or show sufficient cause to the satisfaction of the Court for failing so to appear, he shall be subject to all the provisions of the foregoing rules applicable to plaintiffs and defendants, respectively, who do not appear.

¹ *Hirdhamun Jha v. Jinghoor Jha*, (1839) 5 Cal., 711, see O. XLIII, r. 1 (c)

² *Ashraffunnissa v. Lehareaux*, (1832) 8 Cal., 272, *Ablakh v. Bhagirath*, (1837) 9 All., 427.

³ *Ningappa v. Gangawa*, (1886) 10 Bom., 433; *Raja v. Steinivasa*, (1888) 11 Mad., 319; *Jung Bahadur v. Mahadeo Prosad*, (1901) 31 Cal., 207; 8 Cal. W. N., 160.

⁴ (1891) 18 Cal., 500; *Akrannissa v. Vahunnissa*, (1894) 18 Bom., 429; *Dhonkal Singh v. Phakkar*, (1893) 15 All., 81

⁵ *Doorga v. Shamanund*, (1869) 12 W. R., 376

⁶ *Cook v. Equitable Coal Co*, (1901) 8 Cal. W. N., 621.

Act XIV of 1882, sec. 107

This rule applies to H. C. and Prov. S. C. C.

Party absent, pleader present—A person failing to appear in person in obedience to a personal summons may have the case decided *ex parte* against him, notwithstanding that his pleader be present ¹

Refusal to attend—A Court has also power to send a party to be tried by a Criminal Court on his refusal to attend as a witness.²

Appeal—Where a suit was dismissed for default by plaintiff under this provision no appeal lay from the decree in the North-West, and the only remedy was by way of appeal under s. 588, cl. (8) former Code, now OXLIII r. 1 (c) from the order refusing to set the dismissal aside ³

Setting aside Decrees ex parte.

13. In any case in which a decree is passed *ex parte* against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit:

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also.

Act XIV of 1882, sec. 108. The words "as against him" and the whole of the proviso are new ⁴

This rule applies to H. C. and Prov. S. C. C., and to Part VII Presy. S. C. Act ⁵

Application of rule—In s. 108, Act X of 1877, the words were "in and case in which a decree is passed *ex parte* against a defendant under s. 100," and it was not clear whether that section applied to cases where the decree was passed on a day to which the case had been adjourned, or whether the effect was confined to the first hearing. The corresponding section of Act VIII of 1859 was held in *Comalaunul v. Rungasawmy*,⁶ to refer only to the first hearing; but the point did not arise in the case. A decision to the same effect was passed in the

¹ *Moona v. Gopal*, (1863) S. D., N. W., p. 37; *Kistodhone v. Nilmoney*, Croyton, 3.

² *Jankeer, in the matter of*, B. L. R., Sep. Vol., 716; *Janokee v. Dinkhna*, (1867) 7 W. R., 519

³ *Krishna v. Goland*, (1886) 8 All., 29.

⁴ As to this see post.

⁵ *Tyeb v. Allibhai*, (1907) 31 Bom., 45

⁶ *Comalaunul v. Rungasawmy*, (1869) 4 Mad. H. C., 56.

case of *Gorachand v. Raghu*.¹ On the other hand, it was decided in *Kalee Churn v. Modhoo*,² that the corresponding section of Act VIII of 1859 applied to all cases decided *ex parte* on certain grounds; but at the same time the defendant was not debarred from appealing by the express words of that section (now omitted in Act X, 1877) if the default by non-appearance had taken place at an adjourned hearing,³ and in *Deno Paroye v. Chinta Monee*,⁴ it was held that, where a defendant was prevented from appearing on the last day, through the raud of his adversary, the decision was an *ex parte* decision within this section, although he had been present at the first hearing. It has now been decided by the Full Bench of Calcutta High Court that this rule applies to every case in which a decree is passed *ex parte* against a defendant either under O IX r. 6 or O XVII r. 2.⁵ The application of this rule is not limited to the case of a sole defendant who has not appeared or when there are more defendants than one and none of them has appeared,⁶ and this is now expressly provided.

Does not apply.—But this rule will not apply where the case has been dismissed, not for default by non appearance, but for something else. Thus, on the day fixed for hearing, defendant's pleader obtained an adjournment to procure certain documents and put in written statements. He failed to do either, and on the day fixed the case was decreed in favour of the plaintiff. It was held that the decree was under what is now O XVII r. 2 and not under this rule and rule 12.⁷

Ex parte.—See note "APPEARANCE" under rule 1, p. 531. Though a decree appears to be based on a compromise impugned as a forgery, a defendant is entitled to show it is really *ex parte*.⁸ A decree made in a suit in which the defence was struck out under O XI r. 13 (S. 130 Act XIV of 1882) is not an *ex parte* decree.⁹ The expression "passed *ex parte*" in s. 7 of the Provincial Small Cause Court Act means a decree passed *ex parte* against a defendant, and does not include cases dismissed for default.¹⁰

The fact that an order, under rule 7 has been made against a defendant and has not been appealed against,¹¹ or that an *ex parte* decree has been satisfied,¹²

rehearing in the nature of an appeal.¹⁴ The rule contemplates the case of a Court

¹ *Gorachand v. Raghu*, (1869) 3 B. L. R., App., 121, and see *Zainulabdin v. Ahmed Reza*, (1878) L. R., 5 I. A., 233, 2 All., 67; *Sheo Chinn v. Heera*, (1882) 11 C. L. R., 537.

² *Kalee Churn v. Modhoo*, (1866) 6 W. R., 86.

³ *ib*.

⁴ *Deno Paroye v. Chinta Monee*, (1872) 18 W. R., 457.

⁵ *Jonardan v. Ramdhone*, (1896) 23 Cal., 738, see also *Jamina v. Beri Chand*, (1898) 2 Cal. W. N., 693; *Hildreth v. Sayaji Piraji*, (1896) 20 Bom., 380.

⁶ *Cooke v. Equitable Coal Co.*, (1904) 8 Cal. W. N., 621.

⁷ *Rangasamy v. Sarangan*, (1869) 4 Mad. H. C., 234; and see *Anantharama v. Madhava*, (1878) 3 Mad., 264; and see cases under O XVII rr. 2 and 3.

⁸ *Bholai Nashkar v. Alach*, (1897) 1 Cal. W. N., cxvii.

⁹ *Churni Lal v. Chamman*, (1885) 7 All., 159; *Kesharia v. Potnoah*, (1898) 2 Cal., W. N., 676.

¹⁰ *Jamina v. Sori*, (1898) 2 Cal. W. N., 693.

¹¹ *Sinkarahaga v. Ratnasabhapati*, (1899) 21 Mad., 324.

¹² *Zendoo v. Kishori*, (1899) 23 Bom., 716.

¹³ *Roshanlal v. Lachmi*, (1890) 17 Bom., 507.

¹⁴ *Parvati v. Shankar Ishverdas*, (1892) 19 Bom., 203.

setting aside its own decree and not that of another and a higher tribunal.¹ Where a defendant against whom a decree has been passed *ex parte* for default of appearance, dies, his legal representative is,² is not,³ competent to apply under this rule for an order to set the *ex parte* decree aside. The rule does not apply to the setting aside of an insolvency order.⁴

.. d to apply to execution
.. 4 of Act VI of 1892,
proceedings.⁶

The rule applies to an order in execution proceedings where no notice was given under O. XXI, r. 6 (Sec. 248 Act, XIV of 1882).⁷

Court—The Court remains the same, though the presiding officer may be different, and a Judge can revive a suit tried by his predecessor.⁸

Sufficient cause—A *bona fide* mistake which is not unreasonable is sufficient to have the case restored, such as supposing a month to mean a calendar month.⁹ Where it was the duty of an attorney's clerk to examine every evening

transferred to another Judge, the *ex parte* judgment was set aside on payment of the costs of the day.¹¹ It is sufficient for an infant to show that his guardian

the fact that the original calendar may be a been entered also. First to set aside

¹ Monomohini v. Nara, (1900) 4 Cal. W. N., 458; see also Zimutunnissa v. Muddun Mohan, (1874) 22 W. R., 537.

² Janki Prasad v. Sukhran, (1899) 21 All., 274.

³ Ganoda Prasad v. Shih Naram, (1902) 29 Cal., 33.

⁴ Sarat Chandra v. Mahomed Hossein, (1901) 8 Cal. W. N., 463.

⁵ Gour Mohan v. Tara Chand, (1869) 3 B. L. R., App., 17; Ram Kristo v. Tara Das, (1893) 12 C. L. R., 449; Bivassaran v. Binanda, (1841) 10 Cal., 416.

⁶ Akramnissa v. Valunissa (1891) 18 Bom., 429; Dhonkal v. Phakkar, (1893) 15 All., 84.

⁷ Krishna v. Protap (1906) 3 Cal. L. J., 276.

⁸ Raghoo Mohun v. Kasee, (1863) 10 W. R., 156.

⁹ Harditral v. Bullion Association, (1893) 3 Bom. H. C., 160.

¹⁰ Oriental Corporation v. Mercantile Corp., (1861) 2 Bom. H. C., 267.

¹¹ Burgoine v. Taylor, 9 C. D., 1.

¹² Kesho Pershad v. Hirday, (1890) 6 C. L. R., 69; Sheo Churn v. Ram Nandan, (1895) 22 Cal., 8.

¹³ Ajolhya Pershad v. Sheo, (1901) 5 Cal. W. N., 59.

¹⁴ Hanmantappa v. Jiva Bai, (1902) 21 Bom., 547.

¹⁵ Raj Narain v. Akroor, (1873) 21 W. R., 141.

¹⁶ Damodar v. Choonee, 2 Hyle, 216.

¹⁷ Manishanker, *ex parte*, (1861) 2 Bom. H. C., 351.

¹⁸ Anand Moyas v. Anand Somkar, (1870) 13 W. R., 237.

¹⁹ Awla v. Abdul, (1872) 14 W. R., 141.

²⁰ Chantassappa v. Mainaba, (1870) 7 Bom. H. C., A. C., 133.

was shown that there was no such summons and that the decree was not served on the defendant.

caus². This is now on which the decree was not duly served.³ A suit was remanded for trial by an order, dated the 28th December. It was dismissed for default on the 8th of January *held*, that the date was such as precluded the party most interested from appearing, and that an application made soon after by petitioner as representative of a former party, to have his name substituted and the case revived should have been acceded to.⁴

A case may be restored to the file under this rule, though sufficient cause is not shown.⁵

Proof.—Sufficient cause is proved either by the oath of the petitioner, or by petition supported by an affidavit,⁶ and if the requirements of the rule are carried out, the application cannot be refused on other ground, such as that the ancestors of the applicants were parties to the original proceedings out of which the case arose.⁷ Where a defendant against whom an *ex parte* decree has been passed appears, it is sufficient in the first instance to establish that in the Court which passed the *ex parte* decree, the necessary proof of service of summons on the defendant was not given by the plaintiff.⁸

The onus of proof lies on the applicant,⁹ but if he makes out a *prima facie* case the other party must rebut it.¹⁰

Divorce—As to how a decree *nisi* granted *ex parte* may be attacked, see *Stephen v. Stephen*.¹¹

Fraudulent decree—A suit will lie to set aside an *ex parte* fraudulent decree, although no endeavour has been made to get the decree set aside and the suit revived under rule 7,¹² or after such endeavour has been made, and the

truth of the application, and if it be established, the decree may be set aside.¹³

¹ *Shilbo Roy v. Kashee*, (1876) 23 W. R., 394.

² *Ewing v. Gosaldas*, (1869) 3 B. L. R., Appx. 7.

³ *Bholai v. Alach*, (1906) 3 Calc. L. J., 158.

⁴ *Haradhan v. Protap*, (1870) 14 W. R., 401.

⁵ *Samayya v. Subbamma*, (1903) 26 Mad., 599.

⁶ *Damodar v. Choonee*, 2 Hyde., 266, *Hardatrai v. Bullion Association*, (1865) 3 Bom. H. C., 69, *Anund Moyce v. Anund Soondur*, (1870) 13 W. R., 237.

⁷ *Doorgarane v. Jadub Chander*, (1866) 5 W. R., Mis., 11.

⁸ *Fakhruddin v. Ghafuruddin*, (1901) 23 All., 99.

⁹ *Torab Ali v. Choorammun*, (1873) 24 W. R., 262.

¹⁰ *Jhutoo Kooer v. Lalita*, (1874) 22 W. R., 423.

¹¹ (1890) 17 Calc., 370.

¹² *Abdul Mazumdar v. Mahomed Gazi*, (1894) 21 Calc., 605; *Pran Nath Roy v. Mohesh*, (1897) 24 Calc., 546.

¹³ *Dwarka Prosad v. Luchman*, (1899) 21 All., 239.

¹⁴ *Radha Raman v. Pran Nath Roy*, (1901) 23 Calc., 475; 5 Calc. W. N., 757; *Khagendra Nath v. Pran Nath Roy*, (1902) 29 I. A., 99; 29 Calc., 395; 6 Calc. W. N., 473.

¹⁵ *Koroona Moyce v. Nubokishore*, (1866) 6 W. R., Mis., 30.

Probate.—As to revoking a grant in common form, see *Nistarini v. Brahmo-moyi*.¹

Limitation.—Under art. 164, Sched. II, of the Limitation Act, the application should be made within 30 days from the date of executing any process for enforcing judgment. This thirty days begins to run from the first actual and complete execution of any process;² whether against the person or property of the defendant;³ and process against the person of the debtor is not necessary.⁴ Thus, attachment irrespective of the sale under it is sufficient;⁵ nor is notice of the process on the debtor necessary,⁶ for, if the process has been duly executed, the law presumes that the judgment-debtor must know of it.⁷ But mere notice of execution is not a process, and is insufficient.⁸ An infructuous application for attachment is not such a process as sets limitation running.⁹ Before a Judge can enter into an enquiry whether notice has or has not been served on the applicant in the first instance, when the suit was commenced, he must first determine if the application for re-hearing has been made in proper time.¹⁰ When an application to set aside an *ex parte* decree has been rejected, limitation as regards execution runs from the date of the *ex parte* decree.¹¹ Process of enforcing a judgment has not been executed within the meaning of this rule until the proceedings in execution have been brought to a termination by a sale of property attached.¹² But in *Radha Binode v. Digamburee*,¹³ it was held that process for enforcing judgment was executed when an attachment of the property had taken place, and any application to set aside the *ex parte* decree must be made within thirty days from the date of attachment. So also, the action of an ameen appointed under O XXVI, rr. 13, 14 in a partition suit, to demarcate the shares assigned to the parties is not the executing of a process for enforcing the judgment.¹⁴

Not debtor's property.—The limit is within 30 days from the process for enforcing judgment; this means process against the person or property of the judgment-debtor; and if the process is not personal, time does not begin to run until his property has been affected. So, a judgment debtor is not debarred from coming in more than 30 days after attachment, provided he shows the property attached is not his;¹⁵ but nothing less than this amount of proof will suffice. Where defendant petitioned that he had been obliged to leave his village and settle in a place 24 miles distant, and that he was not in possession of the lands against which the process issued, the petition was rejected.¹⁶

¹ (1891) 18 Cal., 45.

² *Gholam Ahyah v. Shiam Soondur*, (1867) 7 W. R., 375; *Bhubunessury v. Judobenidra*, (1883) 9 Cal., 869; *Sauraj v. Ambika*, (1884) 6 All., 144.

³ *Shib Chunder v. Luckhee*, (1866) 6 W. R., Mis., 51.

⁴ *Baba Brumh v. Dumree*, (1869) 1 All. H. C., 231.

⁵ *Bhubunessury v. Judobenidra*, (1883) 9 Cal., 869; *Radha Binode v. Digumburee*, (1863) 7 D. L. R., F. R., 917.

⁶ *Shumboo Chunder v. Ram Lal*, (1870) 13 W. R., 436.

⁷ *Boro Khosiah v. Jata*, (1871) 15 W. R., 315.

⁸ *Proorno Chunder v. Proorno*, (1877) 2 Cal., 123; but see *Sauraj v. Ambika*, (1884) 6 All., 144; *Anoragoo v. Abdulolah*, (1877) 26 W. R., 99.

⁹ *Panchanon v. Hurro Lal*, (1894) 2 Cal. W. N., col.

¹⁰ *Peasee Mohun Dutt, in the matter of*, (1869) 11 W. R., 310.

¹¹ *Jiraji v. Ramchandira*, (1892) 16 Bom., 123.

¹² *Hail & Binode v. Modhoo*, (1867) 7 W. R., 194.

¹³ (1868) 9 W. R., 236.

¹⁴ *Muhammad Khan v. Hanwant*, (1894) 20 All., 311.

¹⁵ *Shib Chunder v. Luckhee*, (1866) 6 W. R., Mis., 51; *Sookhmojee v. Nurmooda*, (1871) 15 W. R., 210.

¹⁶ *Kalee Prasad v. Digambar*, (1876) 25 W. R., 72.

Appeal.—When an application made under this rule is rejected, an appeal lies against the order of rejection under s 103,¹ but not a second appeal.² No appeal lies from an order setting aside the decree.³ When an *ex parte* decree was set aside by an order under this rule and the suit heard on the merits, and dismissed; *held* that such an order was not an order affecting the decision of the case under s 105, and was not appealable.⁴ And when a defendant has not adopted the remedy provided by this rule he cannot appeal from the *ex parte* decree under the general provisions of s. 96.⁵ The proper course after the rejection of an application under this rule is to prefer an appeal against that order and not against the original decree.⁶

In an appeal from an order refusing to set aside a decree under this rule on the ground that the rule did not apply, the only case that can be remanded by the appeal Court to be tried on the merits is the application under this rule and not the original case, the decree in which is sought to be set aside.⁷ The Court has no jurisdiction to remand the suit, when it has been heard on the merits.⁸

Review.—An *ex parte* decree is liable to review.⁹

For defendant's remedy where the suit has been decided *ex parte* under s. 157, former Code, O XVII r 2, see *Ramtalal v Rameshar*.¹⁰

Revision.—Under s 119, Act VIII of 1859, an order setting aside a judgment was final, and under the present procedure, no appeal is allowed. This was held to mean an order passed within jurisdiction, under the conditions specified by law, if it were otherwise as if it were passed on an application made after 30 days, the Court exercised a jurisdiction it did not possess, and, though no appeal would lie, the order could be set aside on motion under the Charter;¹¹ or on application in the nature of a review to the Judge who passed the order.¹²

How contested.—And though a proper order is so far final that it is not open to appeal, its propriety may be contested in appeal from the final decree. Thus, where an application for re-hearing was admitted after 30 days, all proceedings subsequent to the order of admission were set aside in appeal from the final decree,¹³ but in another case the Judges seemed to look upon such an order as not affecting jurisdiction, but as a mere irregularity, such as the admission of evidence in appeal without recording the reason, and to hold that the Courts are bound to decide on the whole evidence in the case.¹⁴ And therefore it was held that, if the objection is not raised in the first appellate Court, it is

¹ *Luckmi Das v Ebrahim*, (1878) 2 Bom , 644. See O XLIII.

² *Aubinaash Chunder v. Martin*, (1882) 8 Cal. , 832, *Bhagwan Das v. Hira*, (1891) 18 All., 355.

³ *Shama v Hurbans*, (1899) 16 Cal. , 426.

⁴ *Chitramony v Raghoonath*, (1895) 22 Cal. , 931; *Gulab Kunwar v Thakur Das*, (1902) 24 All. 464; *Tasaddug v. Hayatunissa*, (1903) 25 All., 280.

⁵ *Lal Singh v Kunjan*, (1882) 4 All. , 387.

⁶ *Caussanel v Soures*, (1900) 23 Mad , 260.

⁷ *Radha Kissen v. Collector of Jaunpore*, (1901) 5 Cal. W. N. , 153; 23 All. , 220.

⁸ *Sonanka v Beakul*, (1908) 7 Cal. L J. , 379.

⁹ *Mutto v Hahu*, (1884) 6 All. , 65; *Harhur v Buddu* (1883) 13 C. L. R. , 254; *Poresh Nath v Kheirro* (1879) 20 W. R. 284; *contra Motes Chand v Radha Madhub*, (1865) 2 W. R. , Mis. , 31, see "Remedies" O. IX, r. 26 and Appeal and Review O. IX, r. 8.

¹⁰ *Ramtalal v. Rameshar*, (1886) 8 All., 140.

¹¹ *Luckhee Monce v. Bhoolun Mohun*, (1875) 23 W. R., 147.

¹² *Sheo Prosunno v. Buldharee*, (1870) 13 W. R. , 232.

¹³ *Runglall v. Tokhun*, (1876) 25 W. R. , 304; *Bimola v. Kalee Kishen*, (1874) 22 W. R. , 5.

¹⁴ *Boro Khoslah v Jata*, (1871) 15 W. R., 315; 8 D. L. R. , 78.

Where one of several defendants got the benefit of a stay of execution, and the appellate Court was wrong in its decision as regards the latter defendant,

Effect of revival.—Under Act XIV of 1882, s. 108 (which did not contain the words “as against him” or the provisos which are found in this rule) there was a conflict of authority. The High Courts of Bombay,³ Madras,⁴ and Allahabad,⁵ held that an application by one defendant does not reopen the case against his co-defendants. The Calcutta High Court in a recent case held that the effect of setting aside an *ex parte* decree against some only of several defendants

Terms—The Court has no power to impose terms.⁶ The Court has power to set aside an *ex parte* decree on condition that the defendant shall find a surety for any amount which may be subsequently decreed against the defendant.⁷

Defendant applied under s. 119, Act VIII of 1859, and his application was rejected. He appealed; the suit was remanded, and the first Court admitted

ings subsequent to the order appealed against, and to confirm the order of the first Court admitting the defendant to contest the suit.¹³

¹ Boro Khassish v. Jata, (1871) 15 W. R., 315; 8 D. L. R., 78.

² Koroosamoyee v. Nubi, (1869) 11 W. R., 18.

³ Manaku v. Sitaram, (1891) 18 Bom., 142.

⁴ Gopala v. Subbier, (1903) 26 Mad., 691; Sambasari v. Veera, (1903) 24 Mad., 361.

⁵ Shaida Hussain v. Hub Hussain, (1907) 23 All., 42.

⁶ Mahomed Hamidulla v. Tohurennissa, (1897) 23 Cal., 153; 1 Cal. W. N., 632.

⁷ Jadulana v. Mohunt, (1907) 6 Cal. L. J., 226.

⁸ Administrator General of Bengal v. Dyaram Das, (1871) 6 D. L. R., 688.

⁹ Sonalun v. Dinanath, (1899) 26 Cal., 222; 3 Cal. W. N., 228.

¹⁰ Jagat Narayan v. Tuladram, (1869) 1 D. L. R., 71; and see Jodhraj Singh v. Buhooria, (1891) 7 C. L. R., 421.

¹¹ Gowree Byjonnath v. Jolha, (1873) 19 W. R., 416.

¹² Zainulabidin v. Ashgar, (1889) L. R., 15 L. A., 12; 10 All., 166.

¹³ Nulo Kristo v. Nuldar, (1899) 12 W. R., 374; see also Rewa Mahlon v. Ram. Kishen, (1887) 14 Cal., 18; L. R., 13 L. A., 103; Mukbishi v. Gopal, (1899) 29 Cal., 731; Mathura Mohan v. Akhy, (1888) 15 Cal., 537; Kaunsilla v.

obtaining and serving fresh summonses on the witnesses should be thrown on the plaintiff.³

Affidavits not allowed.—In an appeal from an order of rejection under s. 119, Act VIII of 1859, the appellant then tendered an affidavit, explaining conduct in the Lower Court, as evidence under s. 355, Act VIII of 1859, but it was rejected.⁴

Practice.—After an appeal has been filed, an application under this rule should be made to the appellate Court.⁵

When a party has commenced proceedings under this rule his legal representative may continue them.⁶

14. No decree shall be set aside on any such application as aforesaid unless notice thereof has been served on the opposite party.

No decree to be set aside without notice to opposite party.

Act XIV of 1882, Sec. 109

This rule applies to H. C. and Prov. S. C. C.

Opposite party.—An auction-purchaser of property sold in execution of an *ex parte* decree is not a necessary party to an application made by a judgment-debtor to set aside the said decree, inasmuch as the auction-purchaser does not come under the description of "opposite party" in this rule.⁷

Chandar Sen, (1900) 22 All. 377; Yellappa v. Ram Chandra, (1897) 21 Bom., 463, and see notes to O. XXI, r. 92 "Purchase by a stranger," "Purchase by a creditor."

³ Umed Mal v. Srinath, (1900) 27 Calc., 810; 4 Calc. W. N., 692.

⁴ Ram Buksh v. Kishoree, (1869) 12 W. R., 130.

⁵ Bishen Perkaish v. Ruttun, (1873) 20 W. R., 3.

⁶ Leslie v. Allender, (1872) 17 W. R., 390.

⁷ Sankara v. Subraya, (1907) 30 Mad., 535.

⁸ Beti v. Sham, (1907) 29 All., 574; A. W. N., 176.

⁹ Jatindra Mohan v. Srinath Roy, (1899) 26 Calc., 267, 3 Calc. W. N., 261.

ORDER X.

Examination of Parties by the Court.

1. At the first hearing of the suit the Court shall ascertain from each party or his pleader whether he admits or denies such allegations of fact as are made in the plaint or written statement (if any) of the opposite party, and as are not expressly or by necessary implication admitted or denied by the party against whom they are made. The Court shall record such admissions and denials.

Act XIV of 1882, Sect. 117.

This rule applies to H. C. and Prov. S. C. C.

The rule of law is that a judgment deliberately recording the admission of a defendant admitted their possession as mortgagees * As to the effect of admissions by authorized agents, see notes to sec 2 ante and "Pleader." p. 24

2 At the first hearing of the suit, or at any subsequent hearing, any party appearing in person or present in Court, or any person able to answer any material questions relating to the suit by whom such party or his pleader is accompanied, may be examined orally by the Court: and the Court may, if it thinks fit, put in the course of such examination questions suggested by either party.

Act XIV of 1882, Sect. 118

This rule applies to H. C. and Prov. S. C. C.

frame the issues; not putting in a written statement does not justify the trial of a suit *ex parte*.⁴ Parties have no right to put questions to each other.

⁴ *Hurdial v. Heera Lal*, (1871) 16 W. R., 107.

⁵ *Ratan Kuar v. Jiwan Singh*, (1876) 1 All., 191.

⁶ *Joy Prakash v. Meghraji*, (1889) 12 W. R., 270.

⁷ *Sivaramjadhani v. Koppaghatulu*, (1864) 2 Mad. H. C., 311.

3. The substance of the examination shall be reduced to writing by the Judge, and shall form part of the record.

Substance of examination to be written

Act XIV of 1882, Sect 119

or to the Punjab Chief C., in the exercise Prov. S. C. C. See Order XLVIII and XLIX of 1884, s. 16 (2). It does not apply to the Province, in the exercise of his original N. W. Frontier Province Law and Justice

The examination must be on oath or affirmation, see s. 5, Act X of 1873.

Construction.—Statements made by a pleader must not be construed too strictly and should be taken as a whole, and omission to deny a matter pleaded, does not amount to an admission¹

4. (1) Where the pleader of any party who appears by a pleader or any such person accompanying a pleader as is referred to in rule 2, refuses or is unable to answer any material question relating to the suit which the Court is of opinion that the party whom he represents ought to answer and is likely to be able to answer if interrogated in person, the Court may postpone the hearing of the suit to a future day and direct that such party shall appear in person on such day.

Consequence of refusal or inability of pleader to answer.

(2) If such party fails without lawful excuse to appear in person on the day so appointed, the Court may pronounce judgment against him, or make such order in relation to the suit as it thinks fit.

Act XIV of 1882, s. 120 This rule applies to H. C. and Prov. S. C. C.

The object of this examination is not to take evidence or to ascertain what is to be evidence in the case, but to see what are the matters in dispute, and, if necessary, to allow the plaint to be amended²

Material.—Before acting under this rule, the Judge should be satisfied that the question is material,³ and he should record the grounds of his satisfaction and the question asked⁴

Lawful excuse.—Whether an excuse is lawful or not will depend on the nature of the particular case,⁵ and before passing a decree against a person for non-attendance, the Judge should hear what he has to say, and adjudicate on the sufficiency of the excuse⁶ It may be lawful excuse if the party objects to appear and give evidence on the ground that he lives beyond the limits

¹ Natha Singh v. Jodha, (1884) 6 All., 406; but see O. VIII, r. 5.

² Gunga Narain v. Tluekiam, (1887) L. R., 15 I. A., 119; 15 Cal., 333.

³ Gopal Chundet v. Mohesh Chunder, (1874) 21 W. R., 44; Satn v. Hanmantrao, (1893) 23 Bom., 318.

⁴ Makoond Adit v. Suttoorghun Adit, (1872) 17 W. R., 507.

⁵ Doorga Dutt v. Jheengoor, (1872) 18 W. R., 63.

⁶ Mahomed Hamidooli v. Darbesh, (1875) 24 W. R., 314; Bhally Mahomed v. Nobin Chunder, (1871) 15 W. R., 269.

mentioned in O XVI r 19;¹ or is exempted under this Code,² or has not had sufficient time to appear;³ or was of necessity absent on Government service on the date fixed;⁴ But where plaintiff's mookhtear was unable to answer certain questions necessary for fixing the proper issues, and the plaintiff, who was exempt from attendance in the Civil Court, was called on to appear or send some one who could answer and he did neither;⁵ or he promised to appear but did not, and give no reason why he could not;⁶ or refused to appear on social grounds, namely, that persons of his position had a prejudice against appearing in Court;⁷ it was held that his case was properly decided against him.

Or make such order.—The Court is not bound to decree the case against the party who has not appeared, and may pass any order it deems fit,⁸ unless all legal processes to compel his attendance have been exhausted.⁹

A fair cause of action or the defendant a defence, the suit should not be decreed or dismissed under this rule. The true rule appears to be that a suit should not be dismissed for non-attendance unless there is a distinct order to attend, that it has been served upon the plaintiff or brought to his knowledge, that he has wilfully disobeyed it, and the evidence he has been required to give is material,¹⁰ or unless there is satisfactory evidence as to the existence of the

is not imperative but discretionary with the Court to give a decree against the non-attending party.¹¹ It is not intended to empower a Court to decree a claim

¹ Oolam Bukehee v. Pulton Singh, (1863) 3 W. R., Act X, 162.

² Juggud Inder v. Soorj Coomer, Marsh., 627.

³ Khadar v. Rahiman, (1867) 3 Mad. H. C., 167.

⁴ Cowell v. Ishen Chunder, (1872) 18 W. R., 16.

⁵ Nilmonee Singh Deo v. Ram Huree, (1865) 2 W. R., 161.

⁶ Doorga Datt v. Jheengoor, (1872) 18 W. R., 63.

⁷ Kaleo Chunder v. Sarut Soonduree, (1872) 18 W. R., 15; Nursing Deb v. Ramtohun, Marsh., 176.

⁸ Khadar v. Rahiman, (1867) 3 Mad. H. C., 167; Roop Narain v. Kasheoram, (1870) 2 All. H. C., 67.

⁹ Dutee Narain v. Sham Soondar, (1865) 2 W. R., Act X, 43.

¹⁰ Pakaktar v. Jakiram, (1869) 11 W. R., 5.

¹¹ Ishan Chunder v. Hurish Chunder, (1869) 12 W. R., 369; 9 B. L. R., 218, note—Kashinath v. Dwarknath, (1872) 9 B. L. R., 215; 17 W. R., 550; Damoodar Bhoochun v. Rughoonath, (1869) 12 W. R., 212; Thakoor Lall v. Brohmo Moyee, (1871) 15 W. R., 233.

¹² Pearoo Mohun v. Hurish Chunder, (1872) 17 W. R., 141; Raj Chookun v. Busjeet, (1873) 20 W. R., 165; Obhoy Churn v. Pearoo Dossia, (1874) 22 W. R., 270.

¹³ Laith Narain v. Balkeo Chowdhury, W. R., 1865, 24.

¹⁴ Gooroolas v. Greedhur, (1869) 11 W. R., 110.

¹⁵ Premunno Coomar v. Gooroo Pershad, (1861) 1 W. R., 25; Benode Ram v. Brohomomoyee, (1861) 1 W. R., 164.

¹⁶ Padhyar Vasudharan v. Koyak Kovilgatha, (1869) 4 Mad. H. C., 231.

¹⁷ Aleh Ahmed v. Nuseeban, (1872) 17 W. R., 563.

¹⁸ Rajshunder v. Koylath, (1866) 6 W. R., Act X, 66; Gopal Lal v. Kaleenath, (1866) 6 W. R., 83.

which is on the face of it barred by limitation merely because the defendant has been summoned but does not appear;¹ and the stringent provisions of the rule ought to be applied only in the case of contumacious litigants.² But the omissions to exercise the discretion properly is a ground for interference by the superior Court.³ A Court should not presume from the absence of a plaintiff that his accounts did not contain entries showing the payment of consideration to the defendant;⁴ but the Court may presume from the non-appearance of the defendant that facts on which his evidence is necessary are peculiarly within his knowledge.⁵

Execution proceedings.—This rule applies to execution proceedings.⁶

¹ *Gireedharee v. Kalika Sookul*, (1867) 7 W. R., 46.

² *Data Hurukman v. Oodoy Chand*, (1866) 6 W. R., 247; *Thakoor Lal v. Brohmomoyee*, (1871) 15 W. R., 253.

³ *Ishen Chunder v. Onath Nath*, (1872) 18 W. R., 16.

⁴ *Subhaji v. Shuddapa*, (1902) 26 Bom., 392.

⁵ *Hemangini v. Ram Nidhee*, (1868) 1 B. L. R., S. N., X; 10 W. R., 158.

⁶ *Deshan Hossein v. Khodeja*, (1867) 8 W. R., 61.

mentioned in O XVI r. 19;¹ or is exempted under this Code;² or has not had sufficient time to appear;³ or was of necessity absent on Government service on the date fixed;⁴ But where plaintiff's mookhtear was unable to answer certain questions necessary for fixing the proper issues, and the plaintiff, who was exempt from attendance in the Civil Court, was called on to appear or send some one who could answer and he did neither;⁵ or he promised to appear but did not, and gave no reason why he could not;⁶ or refused to appear on social grounds, namely, that persons of his position had a prejudice against appearing in Court,⁷ it was held that his case was properly decided against him.

Or make such order.—The Court is not bound to decree the case against the party who has not appeared, and may pass any order it deems fit,⁸ unless all legal processes to compel his attendance have been exhausted.⁹ It might proceed, for instance, to have the case dismissed.

that it has been served upon the plaintiff or brought to his knowledge, that he has wilfully disobeyed it, and the evidence he has been required to give is material,¹² or unless there is satisfactory evidence as to the existence of the personal knowledge of the defendant of the matters in dispute.¹³ To render a person liable to the penalty under this rule it must be shown that notice had been

ble and judicial.¹⁷ It is not intended to empower a Court to decree a claim against the non-attending party.¹⁸

¹ Golam Bukshee v. Fulton Singh, (1863) 3 W. R., Act X, 162.

² Juggud Inder v. Soorj Coomer, Marsh., 627.

³ Khadar v. Rahiman, (1867) 3 Mad. H. C., 167.

⁴ Cowell v. Ishen Chunder, (1872) 18 W. R., 16.

⁵ Nilmonoo Singh Deo v. Ram Hurree, (1863) 2 W. R., 161.

⁶ Doorga Dutt v. Jheengoor, (1872) 18 W. R., 63.

⁷ Kales Chunder v. Surut Soondaroo, (1872) 18 W. R., 45; Nursing Deb v. Rammohun, Marsh., 176.

⁸ Khadar v. Rahiman, (1867) 3 Mad. H. C., 167; Roop Narain v. Kasheeram, (1870) 2 All. H. C., 67.

⁹ Bustee Narain v. Sham Soondar, (1863) 2 W. R., Act X, 43.

¹⁰ Pakaktar v. Jakirram, (1869) 11 W. R., 5.

¹¹ Ishan Chunder v. Harish Chunder, (1869) 12 W. R., 369; 9 B. L. R., 218, note—Kashinath v. Dwarkanath, (1872) 9 B. L. R., 215; 17 W. R., 550; Damoodar Bhoomhun v. Rughoonath, (1869) 12 W. R., 242; Thakoor Lall v. Brohmo Moyee, (1871) 15 W. R., 233.

¹² Pearee Mohun v. Harish Chunder, (1872) 17 W. R., 141; Raj Chookun v. Basjeet, (1873) 20 W. R., 163; Obhoy Chura v. Pearee Dossia, (1874) 22 W. R., 270.

¹³ Laith Narain v. Bolakee Chowlbury, W. R., 1863, 24.

¹⁴ Gooroodas v. Greedhur, (1869) 11 W. R., 110.

¹⁵ Prosunno Coomar v. Gooroo Pershad, (1861) 1 W. R., 23; Benode Ram v. Brohomomoyee, (1864) 1 W. R., 164.

¹⁶ Padhyar Vasulavan v. Keyak Kovilagatha, (1868) 4 Mad. H. C., 234.

¹⁷ Aleh Ahmed v. Nuseebun, (1872) 17 W. R., 563.

¹⁸ Rajeshunder v. Koylath, (1866) 6 W. R., Act X, 86; Gopal Lal v. Kalcenath, (1869) 3 W. R., 49.

which is on the face of it barred by limitation merely because the defendant has been summoned but does not appear,¹ and the stringent provisions of the rule ought to be applied only in the case of contumacious litigants.² But the omissions to exercise the discretion properly is a ground for interference by the superior Court.³ A Court should not presume from the absence of a plaintiff that his accounts did not contain entries showing the payment of consideration to the defendant;⁴ but the Court may presume from the non-appearance of the defendant that facts on which his evidence is necessary are peculiarly within his knowledge.⁵

Execution proceedings—This rule applies to execution proceedings.⁶

¹ *Gureedhasee v. Kahika Sookul*, (1867) 7 W. R., 46.

² *Data Harukman v. Oodoy Chand*, (1866) 6 W. R., 247; *Thakoor Lal v. Brohmomoyee*, (1871) 15 W. R., 253.

³ *Ishen Chunder v. Ooath Nath*, (1872) 18 W. R., 16.

⁴ *Subhaji v. Shuddapa*, (1902) 26 Bom., 392.

⁵ *Hemangini v. Ram Nidhee*, (1869) 1 B. L. R., S. N., X; 10 W. R., 158.

⁶ *Deshan Hossein v. Khodeja*, (1867) 8 W. R., 61.

ORDER XI.

Discovery and Inspection.

1. In any suit the plaintiff or defendant by leave of the Court may deliver interrogatories in writing for the examination of the opposite parties or any one or more of such parties, and such interrogatories when delivered shall have a note at the foot thereof stating which of such interrogatories each of such persons is required to answer: Provided that no party shall deliver more than one set of interrogatories to the same party without an order for that purpose: Provided also that interrogatories which do not relate to any matters in question in the suit shall be deemed irrelevant, notwithstanding that they might be admissible on the oral cross-examination of a witness.

See Act XIV of 1882, Chap X and R. S. O. 31, r. 1. This rule applies to H. C. and S. 148. ¹ of 1885, embodied Courts in England are collected in the Annual Practice, see notes to O. 31 and the whole subject is comprehensively discussed in *May on Discovery*, a copy of which work should find a place in every reference library.

In any suit.—This rule is restricted to “suits” properly so called, and is narrower than the corresponding English rule, which runs “any cause or matter” we have no definition of the word “suit” in the Code but the alteration in the wording of the English rule shows clearly the intention of the Legislature to confine the application of this Order to proceedings commenced by a plaintiff. See O. IV r. 1.

Plaintiff or Defendant may.—See note to r. 12 *infra* v. “Any party.”

By leave of the Court.—See note to r. 2 *infra*.

Opposite parties.—A party on the discovery although there may be no iss where a person has been irregularly made a party for the purposes of discovery this rule will not apply.²

Between co-plaintiffs or co-defendants discovery will be granted only where there is some right to be adjusted between them,³ and an application for leave to interrogate a co-defendant who had put in no defence, there being no issue raised between him and the applicant, has been refused in England.⁴

Minor or Lunatic.—See note to O. XI r. 23 *infra*.

¹ *Spokes v. Grosvenor*, (1897) 2 Q. B., 121.

² *Rahimboy v. Turner*, (1893) 17 Bom., 311.

³ *Molloy v. Kilby*, (1880) 13 C. D., 162. *Eden v. Wearlale Co.*, (1887) 31 C. D., 222.

⁴ *Marshall v. Langley*, (1899) W. N., 222. Ann. Prac. 1903, 1, 386.

⁷ Per Chitty J in *Tye v. Willoughby*, 38 Sol Journal, 338.

ORDER XI.

Discovery and Inspection.

1. In any suit the plaintiff or defendant by leave of the Court may deliver interrogatories in writing for the examination of the opposite parties or any one or more of such parties, and such interrogatories when delivered shall have a note at the foot thereof stating which of such interrogatories each of such persons is required to answer: Provided that no party shall deliver more than one set of interrogatories to the same party without an order for that purpose: Provided also that interrogatories which do not relate to any matters in question in the suit shall be deemed irrelevant, notwithstanding that they might be admissible on the oral cross-examination of a witness.

Discovery by interrogatories.

See Act XIV of 1882, Chap X and R. S. O. 31, r. 1. This rule applies to H. C. and Prov S. C. C., but not to rent suits in Bengal, see Act VIII of 1885, s. 148. This Order introduces the English rules as to Discovery embodied in Order 31 of the rules of the Supreme Court. The decisions of the Courts in England are collected in the Annual Practice, see notes to O. 31 and the whole subject is comprehensively discussed in Bray on Discovery, a copy of which work should find a place in every reference library.

In any suit—This rule is restricted to “suits” properly so called, and is which runs “any cause or matter”
 Code but the alteration in the
 the intention of the Legislature to
 proceedings commenced by a plaint.
 see O. 11 r. 1.

Plaintiff or Defendant may—See note to r. 12 infra v. “Any party”

By leave of the Court.—See note to r. 2 infra.

Opposite parties.—A party on the opposite side of the record to the applicant is an opposite party, and if he is a necessary party may be ordered to give discovery although there may be no issue between him and the applicant.¹ But where a person has been irregularly made a party for the purposes of discovery this rule will not apply.²

Between co-plaintiffs or co-defendants discovery will be granted only where there is some right to be adjusted between them,³ and an application for leave to interrogate a co-defendant who had put in no defence, there being no issue raised between him and the applicant, has been refused in England.⁴

Minor or Lunatic.—See note to O. XI r. 23 infra.

¹ *Spokes v. Grosvenor*, (1897) 2 Q. B., 121.

² *Rahimboy v. Turner*, (1893) 17 Bom., 311.

³ *Molloy v. Kilby*, (1880) 13 C. D., 162. *Eden v. Wearlale Co.*, (1897) 31 C. D., 223.

⁴ *Marshall v. Langley*, (1889) W. N., 222. Ann. Prac. 1009, 1, 386.

very strictly upheld to protect the Corporation from admissions by its members or officers who may very well have interests adverse or even directly antagonistic to its own¹

Quære, is a solicitor an officer?—See *Great Western Forest Co.*, *in re*, 31 C. D., 496

Practice—The application should be made in Chambers against the company, and if there is any objection, the company appear by their solicitor, the officer does not. The Judge must be satisfied that the officer selected by the party has a competent knowledge of the facts and the means of answering²

Costs—The company's solicitor should act for the member or officer who is directed to answer, and prepare the answers for him, and charge the company with the cost of so doing. He should not employ a separate solicitor³

Foreign sovereign—A foreign republic should, as far as is possible, be treated as a body corporate;⁴ a sovereign as a private individual⁵. See note to r. 11 *infra*, and *Bray* pp 68–72

6 Any objection to answering any interrogatory on the ground that it is scandalous or irrelevant or not exhibited *bona fide* for the purpose of the suit, or that the matters inquired into are not sufficiently material at that stage, or on any other ground, may be taken in the affidavit in answer.

Act XIV of 1882, sect. 125 R S O 31 r 6

7. Any interrogatories may be set aside on the ground that they have been exhibited unreasonably or vexatiously, or struck out on the ground that they are prolix, oppressive, unnecessary or scandalous; and any application for this purpose may be made within seven days after service of the interrogatories.

R. S. O. 31 r 7. This rule apply to H C and Prov. S C C.

Discovery—Discovery is based on the following propositions:—

I.—It is the right, as a general rule, of a plaintiff in equity to examine the defendant upon oath as to all matters of fact which, being well pleaded in the bill, are material to the proof of the *plaintiff's case*, and which the defendant does not by his form of pleading admit

the case of the defendant,⁶ and does not extend to a discovery of the manner

¹ *Deeley v. Standard Discount Co.*, (1879) 13 C. D., 91; 9 C. D., 615.

² *Rep. Costa Rica v. Erlanger*, 1 C. D., 171, 174.

³ *Prioleau v. United States*, L. R., 2 Eq., 639, p. 663

⁴ *Eade v. Jacobs*, 3 Ex. D., 335; *Attorney-General v. Gaskill*, 20 C. D., 519, p. 529; *Bidder v. Bridges*, 29 C. D., 29; see however, *Ali Kader v. Gobind Dass*, (1890) 17 Calc., 840; *Nittomoye Dass v. Soobal Chunder Law*, (1896) 23 Calc., 117.

tions to answer such questions as, he objects to and the interrogating party, if dissatisfied, can apply under r. 11.¹ An application to deliver further interrogatories may be made under this rule.²

3. In adjusting the costs of the suit inquiry shall at the instance of any party be made into the propriety of exhibiting such interrogatories, and if it is the opinion of the taxing officer or of the Court, either with or without an application for inquiry that such interrogatories have been exhibited unreasonably, vexatiously, or at improper length, the costs occasioned by the said interrogatories and the answers thereto shall be paid in any event by the party in fault.

Form of Interrogatories. 4. Interrogatories shall be in Form No. 2 in Appendix C, with such variations as circumstances may require.

R. S. O. 31 rr. 3 and 4. This rule* apply to H. C. and Prov. S. C. C.

Corporations. 5. Where any party to a suit is a corporation or a body of persons, whether incorporated or not, empowered by law to sue or be sued, whether in its own name or in the name of any officer or other person, any opposite party may apply for an order allowing him to deliver interrogatories to any member or officer of such corporation or body, and an order may be made accordingly.

R. S. O. 31 r 5 Act XIV of 1882 sect 124 This rule applies to H. C., and Prov. S. C. C.

Any Member or Officer.—The secretary of a Company or Corporation is, as a rule, the proper person to answer interrogatories on its behalf,³ and the Courts are disinclined to direct a Member to answer unless there is no officer to answer interrogatories from other sources. On the other hand, the officer or member must answer strictly as the fact is, and not as he thinks fit, or as his private information leads him to believe. Corporation interrogated.⁴

On this rule is founded the decision that the answer of a Member or Officer can be read against the Corporation,⁵ so it is obvious that the rule should be

¹ *Shankiswari v. Shohoolhoosun*, (1890) 5 C. L. R., 509; 5 Cal., 707; *Prem Sukh v. Indronath*, (1891) 18 Cal., 420.

² *Doake v. Stevenson*, (1895) 1 Ch., at p. 360.

³ *Berkeley v. Standard Discount Co.* (1879) 13 C. D., p. 97, per Jessel M. R.

⁴ *Southland Co. v. Quirk*, (1878) 3 Q. B. D., 315.

⁵ *Welsh v. New Sunlight Co.* (1899) 2 Ch., 1, see note to r. 11, *infra*, *vide* Information of Agents.

⁶ *Welsh v. New Sunlight Co.*, *supra*. *Chaddock v. British S. A. Co.*, (1896) 2 Q. B., 154.

very strictly upheld to protect the Corporation from admissions by its members or officers who may very well have interests adverse or even directly antagonistic to its own.¹

Quare, is a solicitor an officer?—See *Great Western Forest Co., in re*, 31 C. D., 496

Practice—The application should be made in Chambers against the company, and if there is any objection, the company appear by their solicitor; the officer does not. The Judge must be satisfied that the officer selected by the party has a competent knowledge of the facts and the means of answering.²

Costs—The company's solicitor should act for the member or officer who is directed to answer, and prepare the answers for him, and charge the company with the cost of so doing. He should not employ a separate solicitor.³

Foreign sovereign—A foreign republic should, as far as is possible, be treated as a body corporate;⁴ a sovereign as a private individual.⁵ See note to r. 11 *infra*, and *Bray* pp 68–72

6. Any objection to answering any interrogatory on the ground that it is scandalous or irrelevant or not exhibited *bona fide* for the purpose of the suit, or that the matters inquired into are not sufficiently material at that stage, or on any other ground, may be taken in the affidavit in answer

Objections to interrogatories by answer.

Act XIV of 1882, sect. 125 R. S. O. 31 r 6

7. Any interrogatories may be set aside on the ground that they have been exhibited unreasonably or vexatiously, or struck out on the ground that they are prolix, oppressive, unnecessary or scandalous; and any application for this purpose may be made within seven days after service of the interrogatories.

Setting aside and striking out interrogatories.

R. S. O. 31 r 7. This rule apply to H. C. and Prov. S. C. C.

Discovery—Discovery is based on the following propositions.—

I.—It is the right, as a general rule, of a plaintiff in equity to examine the defendant upon oath as to all matters of fact which, being well pleaded in the bill, are material to the proof of the *plaintiff's case*, and which the defendant does not by his form of pleading admit

II.—Courts of Equity, as a general rule, oblige a defendant to pledge his oath to the truth of his defence. With this (if a) qualification, the right of the plaintiff in equity to the benefit of the defendant's oath is limited to a discovery of such material *facts* as relate to the plaintiff's case or are necessary to support the case of the defendant,⁶ and does not extend to a discovery of the manner

¹ *The State of Alabama v. Bank of Bengal*, 20 C. D., 170; *Bank of Bengal*, 20 C. D., 170.

² *I. v. North Metro.*

³ *I. v. D., 643.*

⁴ *Rep. Costa Rica v. Erlanger*, 1 C. D., 171, 174.

⁵ *Prinoleau v. United States*, L. R., 2 Eq., 639, p. 663.

⁶ *Eade v. Jacobs*, 3 Ex. D., 335; *Attorney-General v. Gaskill*, 20 C. D., 519, p. 629; *Bulder v. Bridges*, 29 C. D., 29; see however, *Ali Kader v. Gobind Dass*, (1890) 17 Cal., 840; *Nittomoye Dass v. Soobul Chunder Law*, (1890) 23 Cal., 117.

tions to answer such questions as, he objects to and the interrogating party, if dissatisfied, can apply under r. 11.¹ An application to deliver *further* interrogatories may be made under this rule.²

3. In adjusting the costs of the suit inquiry shall at the instance of any party be made into the propriety of exhibiting such interrogatories, and if it is the opinion of the taxing officer or of the Court, either with or without an application for inquiry that such interrogatories have been exhibited unreasonably, vexatiously, or at improper length, the costs occasioned by the said interrogatories and the answers thereto shall be paid in any event by the party in fault.

Form of interrogatories. 4. Interrogatories shall be in Form No. 2 in Appendix C, with such variations as circumstances may require.

R. S. O. 31 rr. 3 and 4. This rule apply to H. C. and Prov. S. C. C.

Corporations. 5. Where any party to a suit is a corporation or a body of persons, whether incorporated or not, empowered by law to sue or be sued, whether in its own name or in the name of any officer or other person, any opposite party may apply for an order allowing him to deliver interrogatories to any member or officer of such corporation or body, and an order may be made accordingly.

R. S. O. 31 r. 5. Act XIV of 1882 sect 124 This rule applies to H. C., and Prov. S. C. C.

Any Member or Officer.—The secretary of a Company or Corporation is, as a rule, the proper person to answer interrogatories on its behalf,³ and the Courts are disinclined to direct a Member to answer unless there is no officer

not obliged to disclose information or knowledge acquired by him in his private capacity or otherwise than in the course of his employment under the Corporation interrogated.⁴

On this rule is founded the decision that the answer of a Member or Officer can be read against the Corporation,⁵ so it is obvious that the rule should be

¹ Shamkiew v. Shoocheehoonan, (1890) 5 C. L. R., 690; 5 Calo., 707; Prem Sukh v. Indronath, (1891) 18 Calo., 420.

² Banks v. Stevenson, (1907) 1 Ch. at p. 369.

³ Berkeley v. Standard Dismount Co., (1870) 13 C. D., p. 97, per Jessel M. R.

⁴ Southland Co. v. Quirk, (1875) 3 Q. B. D., 315.

⁵ Welbach v. New Sunlight Co., (1900) 2 Ch., 1, see note to r. 11, *infra*, vide Information of Agents.

⁶ Welbach v. New Sunlight Co., *supra*. Chaddock v. British S. A. Co., (1896) 2 Q. B., 153.

very strictly upheld to protect the Corporation from admissions by its members or officers who may very well have interests adverse or even directly antagonistic to its own.¹

Quare, is a solicitor an officer?—See *Great Western Forest Co., in re*, 31 C. D., 496

Practice—The application should be made in Chambers against the company, and if there is any objection, the company appear by their solicitor, the officer does not. The Judge must be satisfied that the officer selected by the party has a competent knowledge of the facts and the means of answering.²

Costs—The company's solicitor should act for the member or officer who is directed to answer, and prepare the answers for him, and charge the company with the cost of so doing. He should not employ a separate solicitor.³

Foreign sovereign—A foreign republic should, as far as is possible, be treated as a body corporate,⁴ a sovereign as a private individual.⁵ See note 10 r. 11 *infra*, and *Bray* pp 68—72.

6. Any objection to answering any interrogatory on the ground that it is scandalous or irrelevant or not exhibited *bona fide* for the purpose of the suit, or that the matters inquired into are not sufficiently material at that stage, or on any other ground, may be taken in the affidavit in answer

Act XIV of 1882, sect. 125 R S O 31 r 6

7. Any interrogatories may be set aside on the ground that they have been exhibited unreasonably or vexatiously, or struck out on the ground that they are prolix, oppressive, unnecessary or scandalous; and any application for this purpose may be made within seven days after service of the interrogatories.

R S O. 31 r 7. This rule apply to H C and Prov S C C

Discovery—Discovery is based on the following propositions:—

I.—It is the right, as a general rule, of a plaintiff in equity to examine the defendant upon oath as to all matters of fact which, being well pleaded in the bill, are material to the proof of the *plaintiff's case*, and which the defendant does not by his form of pleading admit

II—Courts of Equity, as a general rule, oblige a defendant to pledge his oath to the truth of his defence. With this (if a) qualification, the right of the plaintiff in equity to the benefit of the defendant's oath is limited to a discovery of such material *facts* as relate to the plaintiff's case or are necessary to support the case of the defendant,⁶ and does not extend to a discovery of the manner

¹ This state of affairs was well illustrated in the Calcutta case of *Bank of Bengal*

² *He*

³ *Bc*

⁴ *Rep. Costa Rica v. Erlanger*, 1 C. D., 171, 174.

⁵ *Prioleau v. United States*, L. R., 2 Eq., 639, p. 663.

⁶ *Eade v. Jacobs*, 3 Ex. D., 335; *Attorney-General v. Caskill*, 20 C. D., 519, p. 529; *Biddler v. Bridges*, 29 C. D., 29; see however, *Ali Kader v. Gobind Dass*, (1890) 17 Calo, 840; *Nittomoyo Dass v. Soobul Chunder Law*, (1896) 23 Calo., 117.

in which, or of the evidence by means of which, the *defendant's case* is to be established, or to any discovery of the defendant's evidence.

111—Interrogatories for the examination of a plaintiff differ from those for the examination of a defendant in this respect, that though a plaintiff or defendant is not entitled to discovery of his opponent's case, a defendant may ask any question tending to destroy the case of the plaintiff.¹ And if in the discovery of relevant facts the names of witnesses must be disclosed, it does not take away the right.²

Limitation of these propositions.—But in this country, interrogatories cannot be framed to anticipate or supply defects of pleading or to ascertain the case of the other side. If the pleading of either party is vague, the Court may call for a further written statement, or may frame and record issues until the case raised by the pleadings is recorded with sufficient clearness.³ And this seems to be in accordance with the English rulings under the corresponding Rules of the Supreme Court.⁴

This general right to Discovery is expressly limited by rule 2 of this Order which provides that discovery considers it necessary either Costs. Furthermore and against oppressive and scandalous interrogatories, there are four grounds upon which discovery can be resisted under English Law.⁵

1. As being criminatory or penal.
2. Professional privilege.
3. As disclosing the opposite party's evidence
4. As being injurious to public interests

1. **Criminatory or Penal.**—A party cannot be compelled to give discovery which will tend to criminate him or expose him to the risk of any kind of punishment.⁶ The objection must be taken in affidavit, and the rule is the same for discovery of documents as well as facts,⁷ the objection must be made upon oath, see generally Bray 321-328, and Ann. Prac. notes to O 31 r 1.

2. **Professional Privilege.**—This privilege does not extend beyond legal professional agents;⁸ it can be waived,⁹ but only by the client.¹⁰ The privilege will not protect communications in furtherance of a fraudulent or illegal purpose.¹¹

Persons claiming under client.—Parties claiming under a deceased client can assert the privilege against those claiming adversely to the client but not against others claiming under the client.¹²

¹ *Hoffmann v. Postiff*, L. R., 4 Ch. Cav., 673; *Commissioners of Sewers v. Glasco*, L. R., 15 Eq., 302.

² *Marriott v. Chamberlain*, 17 Q. B. D., 151.

³ *Ali Kader v. Goldind Dava*, (1899) 17 Cal., 810.

⁴ *Benbow v. Low*, 16 C. D., p. 83. Re *Strachan*, (1897) 1 Ch., pp. 415, 417, 418. *Bray's Digest* Art 62 cited in Ann. Prac., 1908, i, 397.

⁵ *Bray's Digest* Art 42 cited in Ann. Prac., 1908, i, 387.

⁶ See Ann. Prac., 1908, i, 387. *Reafem v. Reafem*, (1891) p. 159.

⁷ *Spoken v. Grosvenor Co.*, (1897) 12 Q. B., 113; *National Association v. Smithies*, (1906) A. C., 431.

⁸ *Russell v. Jackson*, 21 L. J., Ch. 146.

⁹ *Calcraft v. Guest*, (1898) 1 Q. B., 759; *Goldstone v. Williams*, (1899) 1 Ch. p. 53.

¹⁰ *Anderson v. Bank of Columbia*, (1876) 2 C. D., p. 619. *Procter v. Smiles*, 55 L. J., Q. B., 527. *Bray* p. 425.

¹¹ *R. v. Bullivant*, (1901) A. C., 196; *Williams v. Quelrads Lily Co.*, (1895) 2 Ch., 751. Ann. Prac., 1908, i, 391.

¹² *R. v. Bullivant*, *supra* and see *Bray*, 365-388.

Similarly a *cestui que trust* is entitled to see opinions given to and taken by the Trustee in administering the trust, but not of course opinions or communications in respect of the Trustee's defence to a suit by the *cestui-que-trust*.¹

Ratepayers have similar rights in respect of opinions taken by the Corporation to which they belong on the subject of rates,² and shareholders may sometimes see communications between their Company and its solicitors.³

What is privileged—Not all communications between a client and his legal adviser are privileged, but those only which are of a professional and confidential character for the purpose of obtaining legal advice.⁴ Such direct communications are privileged whether they refer to pending or probable litigation or not.⁵ The privilege is not confined to legal advice but extends to statements of facts.⁶ As to third persons through whom such communications may pass see the under noted cases.⁷

3. *Disclosing Evidence*—No party need disclose the names of his witnesses unless the name is in some other way a material fact in the case,⁸ as where certain persons were alleged to be in possession of letters, the existence of which was disputed. In an action for seduction, where the defendant denied paternity, the plaintiff was not allowed to interrogate as to the name of any person whom the defendant alleged to be the father of the child.⁹ In a suit for damages, for personal injuries the plaintiff may not ask for the names of the Company's servants who saw the accident.¹⁰

The reason underlying these decisions is that to insist on such disclosure would facilitate the tampering with witnesses and the manufacture of contradictory evidence.¹¹

A party is entitled to interrogate for the purpose of destroying his opponent's case,¹² but documents relating solely to the evidence to be used in support of a party's own case are privileged. In answer and to support this privilege the party must swear that to the best of his belief after proper examination the documents inquired for contain nothing supporting or tending to support his adversary's case or impeaching his own.¹³ Such an oath will generally be regarded as conclusive.¹⁴

4. *Injurious to Public Interests*—Public official documents are protected from disclosure, if it would be injurious to the public interest.¹⁵ As to privileged documents see Evidence Act sects 132-136.

¹ *Postlethwaite v. Riekman*, (1887) 33 C. D., 722.

² *Corporation of Bristol v. Cox*, (1881) 26 C. D., p. 633.

³ *Gourand v. Edison Co.*, 57 L. J., Ch., 495 and see *Bray*, op cit 378-388.

⁴ *R. v. Bullivant*, (1901) A. C., p. 198; *Wheeler v. Le Marchant*, 17 C. D., p. 682.

⁵ *Minet v. Morgan*, (1873) L. R., 8 Ch., 361.

⁶ *Woolley v. N. L. Ry. Co.*, L. R., 4 C. P., 604; *Bray*, 393-397. *Gouldstone-Williams*, (1899) 1 Ch., 47.

⁷ *Wheeler v. Le Marchant*, 17 C. D. p. 682. *Anderson v. Bank of Columbia*, 2 C. D., 648. *Southwark v. Quick* 3 Q. B. D., 322. *Bray*, 397-402 and see *Ann. Prac.* notes to O 31, r 1.

⁸ *Marriott v. Chamberlain* 17 Q. B. D., 154.

⁹ *Hooton v. Dalby* (1907) 2 K. B. 18.

¹⁰ *Marshall v. Metropolitan District Ry. Co.*, 7 Times Rep., 49.

¹¹ See *Benbow v. Low*, (1890) 16 C. D., p. 95.

¹² *A. G. v. Newcastle*, (1897) 2 Q. B., p. 394. *Plymouth Co. v. Traders Association*, (1906) 1 Q. B., p. 417.

¹³ *Minet v. Morgan* L. R., 8 Ch. 361; *Budden v. Wilkinson*, (1893) 2 Q. B. 432 but see *Johnson v. Whitaker*, 90 L. T., 535; *Bray's Digest Arts.* 23 and 64.

¹⁴ *Roberts v. Oppenheim*, (1884) 26 C. D., at p. 724; *Frankenstein v. Gavins Co.*, (1897) 2 Q. B., 62. *Bray's Digest Arts.* 38-39.

¹⁵ *Wade v. E. I. Co.* 8 D. G. M. & G. p. 191; *Chatterton v. Sec. of State for India*, (1895) 2 Q. B., p. 195; *Re Jas. Hargreaves*, (1900) 1 Ch., 347.

In addition to these general grounds upon which discovery may be resisted; rules, 6 and 7 afford special protection against oppressive interrogatories:—

Any objection may be taken—Any ground of objection may be taken in the affidavit in answer even where the interrogatory had been allowed by the Court under rule 2 of this order.¹

Scandalous—Nothing can be scandalous, which is relevant,² and interrogatories, though tending to criminate or discredit the party interrogated, are not scandalous if they are pertinent and material to the case of the interrogating party.³

Irrelevant—Irrelevant interrogatories should not be allowed; for there is a distinction between the right to interrogate and the right to cross-examine.⁴ Discovery must be directly relevant to the matter in issue.⁵ In a suit on a partnership-deed, in which it was stated that a certain sum was to be taken as £6,000, interrogatories as to the items of which it is composed were not allowed.⁶ In a suit for specific performance by plaintiffs, trustees of a married woman, defendant was not allowed to ask: (1) Whether the plaintiffs were not trustees of the money intended to be employed in the purchase? (2) What were the terms of the trust? (3) Whether it was not a breach of trust to employ the funds in the purchase of an under-lease? (4) As to the custody of the trust-deeds? In an action for the price of a horse sold, where defendant pleaded the horse had been falsely represented to be quiet and a good worker, he was not allowed to ask the plaintiff: (1) Was the horse, which is the subject of the action, the property of the plaintiff at the time of sale? (2) If it was your property, how did it become so?⁷ So in an action by a principal against his agent for money received, interrogatories by the defendant to shake the character of the plaintiff were not allowed.⁸

In an action for libel against a newspaper Company and a man named Jackson, it was ruled that interrogatories as to whether Jackson was publisher and supervisor of the paper, whether he was a share-holder in the company by whom the libellous paragraphs were brought to the office, and whether they were printed by Jackson or the company were allowed. Interrogatories as to whether he was editor, wrote the paragraphs, saw and corrected them, and whether he or the company had the originals, and if they objected to produce them, were disallowed.⁹ In an action for damages for seduction, the defendant cannot be asked how rich he is.¹⁰

Admissions—Discovery is not limited to the ascertainment of facts new to the interrogating party but he may seek to obtain admissions which will facilitate or save expense in proving the issues between himself and his opponent.¹¹

Material to the suit—A third objection is that they are “not sufficiently material at that stage of the suit.” The word ‘material’ means more than relevant, and in the sense it is here used means material to the case made and the

¹ See *Peck v. Ray*, (1891) 3 Ch., 242.

² *Fisher v. Owen*, 8 C. D., p. 653.

³ *Allhusen v. Lobbouhere*, 3 Q. B. D., 660, 661, 666. *National Association v. Smithies*, (1906) A. C., 431. See Ann. Prac., 1909 notes to O. 31, r. 7.

⁴ See O. XI, r. 1.

⁵ *Attorney General v. Gaskill*, 20 C. D., 519, p. 530; *Owen v. Morgan*, 30 C. D., 316; *Kennedy v. Dodson*, (1893), 1 Ch. D., 331.

⁶ *Wier v. Tucker*, L. R., 14 15, 25.

⁷ *Mansfield v. Childerhouse*, W. N., (1876), p. 258; 4 C. D., 82.

⁸ *Sivier v. Harris*, W. N., (1876), 22.

⁹ *Baker v. Newton*, W. N., (1876), 8.

¹⁰ *Carter v. Leeds Daily News Company*, W. N., (1876) 11; but see *Jones v. Richards*, 15 Q. B. D., 439.

¹¹ *Hobbs v. Taylor*, L. R., 9 Q. B., 79.

¹² *A. G. v. Gaskill* 20 C. D., p. 528.

relief prayed for, at the stage of the case when discovery is sought (*Wigram*, 45) ;¹ or the first issue to be tried.² What is material at one stage of a suit may not be material at another. For instance, if defendant moved to take the plaint off the file on the ground that it shewed no cause of action at all, or a cause of action barred, interrogatories on the merits would not be allowed until the motion had been decided, for if the plaint were struck off, no necessity for discovery would arise. But if he files a written statement and joins issue, he will be liable to answer on the whole suit, though whether he will be compelled to do so or not will depend on the peculiar features of the case.³ In *Moore v. Craven*,⁴ defendant who was sued as a hop agent, denied the agency. He was asked to give the names of the persons to whom he had sold. Lord Hatherley, L. C., said: "The Court does not, when discovery is a matter of indifference to the defendant, weigh in golden scales the questions of materiality or immateriality; but when the nature of the discovery required is such that the giving of it may be prejudicial to the defendant, the Court takes into consideration the special circumstances of the case, and whilst, on the one hand, it takes care that the plaintiff obtains all the discovery which can be of use to him, on the other hand, it is bound to protect the defendant against undue inquiry into his affairs. The question of materiality must be tested by reference to the case made by the plaintiff's pleadings, and to what will be in issue at the hearing. Here the question to be decided is agency or no agency. If the agency is proved, the defendant admits that there would be a right to an account. The names and addresses of the purchasers, even if fully set out, would not in any way tend to prove agency. The interrogatory therefore is not material to the issue about to be tried, and the exception must be overruled with costs."

And, on the same grounds as those given in this judgment, a plaintiff will not, as a rule, be granted discovery to which he is not entitled if he is wrong, and which if he wins will follow as of course. Thus, in a case of infringing of trademarks, defendants, who had sealed up certain parts of entries and letters admitted to relate to the matters in question in the suit, were ordered by the first Court to unseal (1) the names of customers and of places, and the prices forming parts of such entries; and (2) the portions of letters and copies of letters which contained the names of the writers and of the persons to whom, the letters copied were sent; and (3) the places to and from which the letters were sent, and (4) the description of the marks to be placed, or which had been placed on the goods referred to in such letters. *held*, on appeal, that they ought not to be compelled to disclose the names of their customers, or the names of the persons to or from whom the letters were sent or received, or any prices, inasmuch as their discovery might be used in a manner prejudicial to the defendants in their trade, and was not likely to assist the plaintiffs in making out their case at the hearing; the rest of the order was upheld.⁵

Where the question is one of agency, discovery of the alleged agent's private transactions will not be allowed till the first point has been decided;⁶ but discovery, though merely useful for the purposes of consequential relief after decree, will, in England, be ordered before decree, unless it be productive of unnecessary hardship on the defendant; thus, in a suit for account based on a partnership, defendant was compelled to answer whether he had drawn out partnership moneys on his own account, although he objected to answer before the plaintiff had established the partnership;⁷ and a mortgagee in possession admitting the mortgage, must answer as regards the state and particulars of the

¹ See *Parker v. Wells*, 18 C. D., 477, p. 493; *Fennessy v. Clark*, 37 C. D., 184, p. 187.

² *Rowcliffe v. Leigh*, 6 C. D., 256, p. 263; *Neckram Dobay v. Bank of Bengal*, (1887) 14 Cal., 703.

³ *Chichester v. Marquis of Donegal*, L. R., 4 Ch. App., 419.

⁴ *Moore v. Craven*, L. R., 7 Ch. App., 95.

⁵ *Carver v. Pinto Leite*, L. R., 7 Ch. App., 90.

⁶ *Great Western Colliery Co. v. Tacker*, L. R., 9 Ch. App., 376.

⁷ *Saull v. Brown*, L. R., 9 Ch., 364.

account before decree;¹ and in a suit for specific performance where the contract was not denied, defendant was compelled to set out the names of the persons to whom he had subsequently let out the premises, to give an account of the rents, and state if the plaint was not deteriorating.²

Damages.—Where the defendant's object has been to pay money into Court in satisfaction, he will be allowed to interrogate the plaintiff as to the particularity of the damage sustained by him.³

Foreign proceedings.—Interrogatories regarding legal proceedings in a foreign country are not material.⁴

Oppressive.—Interrogatories must not exceed the legitimate requirements of the particular occasion.⁵

Objectionable or oppressive interrogatories should be struck out.⁶ In a suit to set aside an agreement under which a partnership had been dissolved, plaintiff asked defendant to set forth the partnership accounts. The latter answered that the accounts were extensive, and he had no means of setting them out without paying an accountant, which he ought not be compelled to do, as plaintiff had access to them: *held*, a good answer.⁷

But an interrogatory is not oppressive merely because it involves trouble and expense in answering or the disclosure of private or business or confidential matters.⁸

On any other ground.—That is the ground stated in rule 7, or any of the four general grounds set out above.

Good faith.—Even if the interrogatories are relevant, they may be objected to on the ground that they have not been *put bona fide for the purposes of the suit*. All questions put *mala fide*, with ulterior object beyond that of helping the suit, should be disallowed.⁹

8. Interrogatories shall be answered by affidavit to be

Affidavit in answer, filed within ten days, or within such other time as the Court may allow.

9. An affidavit in answer to interrogatories shall be

Form of affidavit in answer, in Form No. 3 in Appendix C, with such variations as circumstances may require.

R. S. O. 31, rr. 8-9. Act XIV of 1882, sect. 126 This rule applies to H. C. and Prov. S. C. C.

An affidavit not sworn to before the proper authority may be admitted with the consent of the other side;¹⁰ and even if it has not been made on oath, it may

¹ *Elmer v. Cressy*, L. R., 9 Ch. App., 69; *West of England Bank v. Nickolls*, 6 C. D., 613.

² *Dixon v. Fraser*, L. R., 2 Eq., 497.

³ *Horne v. Hough*, L. R., 9 C. P., 135. See also *Neckram Dolay v. Bank of Bengal*, (1887) 14 Cal., 703, where interrogatories as to the way in which the plaintiff had arrived at the amount of damages claimed by him were not allowed, and see *Schreiber v. Heymann*, 63 L. J., Q. B., 749.

⁴ *Hoffmann v. Postill*, L. R., 4 Ch. App., 673.

⁵ *White v. Credit Reform*, (1903) 1 K. R., 639.

⁶ *Winters v. Dabbs*, W. N., 1876, 21.

⁷ *Lockett v. Lockett*, L. R., 4 Ch. App., 336.

⁸ *Bray* (p. cit. 298 307).

⁹ *Baker v. Lane*, 2 H. & C. Rep., 541; explained in *Hickford v. Darcy*, L. R., 1 Ex., 357; *Mary v. Alexandra*, L. R., 2 A. & E., 319.

¹⁰ *Pell v. Turner*, L. R., 17 Eq., 439; *Lyle v. Fildes*, L. R., 15 Eq., 67.

be filed under similar circumstances, if certified to by the person before whom it was made.¹

The application for further time will not be granted as a matter of course, but should be supported by affidavit.²

10. No exceptions shall be taken to any affidavit in answer, but the sufficiency or otherwise of any such affidavit objected to as insufficient shall be determined by the Court.

R. S. O. 31, r. 10. This rule applies to H. C. and Prov. S. C. C.

The opposite answer is apply for

11. Where any person interrogated omits to answer, or answers insufficiently, the party interrogating may apply to the Court for an order requiring him to answer, or to answer further, as the case may be. And an order may be made requiring him to answer or answer further, either by affidavit or by *viva voce* examination, as the Court may direct.

R. S. O. 31, r. 11. Act XIV of 1883, sect. 127. This rule applies to H. C. and Prov. S. C. C.

If interrogatories are scandalous or in any way an abuse of the Court, the Court may interfere at any stage. In other cases, the party interrogated may either omit to answer, or file an affidavit in answer, stating in it his objections to answer such questions as he objects to. Then the course for the interrogating party is to apply under this rule for an order requiring the opposite party to answer or to answer further, as the case may be, either *viva voce* or by affidavit.³

Practice—A party at whose instance interrogatories have been administered must put in the answers as part of his evidence, if he wishes to use them at the hearing.⁴

General rule—The general rule is, that the person answering must answer sufficiently;⁵ and that to answer a question substantially is sufficient.⁶ It is not sufficient to answer from his own knowledge; he is bound to speak according to his knowledge, information and belief; if he has none, he should say so. Thus, where a defendant said: "I am personally wholly unacquainted with the facts inquired about by the said interrogatories, and am unable to answer

¹ Bacon v. Turner, W. N., 1876, 292.

² Brown v. Lee, 11 Beav., 162; see also Byng v. Clark, 13 Beav., 92. For form of order, see Weston v. Cohen, W. N., 1869, 74.

³ Anstey v. North Woolwich Co., 11 C. D. 439; Ashley v. Taylor, L. T., 44; Ann. Prac. 1908, I, 407.

⁴ Furber v. King, 29 W. R., 336.

⁵ Shamkissore v. Shudheebhoosau, (1880) 5 Cal., 707; 5 C. L. R., 593; Prem Sukh v. Indro Nath, (1891) 18 Cal., 420.

⁶ Gosto Behary Pal v. Johar Lall Pal, (1879) 4 Cal., 836; 4 C. L. R., 164. See r. 22, post.

⁷ Bolckow v. Fisher, 10 Q. B. D., 161; Lyell v. Kennedy, 27 C. D., 1, p. 16.

⁸ Parker v. Wells, 18 C. D., 477, p. 487; Lyell v. Kennedy, 27 C. D., 1, p. 16.

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⁵ *White v. Credit Reform*, (1905) 1 K. B., 659.

⁶ *Winters v. Dabbs*, W. N., 1876, 21.

⁷ *Lockett v. Lockett*, L. R., 4 Ch. App., 336.

⁸ *Bray op. cit.* 294-307.

⁹ *Baker v. Lane*, 3 H. & C. Rep., 544; explained in *Bickford v. Darcy*, L. R., 1 Ex., 357; *Mary v. Alexandra*, L. R., 2 A. & E., 319.

¹⁰ *Ball v. Turner*, L. R., 17 Eq., 439; *Lyle v. Ellwood*, L. R., 15 Eq., 67.

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Practice—A party at whose instance interrogatories have been administered must put in the answers as part of his evidence, if he wishes to use them at the hearing.⁶

General rule—The general rule is, that the person answering must answer sufficiently;⁷ and that to answer a question substantially is sufficient.⁸ It is not sufficient to answer from his own knowledge; he is bound to speak according to his knowledge, information and belief, if he has none, he should say so. Thus, where a defendant said, "I am personally wholly unacquainted with the facts inquired about by the said interrogatories, and am unable to answer

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* *Brown v. Lee*, 11 Beav., 162; see also *Byng v. Clark*, 13 Beav., 92. For form of order, see *Weston v. Cohen*, W. N., 1869, 74.

² *Anstey v. North Woolwich Co.*, 11 C. D. 439, *Ashley v. Taylor*, L. T., 44; *Ann. Prac.*, 1908, I, 407.

* *Farber v. King*, 29 W. R., 536.

⁵ *Shankarasore v. Shoshreebhoosani*, (1880) 5 Cal., 707; *J. C. L. R.*, 503; *Prem Dutt v. Indro Nath*, (1891) 18 Cal., 420.

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See r 22, *post*.

⁷ *Bolckow v. Fisher*, 10 Q. B. D., 161; *Lyell v. Kennedy*, 27 C. D., 1, p. 16.

* Parker v. Wells, 18 C. D., 477, p. 487; Lyell v. Kennedy, 27 C. D., 1, p. 16.

any of them from my own knowledge, save in as hereafter appears," the answer was held insufficient.¹

Agents or servants.—Nor is it a sufficient answer that the questions in issue are not within his own knowledge, but only within the knowledge of his agents or servants, or the agents and servants of the corporation to which he belongs. He is bound to obtain the information from them and answer, unless it would be unreasonable to require him to do so,² provided he is asked whether he inquired from them or the case is one where that which was done was obviously done in the master's absence, or such as in the ordinary course of business would be done by or be known to his servants or agents.³ His agent's knowledge is regarded in law as his own knowledge in such matters.⁴ But he is not bound to disclose information acquired by them otherwise than in course of their employment.⁵ "*Agents*" has been construed in England to include Bankers and solicitors.⁶ Answers to interrogatories may be insufficient by reason of containing, in addition to the information asked for, impertinent or otherwise objectionable matter.⁷

Corporation.—If a corporation put forward their town clerk to answer, he cannot refuse to answer on the ground that the information asked was obtained by him as a solicitor in an action.⁸

12. Any party may, without filing any affidavit, apply to the Court for an order directing any other party to any suit to make discovery on oath of the documents which are or

Application for discovery of documents.

have been in his possession or power, relating to any matter in question therein. On the hearing of such application the Court may either refuse or adjourn the same, if satisfied that such discovery is not necessary, or not necessary at that stage of the suit, or make such order, either generally or limited to certain classes of documents, as may, in its discretion, be thought fit: Provided that discovery shall not be ordered when and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs.

R. S. O. 31 r. 12.

This rule applies to H. C. and Prov. S. C. C.

Any other party.—See note to O. XI, r. 1 *ante* v. "*opposite party*."

Person suing in another's name.—The real plaintiff must make a full discovery, if required as though his name were on the record,⁹ but a person

¹ *Minnehaha*, L. R., 3 A. and E., 148.

² *Bolckow v. Fisher*, 10 Q. B. D., 161; *Pavitt v. Metropolitan Coy.*, W. N., 1883, 100; *Southwark Water Co. v. Quick*, 3 Q. B. D., 321.

³ *Resbotham v. Shropshire Ry. Co.*, 24 C. D., 110.

⁴ *Anderson v. Bank of Columbia*, 2 C. D., 641.

⁵ *Welsbach Co. v. New Sunlight Co.* (1890) 2 Ch., 40.

⁶ *Alliott v. Smith*, (1895) 2 Ch., 111.

⁷ *Peyton v. Harting*, L. R., 9 C. P. 9; *Lyell v. Kennedy*, 27 C. D., 1, p. 10.

⁸ *Mayor &c of Swansea v. Quirk*, 5 C. P. D., 106.

⁹ *Rep. of Costa Rica v. Erlanger*, 1 C. D., 171; *Willis v. Baddeley*, (1892) 11 Q. B., 321.

cannot be made a party merely for the purposes of discovery.¹ See generally on this subject Ann. Prac 1908, i, 410.

Affidavit conclusive—A party's oath that a particular document is irrelevant is conclusive unless the Court is otherwise satisfied that the document is in fact relevant; mere suspicion is insufficient according to the English practice unless the Court is reasonably satisfied of its untruth, it will not go behind the affidavit.²

Objection to affidavit—In England a party seeking discovery must as a general rule, rest on the affidavit, he cannot cross-examine upon it, nor adduce evidence to contradict it, neither can he do this in another form, namely, by administering general interrogatories.³ If he can show from the pleadings the affidavit itself, or from the documents therein referred, that other documents exist in his possession or power which are material or relevant to the suit, the Court may compel him to make a further affidavit, but not otherwise.⁴ At the same time the party is not without other remedies. If the affidavit is not verified by the party in the cause,⁵ or does not give a distinct description of the documents, he can take out a summons to consider the sufficiency,⁶ and further, if the Court is satisfied that material documents, not mentioned are in the deponent's possession, he will be compelled to make a further affidavit;⁷

matters, he can file a concise statement of them with interrogatories, and it will be no answer for the other side to say that some of the matters given in the specific statement were comprised in, or that they were all referred to, in the answer, and that the first affidavit was sufficient.¹⁰

Co-plaintiffs, Co-defendants—Discovery of documents and inspection may be allowed to a plaintiff, from a co-plaintiff or a defendant to a co-defendant, if there are rights which have to be adjusted between them in the suit.¹¹

13. The affidavit to be made by a party against whom

Affidavit of documents such order as is mentioned in the last preceding rule has been made, shall

¹ Burchard v Macfarlane, (1891) 2 Q. B., 217.

² Bray's Digest Art 38 cited in Ann. Prac 1903, i, 411 Vinayakrao v Narottam, (1893) 17 Bom., 681.

³ Hall v. Truman, (1896) 23 C. D., 307; Nicholl v. Wheeler, 17 Q. B. D., 101.

⁴ Wright v. Pitt, L. R., 3 Ch. App., 899; Noel v. Noel, 1 D. J. & S., 468; Kennelly v. Wyman, 1 Cal., 178; Jones v. Monto Video Co. 5 Q. B. D., 536; Rose v. Dublin Tram. Co., L. R., 8 Q. B. D., 213.

⁵ Kahan v. Safdar Husain, (1886) 8 All., 265.

⁶ Lazarus v. Mozley, 1 L. T., 3; Oriental Bank v. Brown, (1886) 12 Cal., 265; see Rylie v. Shitshankar, (1891) 15 Bom., 7.

⁷ Saul v. Browne, L. R., 17 Eq., 402; Compagnie Financiere v. Peruvian Co., 11 Q. B. D., 55.

⁸ Kahan v. Safdar Husain, (1886) 8 All. 265; see O. XI, r. 2t, *infra*.

⁹ Hall v. Truman, 23 C. D., 307; but see Morris v. Edwards, 15 App. Cas., 309. And see Att.-Gen. v. Emerson, 10 Q. B. D., 191; Bewicke v. Graham, 7 Q. B. D., 403, where the party making the affidavit admitted possession of certain documents, but objected to produce them on the ground that they related to and supported his own case solely. See also Oriental Bank v. Brown, (1886) 12 Cal., 265.

¹⁰ Newall v. The Telegraph Construction Company, L. R., 2 Eq., 756.

¹¹ Shaw v. Smith, 18 Q. B. D., 193. See also Brown v. Watkins, 16 Q. B. D., 125.

specify which (if any) of the documents therein mentioned he objects to produce, and it shall be in Form No. 5 in Appendix C, with such variations as circumstances may require.

R. S. O. 31, r. 13.

This rule applies to H. C. and Prov. S. C. C.

Shall specify the documents—The documents must be described sufficiently to enable production to be enforced.¹ If a number of letter books and file be set out without distinguishing which are relevant, the party may be ordered to pay the costs incurred or the affidavit may be wholly struck off as prolix.²

14. It shall be lawful for the Court, at any time during the pendency of any suit, to order the production by any party thereto, upon oath, of such of the documents in his possession or power, relating to any matter in question in such suit, as the Court shall think right; and the Court may deal with such documents, when produced, in such manner as shall appear just

Act XIV of 1882, sec. 129. R. S. O. 31, r. 14

This rule applies to H. C. and Prov. S. C. C.

In England, it has been held that the Court has no discretionary power under this rule to refuse an order for production of documents material at the date of the application except upon the general grounds stated in the notes to O. XI, r. 7, *supra*.³

Ground of application.—A party must show that he had a *prima facie* case or show other sufficient cause in support of the application.⁴ The application need not contain mention of any documents, for it is probable that the applicant may not know the documents in his adversary's possession until he gets his affidavits.⁵

Any matter in question.—The meaning of these words is that the document should be evidence upon some issue or one which it is reasonable to suppose contains information which *may* either directly or indirectly enable the party requiring the affidavit, either to advance his own cause or damage the case of his adversary.⁶

How and by whom answered.—The party against whom the order issues must describe all his documents in the affidavit, although he asserts that he cannot be compelled to produce the documents,⁷ and where there are several parties all must ordinarily join.⁸

¹ *Budden v. Wilkinson*, (1890) 2 Q. B. 432.

² *Hill v. Hart Davis*, 26 C. D. 470. *Bolton v. Natal Co.*, W. N., (1897) 145, 178. See Ann. Prac. O. 31, r. 13.

³ *Bustros v. White*, (1876) 1 Q. B. D. 426.

⁴ *Lane v. Gray*, L. R., 16 Eq. 552; *Mostyn v. Western Coal and Iron Company*, W. N., 1875, p. 260.

⁵ W. N., 1876, pp. 22, 24.

⁶ *Compagnie Financière v. Peruvian Co.*, 11 Q. B. D., 55, p. 63.

⁷ *Rushdell v. Fortcath*, 3 K. & J., 44; see also *Evans v. Lewis*, L. R., 1 C. P., 656; *Kalian v. Sufdar Hussain*, (1886) 8 All. 265.

⁸ *Byrne v. Shishankar*, (1891) 15 Bom., 7.

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¹ *Buiklen v. Wilkinson*, (1890) 2 Q. B. 432.

² *Hill v. Hart Davis*, 26 C. D. 470. *Bolton v. Natal Co.*, W. N., (1887) 145, 178. See *Ann. Pract.* O. 31, r. 13.

³ *Bustros v. White*, (1876) 1 Q. B. D., 426.

⁴ *Lane v. Gray*, L. R., 16 Eq., 552; *Mostyn v. Western Coal and Iron Company*, W. N., 1875, p. 260.

⁵ W. N., 1876, pp. 22, 21.

⁶ *Compagnie Financiere v. Peruvian Co.*, 11 Q. B. D., 55, p. 63.

⁷ *Bunbodd v. Forteach* 3 K. & J., 44; see also *Evans v. Lewis*, L. R., 1. C. P., 650; *Kalish v. Sidiir Rusain*, (1846) 8 All., 265.

⁸ *Ryrie v. Shivabankar*, (1891) 15 Bom., 7.

Advocate General—Cannot be required to make an affidavit.¹

Official Liquidator—In England, the Official Liquidator, who is an officer of Court and under its control, cannot be called on to make an affidavit of documents.²

Corporation or Foreign State—Where the party is a corporation or a Foreign Government and cannot make an affidavit, the affidavit must be made by some person on the party's behalf.³

Solicitor—The order should not issue against the solicitor of the party from whom discovery is demanded.⁴

When a party wants further documents, his proper course is to apply on further affidavit at the hearing of the suit.⁵

Place of production—In England the practice has arisen to allow production at the attorney's office.⁶

Taking Copies—In England the right to inspection includes a right to take copies of the documents produced,⁷ and sometimes the Court will order photograph to be taken.⁸

Sealing up of Documents—A party has the right to seal up such parts of his documents as do not relate to the matters in question in the suit.⁹ Where books are in actual daily use the English practice is to allow a party to cover up the irrelevant parts during inspection subject to making an affidavit that no relevant parts have been covered.¹⁰ In the High Court when the right of a party producing documents, to seal certain portions of them is contested, the Court appoints an officer to whom the plaintiff states in confidence why he wants to inspect any portion of the documents sealed, and the officer after looking at the documents reports whether and in what way the part sealed or desired to be sealed is material to the case of the other party.¹¹ And see s. 162 of the Evidence Act.

Discretion—A Court has no discretion to refuse production, unless the documents are privileged.¹²

At any time—A party who has obtained privately, by interrogatories, or in the manner laid down in the last section, knowledge of the documents in the hands of his adversary, may proceed under this section to enforce their production. The application may be made at any time even in appeal;¹³ but not, except in peculiar cases before plaintiff has filed his written statement, if the defendant has been served with a concise statement instead of a copy of the plaint.¹⁴

¹ *Advocate General v. Adams*, (1906) 30 Bom., 474.

² *Mutual Society, in re*, 22 C. D. 714.

³ *Prieleau v. United States*, L. R., 2 Eq., 659; *Republic of Liberia v. Royo*, 1 App. Cas., 139. See note under O. XI, r. 1.

⁴ *Cashin v. Cradlock*, 2 C. D., 140.

⁵ *Amarendra Nath Chatterjee v. Kali Kissen Tagore*, (1897) 2 Cal. W. N., 17.

⁶ *Brown v. Sewell*, 16 C. D., 517; *Ann. Prac.*, 1908, i. 415.

⁷ *Pratt v. Pratt*, 47 L. T., 249; *Bevan v. Webb*, (1901) 2 Ch. D., 74.

⁸ *Lewis v. Lonsborough*, (1893) 2 Q. B., 191.

⁹ *Jadub Lal v. Kanai Lal*, (1893) 20 Cal., 587; *Horendra Nath v. Girindra Kumar*, (1898) 3 Cal. W. N., 495.

¹⁰ *Ann. Prac.* 1908, i. 416; *Graham v. Sutton*, (1897) 1 Ch., 761; *Jones v. Andrew*, 58 L. T., 601. *Bray*, 233, 238.

¹¹ *Heeralall Rukht v. Ram Surun*, (1879) 4 Cal., 835. See also *Jadub Lal v. Kanai*, (1893) 20 Cal., 587; *Horendra Nath v. Girindra Kumar*, (1898) 3 Cal. W. N., 495. And see s. 162 of the Evidence Act.

¹² *Wallace v. Jefferson*, (1878) 2 Bom., 453.

¹³ *National Funds Assurance Company, in re*, W. N., 1876, p. 192.

¹⁴ *Cashin v. Cradlock*, 2 C. D., 140. Cf. *Elder v. Carter*, 25 Q. B. D., at p. 201, per Bowen L. J.

Against whom to issue.—The order must be made by the Court;¹ and should not issue against any person not a party; not even a party's solicitor;² nor is a verbal order to a pleader sufficient;³ and if a person having no interest in the suit has been made a party to obtain production of documents, he should apply to have his name struck out of the record as soon as possible.

Relevancy how decided—In England, the general rule is that, as to relevancy, the Court accepts the statement of the party from whom production is required if he swears that to the best of his knowledge, information and belief, the documents called for do not contain anything impeaching his case, or supporting or material to the case of the other party.⁴

When inspection of documents is objected to on the ground of immateriality, the Court will, if necessary, order them to be produced for its own inspection in order to judge of their materiality.⁵

Privilege—The law as regards privilege will doubtless follow the Evidence Act; and if so, it is probable that production of the following documents will not be enforced

1. Documents connected with a party's conduct as Judge or Magistrate in Court, or anything which came to his knowledge in Court as such (s. 122)
2. Communications made during marriage, except in suits between husband and wife (s. 122)
3. Unpublished documents of State (s. 123)
4. Official correspondence where the public interests would suffer by the disclosure (s. 124)
5. Documents containing information concerning commission of an offence given to a Magistrate or Police Officer (s. 125)
6. Professional communications (s. 126), of a confidential or private nature.⁶ The law on this point in England is as follows

before him for the purpose of taking his advice.⁷ In *Young v. Holloway*,⁸ the plaintiff and her solicitor and counsel received anonymous letters regarding and relevant to a pending suit; privilege was refused in regard to the letters received by the plaintiff herself, but allowed in regard to the others. And where a dispute arose between the plaintiff corporation and the defendant which it was

¹ Leigh's Estate, *in re*, W. N., 1876, p. 266.

² Cashin v. Craddock, 2 C. D., 140.

³ Doorgamonee Dassie v. Benode Monee, W. R., 1864, p. 161.

⁴ Minet v. Morgan, 8 L. R., Ch. App., 361; but see *Att.-Gen. v. Emerson*, 10 Q. B. D., 191; and *Emmerson v. Ind.*, 33 C. D., 323. See p. 567, *supra*, and sec. 102 Evidence Act.

⁵ Gurmuk Roy v. Tularam, (1901) 28 Cal., 424.

⁶ Haroom Mahomed v. Abdul Karim, (1879) 3 Bom., 61; and see *Ryrie v. Shivshankar*, 15 Bom., 7.

⁷ *Southwark Water Co. v. Quick*, 3 Q. B. D., 316. See *Anderson v. Bank of Columbia*, 2 C. D., 641; *Dustres v. White*, 1 Q. B. D., 423; *Wheeler v. Le Marchant*, 17 C. D., 675; *Mason v. Cattley*, 22

⁸ *Young v. Holloway*, 12 P. D., 167.

contemplated might lead to litigation, the minutes of a committee of the corporation to whom the matter was referred were held to be privileged,¹ notwithstanding the defendant was a rate-payer. Where a party expressly refers in his pleadings to documents as the source of facts which he sets up, he cannot afterwards claim privilege for them.²

Trustees and Companies—The beneficial owner in a suit against his trustee and a rate-payer in a suit against the corporation are in a better position than ordinary parties.³

Correspondence with solicitors—Also all correspondence between a party or his predecessors in title and their solicitors as such, with respect to questions connected with the matters in dispute in the suit, although made before any litigation was in contemplation,⁴ and a letter written by the solicitor of two plaintiffs to the solicitor of a third plaintiff is within the rule,⁵ and so is advice received with reference to these communications.⁶ But privilege attaches only to statements made in professional confidence and in the legitimate course of professional employment of the solicitor, and communications made for the purpose of being guided in the commission of an offence are not privileged;⁷ and no privilege exists, where a person is charged with fraud, as regards communications between himself and his solicitor on this subject.⁸ So, where a suit for specific performance was resisted on the ground of fraud and misrepresentation of the value of the property, inspection of plaintiff's title-deeds and accounts was allowed.⁹

Agent—Nor does privilege attach to a statement made by one party against another when the communications were made on behalf of them all¹⁰ and no privilege at all attaches, unless the communication is of a professional or quasi professional nature, i.e., a communication made by the party's solicitors, or by an agent in consequence of their suggestion. Thus, a letter written by an agent direct on the subject-matter is not privileged,¹¹ even though marked private and confidential¹² and after litigation was highly probable.¹³ So, letters written between two servants but not with the purpose of being communicated to a solicitor are not privileged.¹⁴

Mortgage—A mortgagee is bound to produce the mortgage-deed but not the title-deeds, for the inspection of the mortgagor;¹⁵ but when the time for

¹ *Mayor and Corporation of Bristol v. Cox*, 26 C. D., 678.

² *Umblea Churn Sen v. Bengal Spinning Co. Ltd.*, (1903) 22 Cal., 103. See r. 15; *infra*.

³ *Postlethwaite v. Rickman* v. 35 C. D., 722; *Corporation of Bristol v. Cox*, 26 C. D., 678, p. 683.

⁴ *Minet v. Morgan*, L. R., 8 Ch. App., 361; *Thomas v. Rawlings*, 27 Beav., 140; *Wheatley v. Williams* 1 Mees & W., 533; *Carpmael v. Powis*, 1 Phil., 687; *Bacon v. Bacon*, Weekly Notes, 1876, p. 96.

⁵ *Kay v. Poorunchand*, (1890) 4 Bom., 631.

⁶ *Ryrie v. Shirahankar*, (1891) 15 Bom., 7. See also *Vishnu v. New York Life Ins. Co.*, (1903) 7 Bom. L. R., 709.

⁷ *Queen v. Cox*, 14 Q. B. D., 153.

⁸ *Gartside v. Outram*, 26 L. J., Ch., 113; *Postlethwaite v. Rickman*, 35 C. D., 722; *Queen v. Cox*, 14 Q. B. D., 153.

⁹ *Sutherland v. Singhee Churn*, (1894) 10 Cal., 808. And see, in regard to communications with muktars, the case of the *Queen v. Chandrakant*, (1863) 1 B. L. R., Cr., 8.

¹⁰ *Reynell v. Sprye*, 10 Beav., 51; *Tugwell v. Hooper*, 10 Beav., 348.

¹¹ *Bustros v. White*, 1 Q. B. D., 423.

¹² *Hopkinson v. Lord Burghley*, L. R., 2 Ch. App., 447.

¹³ *Anderson v. Bank of Brit. Columbia*, 2 C. D., 644; *Wallace v. Jefferson*, (1897) 2 Bom., 453.

¹⁴ *Bipra Doss v. Secretary of State*, (1885) 11 Cal., 635, and see *Ryrie v. Shirahankar*, (1891) 15 Bom., 7.

¹⁵ *Patch v. Ward*, L. R. 1 Eq., 436.

Against whom to issue.—The order must be made by the Court;¹ and should not issue against any person not a party; not even a party's solicitor;² nor is a verbal order to a pleader sufficient;³ and if a person having no interest in the suit has been made a party to obtain production of documents, he should apply to have his name struck out of the record as soon as possible.

Relevancy how decided—In England, the general rule is that, as to relevancy, the Court accepts the statement of the party from whom production is required if he swears that to the best of his knowledge, information and belief, the documents called for do not contain anything impeaching his case, or supporting or material to the case of the other party.⁴

When inspection of documents is objected to on the ground of immateriality, the Court will, if necessary, order them to be produced for its own inspection in order to judge of their materiality.⁵

Privilege—The law as regards privilege will doubtless follow the Evidence Act; and if so, it is probable that production of the following documents will not be enforced

1 Documents connected with a party's conduct as Judge or Magistrate in Court, or anything which came to his knowledge in Court as such (s. 122)

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4 Official correspondence where the public interests would suffer by the disclosure (s. 124)

5 Documents containing information concerning commission of an offence given to a Magistrate or Police Officer (s. 125).

6 Professional communications (s. 126), of a confidential or private nature.⁶ The law on this point in England is as follows

Confidential communications: statements prepared in view of litigation—Documents prepared in relation to an intended action, whether at the request of a solicitor or not, and whether ultimately laid before the solicitor or not, are privileged, if prepared with a *bona fide* intention of being laid down before him for the purpose of taking his advice.⁷ In *Young v Holloway*,⁸ the plaintiff and her solicitor and counsel received anonymous letters regarding and relevant to a pending suit; privilege was refused in regard to the letters received by the plaintiff herself, but allowed in regard to the others. And where a dispute arose between the plaintiff corporation and the defendant which it was

¹ *Lough's Estate, in re*, W. N., 1876, p. 236.

² *Cashin v Craddock*, 2 C. D., 140

³ *Doorgunness Dassie v Benode Monce*, W. R., 1864, p. 164

⁴ *Mint v. Morgan*, 8 L. R., Ch. App., 361; but see *Att.-Gen. v. Emerson*, 10 Q. B. D., 191; and *Emmerson v. Ind.*, 33 C. D., 323. See p. 567, *supra*, and see, 162 Evidence Act

⁵ *Gurmuk Roy v. Tularam*, (1901) 28 Cal., 424.

⁶ *Haroom Mahomed v. Abdul Karim*, (1879) 3 Bom., 91; and see *Ryrie v. Shivshankar*, 15 Bom., 7.

⁷ *Southark Water Co v. Quick*, 3 Q. B. D., 316. See *Anderson v. Bank of Columbia*, 2 C. D., 641; *Bustros v. White*, 1 Q. B. D., 423; *Wheeler v. Le Marchant*, 17 C. D., 675; *Mason v. Cattley*, 22 C. D., 200.

⁸ 4 Q. B. D., 509; *Ryrie v. Shivshankar*, (1891) 15 Bom., 7.

⁹ *Young v. Holloway*, 12 P. D., 167.

Revision—An order under the corresponding section of the former Code was not open to revision and could only be impeached in appeal from the decree.¹

15 Every party to a suit shall be entitled at any time to give notice to any other party, in whose pleadings or affidavits reference is made to any document, to produce such document for the inspection of the party giving such notice, or of his pleader, and to permit him or them to take copies thereof; and any party not complying with such notice shall not afterwards be at liberty to put any such document in evidence on his behalf in such suit unless he shall satisfy the Court that such document relates only to his own title, he being a defendant to the suit, or that he had some other cause or excuse which the Court shall deem sufficient for not complying with such notice, in which case the Court may allow the same to be put in evidence on such terms as to costs and otherwise as the Court shall think fit.

16. Notice to any party to produce any documents referred to in his pleading or affidavits shall be in Form No. 7 in Appendix C, with such variations as circumstances may require.

R S O 31, rr 15 and 16. This rule applies to H. C. and Prov. S. C. C.

These rules deal with documents referred to in the pleadings as distinct from all other documents and is intended to put the other side in the same position as though the documents were actually set out in full in the pleadings.² A defendant is entitled to have inspection of documents referred to in the plaint before filing his written statement.³

Reference is made.—Documents referred to generally fall within this rule,⁴ where entries in a book are referred to, those particular entries alone may be inspected.⁵

Own title. In an English case a defendant was allowed to withhold a conveyance to himself on giving by way of particulars the date of the consideration for the purchase.⁶

Affidavits include answers to interrogatories.⁷

17. The party to whom such notice is given shall, within ten days from the receipt of such notice, deliver to the party giving the same a notice stating a time within three days from the delivery thereof at which the documents, or such of them as

¹ Nizam of Hyderabad, *in re*, (1886) 9 Mad., 256.

² See *Quilter v. Heatley*, 21 C. D., pp. 48-51, Ann. Prac. 1903, i. 417.

³ *Ram Dyal v. Norhury* (1884) 18 Bom., 363.

⁴ *Smith v. Harris*, 48 L. T., 869.

⁵ *Quilter v. Heatley* 23 C. D., 42.

⁶ *Milbank v. Milbank*, (1900) 1 Ch., 376; and see *Sutherland v. Singhee Charn*, (1884) 10 Cal., 808.

⁷ *Moore v. Peachey*, (1891) 2 Q. B., 707; *Brays Digest*, Art. 707.

he does not object to produce, may be inspected at the office of his pleader, or in the case of banker's books or other books of account or books in constant use for the purposes of any trade or business, at their usual place of custody, and stating which (if any) of the documents he objects to produce, and on what ground. Such notice shall be in Form No. 8 in Appendix C, with such variations as circumstances may require.

18. (1) Where the party served with notice under rule 15 omits to give such notice of a time for inspection or objects to give inspection, or offers inspection elsewhere than at the office of his pleader, the Court may, on the application of the party desiring it, make an order for inspection in such place and in such manner as it may think fit: Provided that the order shall not be made when and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs.

(2) Any application to inspect documents, except such as are referred to in the pleadings, particulars or affidavits of the party against whom the application is made or disclosed in his affidavit of documents, shall be founded upon an affidavit showing of what documents inspection is sought, that the party applying is entitled to inspect them, and that they are in the possession or power of the other party. The Court shall not make such order for inspection of such documents when and so far as the Court shall be of opinion that it is not necessary, either for disposing fairly of the suit or for saving costs.

R. S. O. 31, rr. 17 and 18. These rules apply to H. C. and Prov S. C. C.

This rule (No 17) does not apply where an order has been made for production at a specified place *see r. 14 supra*

Commentary on the Code of Civil Procedure, 1908, Vol. 1, p. 100, para. 100.1. This rule is a modification of the rule in the English Rules of Court, 1908, Vol. 1, p. 100, para. 100.1.

Bankers Books Compare Bankers Books Evidence Act

Ten days —As to when begins to run see *Dhapi v. Ram Pushad*,¹ and see the same case for the remedy of the opposite party in case notice is given under this section.

¹ *Kevaldas Sakarchand v. Pestonji*, (1891) 5 Bom., 467.

² See *Dhapi v. Ram Pershad*, (1897) 14 Cal., 763, 777.

Conclusiveness of affidavit Presumably rule 18 is not intended to vary the long-standing rule that the Courts will not go behind the oath of the party against whom inspection is sought.¹

Notice—No order will be made unless notice has been served.²

19 (1) Where inspection of any business books is applied for, the Court may, if it thinks fit, instead of ordering inspection of the original books, order a copy of any entries therein to be furnished and verified by the affidavit of some person who has examined the copy with the original entries, and such affidavit shall state whether or not there are in the original book any and what erasures, interlineations or alterations: Provided that, notwithstanding that such copy has been supplied, the Court may order inspection of the book from which the copy was made.

Verified copies

(2) Where on an application for an order for inspection privilege is claimed for any document, it shall be lawful for the Court to inspect the document for the purpose of deciding as to the validity of the claim of privilege.

(3) The Court may, on the application of any party to a suit at any time, and whether an affidavit of documents shall or shall not have already been ordered or made, make an order requiring any other party to state by affidavit whether any one or more specific documents, to be specified in the application, is or are, or has or have at any time been, in his possession or power; and, if not then in his possession, when he parted with the same and what has become thereof. Such application shall be made on an affidavit stating that in the belief of the deponent the party against whom the application is made has, or has at some time had, in his possession or power the document or documents specified in the application, and that they relate to the matters in question in the suit, or to some of them.

R. S. O. 31 r. 19a. This rule applies to H. C. and Prov. S. C. C.

Privilege—This has been held in England to include all valid objections to discovery *e.g.* irrelevancy.³

Sealed Documents—Papers sealed up may be inspected under clause(2).⁴

20. Where the party from whom discovery of any kind or inspection is sought objects to the same, Premature discovery. or any part thereof, the Court may, if

¹ See *Am. Dec. O. 21* = 12 *Willson v. Watson* 21 Q. B. D. 537.

² .

³ .

⁴ .

satisfied that the right to the discovery or inspection sought depends on the determination of any issue or question in dispute in the suit, or that for any other reason it is desirable that any issue or question in dispute in the suit should be determined before deciding upon the right to the discovery or inspection, order that such issue or question be determined first, and reserve the question as to the discovery or inspection.

R. S. O 31, r. 20 This rule applies to H. C. and Prov. S. C. C. See note to r. 7, *supra* vide *Material to the suit*

Determination of any issue—The object of this rule is to give the Court, (before the hearing of the issue for the exclusion of evidence) the power to determine what evidence should be used at the trial.¹

21. Where any party fails to comply with any order to answer interrogatories, or for discovery or inspection of documents, he shall, if a plaintiff, be liable to have his suit dismissed for want of prosecution, and, if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not defended, and the party interrogating or seeking discovery or inspection may apply to the Court for an order to that effect, and an order may be made accordingly.

R. S. O. 31, r. 21. This rule applies to H. C. and Prov. S. C. C.

The Courts in England do not make an order unless this rule is satisfied that the party in default is seeking to avoid a fair discovery.²

22. Any party may, at the trial of a suit, use in evidence any one or more of the answers or any part of an answer of the opposite party to interrogatories without putting in the others or the whole of such answer: Provided always that in such case the Court may look at the whole of the answers, and if it shall be of opinion that any others of them are so connected with those put in that the last-mentioned answers ought not to be used without them, it may direct them to be put in.

R. S. O 31 r 22 This rule applies to H. C. and Prov. S. C. C.

See *Lyell v. Kennedy* and *Gosto Behary Pal v. Johar Lall Pal*.³

¹ *Ahmedbhai v. Vellebhai*, (1882) 6 Bom., 572. It is usual to proceed on summons *id.*, 703, p. 705. For example of cases tried in England under a corresponding rule, see *Rouchie v. Leigh*, 6 C. D., 256; *Sheward v. Lord Lonsdale*, 5 C. D., 47; *Parker v. Wells*, 18 C. D., 477; *Leitch v. Abbott*, 31 C. D., 374.

² *Rep. of Liberia v. Royce*, 1 A. C., p. 143. See *Nelson v. Nelson*, (1906) 2 K. B., 217.

³ See *Lyell v. Kennedy*, 27 C. D., pp. 15 and 29, and *Gosto Behary Pal v. Johar Lall Pal*, (1876) 4 Cal., 890, 4 C. L. R., 161.

Any order—No action can be taken under this rule until an order has been passed under, r r 11 or 18 *supra*.¹ A case will not be dismissed or a defence struck out unless as a last resort,² or except in extreme cases,³ unless the Court is satisfied that the party called on is avoiding making fair discovery,⁴ and if the parties concerned are *furdanashin* ladies this should be taken into account,⁵ but where defendant failed, to answer interrogatories, and was allowed another week and again failed, Quam, J., said that the rule was inserted purposely prevent procrastination, and made an order to strike out the defence unless the answer was filed within twenty-four hours.⁶ A and his wife B, trading under the name of Barrow & Co, sued C, who served them with an order for production; B alone made an affidavit of documents, A having meanwhile absconded. On an application to dismiss the suit, the Vice-Chancellor held that this section did not make it imperative to dismiss the suit and allowed B, the wife, to carry on the case.⁷ The party against whom the order is passed can apply to have it set aside.⁸

Joint possession—See Carew v Carew.⁹

Contempt—In the High Court, a party disobeying an order for inspection and discovery is also liable to be committed for contempt.¹⁰

Appeal—An order under this rule is a decree under s 2 and is appealable,¹¹ It is not an *ex-parte* decree.¹²

Revision.—An order under this rule may be open to revision.¹³

Order to apply to 23. This Order shall apply to minor plaintiffs and defendants, and to the next friends and guardians for the suit of persons under disability,

R. S. O. 31, r 29 This rule applies to H. C. and Prov S. C. C.

Under the former Code, no discovery could be had from minors,¹⁴ and this rule extends the provisions of the order to lunatics, a step further than the corresponding English rule.

¹ Prem Sukh v Indronath, (1891) 18 Calc., 420, overruling Lall Dabee v. Santo, 10 Calc., 505.

² Assenoolia v Abdul Aziz, (1883) 9 Calc., 923; See Chunnai Lal v. Ralli, (1905) A. W. N., 62.

³ Sham Kishore v. Shashi Bhooman, (1889) 5 Calc., 707.

⁴ Wilson v. Raffalovich, 7 Q. B. D., 553.

⁵ Kahan v. Safdar Husam, (1896) 8 All., 265.

⁶ Twycross v. Grant, W. N., 1875, p. 229. See Banshi Singh v. Palit Singh, (1907) 7 Calc. L. J., 295, in which most of these decisions are recounted and repeated.

⁷ Hartley v. Owen, W. N., 1876, p. 193.

⁸ Assenoolia v. Abdul Aziz, (1883) 9 Calc., 924.

⁹ Carew v. Carew, 1 P. D., (1891), 360.

¹⁰ Hasoonbboy v. Cowasji, (1883) 7 Bom., 1; Navvahoo v. Narotam Des, (1883) 7 Bom., 5.

¹¹ Man Singh v. Mchta Hartharram, (1895) 19 Bom., 397.

¹² Chunnai Lal v. Chamman, (1885) 7 All., 159; Kesharia v. Pottoah Sett, (1898) 2 Calc. W. N., 676.

¹³ Dhapi v. Ram Pershad, (1887) 14 Calc., 765.

¹⁴ Dunear v. Bhogro Prosad, (1895) 22 Calc., 891.

ORDER XII.

Admissions.

Notice of admission of
case.

1. Any party to a suit may give notice by his pleading, or otherwise in writing that he admits the truth of the whole or any part of the case of any other party.

R. S. O. 32, r 1

Rules; and is introduced
Notices to admit facts
High Court at Calcutta,

Admissions—May be made in the pleadings or in any affidavit such as answers to interrogatories,¹ in fact any statement made by a man on oath may be used against him as an admission.²

Evidence where facts admitted—In England if all the facts alleged in the plaint are admitted by the defendant the plaintiff will not be allowed to call evidence except by permission of the Court granted upon special grounds.³

The admission of documents does not make them evidence, and they should be formally tendered and marked at the hearing in case they should be wanted upon appeal.⁴

Costs.—Due to refusal or neglect to admit. *See r 9, infra.*

2. Either party may call upon the other party to admit any document, saving all just exceptions; and in case of refusal or neglect to admit, after such notice, the costs of proving any such document shall be paid by the party so neglecting or refusing, whatever the result of the suit may be, unless the Court otherwise directs; and no costs of proving any document shall be allowed unless such notice is given, except where the omission to give the notice is, in the opinion of the Court, a saving of expense.

3. A notice to admit documents shall be in Form No. 9 in Appendix C, with such variations as circumstances may require.

Form of notice.

R. S. O. 32 r. 2. Act XIV of 1852, section 128

This rule applies to H. C. and Prov. S. C. C.

¹ Att Gen. v Gaskill, 20 C. D., 519.

² Per Jessel M. R., Exp. Hall, 10 C. D., p. 583.

³ Hardwick, 9 P. D., 32.

⁴ Watson v. Rodwell, 11 C. D., p. 153.

The following form appeared in the last Edition of this work and has been reproduced in its formal parts in Form No. 9 App C, it may still be useful in shewing the manner in which the documents should be set out.

Take notice that the plaintiff (or defendant) in this suit proposes to adduce in evidence the several documents hereunder specified, and that the same may be inspected by the defendant (or plaintiff), his pleader or agent at , on , between the hours of ; and the defendant (or plaintiff) is hereby required within forty-eight hours from the last-mentioned hour, to admit that such of the said documents as are specified to be originals were respectively written, signed or executed, as they purport respectively to have been ; that such as are specified as copies are true copies and such documents as are stated to have been served sent, or delivered were so served, sent, or delivered respectively ; saving all just exceptions to the admissibility of all such documents as evidence in the cause.

Dated of 18 (Signed) G. H. Pleader or agent for plaintiff (or defendant)

To E. F., (Pleader or agent) for defendant (or plaintiff)

ORIGINALS

DESCRIPTION OF DOCUMENTS.	DATES.
Deed of assignment A. B. and C. D. sent to E. F. and F. G. assigned to	Jan. 1st, 1868
"	1st, 1869.
"	2nd, 1868.
"	1st, 1868.
"	3rd, 1867.
Memorandum of agreement between C. D., captain of said ship, and E. F.	Jan. 1st, 1869.
Bill of exchange for £100 at three months, drawn by A. B. on and accepted by, C. D., endorsed by E. F. and G. H.	May 1st, 1869.

COPIES.

DESCRIPTION OF DOCUMENTS	DATES.	Original or duplicate served, sent or delivered, when, how, and by whom.
Register of baptism of A. B. in the Parish of X	Jan. 1st, 1618	
Letter : plaintiff to defendant	Feb. 1st, 1868.	Sent by General Post, Feb. 2nd, 1868.
Notice to produce papers	Mar. 1st, 1868.	Served Mar. 2nd, 1868, on defendant's pleader, by E. F. of
Record of a judgment of the Court of Queen's Bench, in an action F. S. v. F. N.	Trinity term, 10th Vict.	
Letters Patent of King Charles II in the Rolls Chapel	Jan. 1st, 1650	

What documents it should contain.—From this form it is evident that notice should be given of *all* documents intended to be used in evidence whether in possession or otherwise, and even though the opposite party stated

he would not admit them;¹ even though it might be doubtful whether the document, for instance, a copy of a deposition or counter-part, might be legally admissible;² otherwise, "no costs of proving such document shall be allowed."

Effect of admission—The admission "saving all just exceptions to the admissibility of such document in evidence" does not enable a party to use copies as evidence without laying a foundation for the secondary evidence by giving notice to the opposite party, &c.³ or prevent the party admitting from objecting on the ground that the document has not been sufficiently stamped;⁴ but an admission of a document made by A as agent is an admission of his authority.⁵

Expense of proving such documents.—If the party serving notice fails to prove the documents, the party refusing to admit will not be made liable for the costs of the unsuccessful attempt.⁶

Co-defendants—Admissions of documents between co-defendants, to which the plaintiff is not a party, cannot be read as evidence against him.⁷

4. Any party may, by notice in writing, at any time not later than nine days before the day fixed for the hearing, call on any other party to admit, for the purposes of the suit only, any specific fact or facts mentioned in such notice. And in case of refusal or neglect to admit the same within six days after service of such notice, or within such further time as may be allowed by the Court, the costs of proving such fact or facts shall be paid by the party so neglecting or refusing, whatever the result of the suit may be, unless the Court otherwise directs: Provided that any admission made in pursuance of such notice is to be deemed to be made only for the purposes of the particular suit, and not as an admission to be used against the party on any other occasion or in favour of any person other than the party giving the notice: Provided also that the Court may at any time allow any party to amend or withdraw any admission so made on such terms as may be just.

5 A notice to admit facts shall be in form No. 10 in Appendix C, and admissions of facts shall be in Form No. 11 in Appendix C, with such variations as circumstances may require.

R. S. O. 32, rr 4 and 5. See Rules of the Calcutta High Court

Wherever possible a notice to admit facts should take the place of interrogatories⁸

¹ *Butter v. Chapman*, 8 M. & W., 388; *Spencer v. Barrough*, 9 M. & W., 425.

² *Cromwell, L. R.*, 3 A. & E., 316; *Deo v. Smith*, 8 Ad. & El., 235.

³ *Sharp v. Lamp*, 11 Ad. & El., 805.

⁴ *Vane v. Whittington*, 2 DowL. N. S., 757.

⁵ *Wilkes v. Hopkins*, 1 C. B., 737.

⁶ *Stracey v. Blake*, 7 C. & P., 491; *Doe v. Peters*, 1 C. & K., 279. *Freeman v. Boshier*, 6 D. & L., 517.

⁷ *Dodds v. Tuke*, 25 C. D., 617.

⁸ *Clarke v. Clarke*, (1897) W. N., 120.

The notice may be served with the plaint and if the defendant refuses to answer it, he does so at his peril as to costs ¹

6. Any party may at any stage of a suit, where admissions of fact have been made, either on the pleadings, or otherwise, apply to the Court for such judgment or order as upon such admissions he may be entitled to without waiting for the determination of any other question between the parties: and the Court may upon such application make such order, or give such judgment, as the Court may think just.

R. S. O. 32, r. 6 This rule applies to H. C. and Prov. S.C.C.

The object of this rule is to enable the plaintiff or the defendant to get rid of so much of the action as to which there is no controversy ²

It is permissive only and the plaintiff is not debarred from relying on admissions in the pleadings at the trial because he does not choose to avail himself of this rule ³

A verbal admission is sufficient if clearly proved ⁴

Infants—The Courts in England do not pass orders under this rule against minors ⁵

... be clear and unequivocal
... his case must be
... claims, a mere
... less the claim is

good in law ⁶

The power of the Court is discretionary and the rule was not meant to apply to cases in which any serious question of law is to be argued. ⁷

Withdrawal—Admissions may be withdrawn where the Court is satisfied that they were made in error. ⁸

7. An affidavit of the pleader or his clerk, of the due signature of any admissions made in pursuance of any notice to admit documents or facts, shall be sufficient evidence of such admissions, if evidence thereof is required.

Affidavit of signature.

8. Notice to produce documents shall be in Form No. 12 in Appendix C, with such variations as circumstances may require. An affidavit to produce documents.

¹ *Crawford v. Chorley*, (1833) W. N., 193; See Ann. Prac. 1908, i. 428.

² Per Jessel M. R., *Thorp v. Houldsworth*, 3 C. D., p. 640

³ *Tildesley v. Harper*, 7 C. D., 403.

⁴ *In re Beery*, (1894) 1 Ch. 499; and as to admissions on correspondence see *Tildesley v. Harper*, 7 C. D., 403. As to the nature and extent of admissions on which the court will act, *Symonds v. Jenkins*, (1875) 24 W. R., 512.

⁵ *Syrol v. Syrol*, 5 L. R., Ir. Ch. D., 134; Ann. Prac. note to O. 32, r. 6.

⁶ *Chilton v. Corp. of London*, 7 C. D., 735; *Laudergan v. Feast*, 34 W. R., 691; and other cases cited in Ann. Prac. note to O. 32 r. 6.

⁷ *Gilbert v. Smith*, 2 C. D., p. 689, per Mellish L. J. See Re, Wright, (1895) 2 Ch. at p. 750.

⁸ *Hollis v. Barton*, (1892) 3 Ch. 226

he would not admit them ;¹ even though it might be doubtful whether the document, for instance, a copy of a deposition or counter-part, might be legally admissible ;² otherwise, "no costs of proving such document shall be allowed."

Effect of admission—The admission "giving all just exceptions to the admissibility of such document in evidence" does not enable a party to use copies as evidence without laying a foundation for the secondary evidence by giving notice to the opposite party, &c.³ or prevent the party admitting from objecting on the ground that the document has not been sufficiently stamped ;⁴ but an admission of a document made by A as agent is an admission of his authority.⁵

Expense of proving such documents—If the party serving notice fails to prove the documents, the party refusing to admit will not be made liable for the costs of the unsuccessful attempt.⁶

Co-defendants—Admissions of documents between co-defendants, to which the plaintiff is not a party, cannot be read as evidence against him.⁷

4. Any party may, by notice in writing, at any time
 Notice to admit facts, not later than nine days before the day
 fixed for the hearing, call on any other
 party to admit, for the purposes of the suit only, any
 specific fact or facts mentioned in such notice. And in case
 of refusal or neglect to admit the same within six days
 after service of such notice, or within such further time as
 may be allowed by the Court, the costs of proving such fact
 or facts shall be paid by the party so neglecting or refusing,
 whatever the result of the suit may be, unless the Court
 otherwise directs : Provided that any admission made in
 pursuance of such notice is to be deemed to be made only
 for the purposes of the particular suit, and not as an admis-
 sion to be used against the party on any other occasion or
 in favour of any person other than the party giving the
 notice : Provided also that the Court may at any time allow
 any party to amend or withdraw any admission so made on
 such terms as may be just.

5. A notice to admit facts shall be in form No. 10 in
 Form of admissions, Appendix C, and admissions of facts shall
 be in Form No. 11 in Appendix C, with
 such variations as circumstances may require.

R. S. O. 32, rr 4 and 5. See Rules of the Calcutta High Court
 Wherever possible a notice to admit facts should take the place of interroga-
 tives.⁸

¹ Rutter v. Chapman, 8 M. & W., 389 ; Spencer v. Barough, 9 M. & W., 425.

² Cromwell, L. R., 3 A. & E., 316 ; Deo v. Smith, 8 Ad. & El., 255.

³ Sharp v. Laup, 11 Ad. & El., 805.

⁴ Vane v. Whittington, 2 Dowl. N. 8, 757.

⁵ Wilkes v. Hopkins, 1 C. B., 737.

⁶ Stracey v. Blake, 7 C. & P., 401 ; Doe v. Peters, 1 C. & K., 279. Freeman v. Boshier, 6 D. & L., 517.

⁷ Dodds v. Tuke, 25 C. D., 617.

⁸ Clarke v. Clarke, (1899) W. N., 130.

ORDER XIII

Production, Impounding and Return of Documents.

1. (1) The parties or their pleaders shall produce, at the first hearing of the suit, all the documentary evidence of every description in their possession or power, on which they intend to rely, and which has not already been filed in Court, and all documents which the Court has ordered to be produced.

(2) The Court shall receive the documents so produced : provided that they are accompanied by an accurate list thereof prepared in such form as the High Court directs.

Act XIV of 1882, sect. 138

This rule applies to H. C. and Prov. S. C. C.

Scope of section—By O. VII, r. 14 if plaintiff sues or relies on a document he must either produce it with his plaint, or enter it in the list attached to it. By O. VII, r. 18 any document which has not been produced or entered, cannot be received in evidence without leave of the Court ;¹ and by this rule the parties must bring with them and have in readiness at the first hearing all the documentary evidence within their power and on which they rely and file it ; if not called on, they are not bound to file it then.² But if, during the course of a trial, something new were brought to light, and any additional issues were framed, the parties would not be entitled to shut out good and valuable evidence of whose genuineness there could be no doubt, merely because the other parties had, without good and assignable cause, abstained from bringing it before the Court on the first hearing.³ So, a Court may receive in evidence a document not filed with the plaint on being satisfied of its genuineness, even though unstamped.⁴ This rule is enacted to prevent fraud by the late production of suspicious documents ; but not to shut out formal evidence beyond suspicion, such as certified copies of public documents like records of Government.⁵

Appeal—The mere admission of further evidence after the first hearing is not a good ground for appeal,⁶ nor can an appellate Court reject evidence admitted by the first Court simply on that ground.⁷

2 No documentary evidence in the possession or power of any party which should have been but has not been produced in ac-

Effect of non-production of documents.

¹ *Promsark Chunder v. Rajkisto Mitter*, 1 Hyde, 145 ; *Roshun Jehan v. Inayut Hossein*, Marsh, 127.

² *Mahbub Hossein v. Patna*, (1869) 1 B. L. R., 120.

³ *Ikram Hossein v. Ram Lochun*, (1875) 23 W. R., 29.

⁴ *Attasillah Mundle v. Sakeeddeen Turupdar*, W. R., 1861, p. 271.

⁵ *Ranchhod v. Secretary of State*, (1894) 22 Bom., 173. See r. 2, *infra*.

⁶ *Tota Ram v. Rickmune*, (1867) 12 W. R., (P. C.), 32.

⁷ *Minakshi v. Vela*, (1883) 8 Mad., 373 ; and see *Bhoom Narain v. Kurmoon*, (1861) 1 W. R., 193. see also note under O. VII, r. 18, *supra*.

cordance with the requirements of rule 1 shall be received at any subsequent stage of the proceedings unless good cause is shown to the satisfaction of the Court for the non-production thereof; and the Court receiving any such evidence shall record the reasons for so doing.

Act XIV of 1882, sect. 139.

This rule applies to H. C. and Prov. S C C.

The parties are not entitled to adduce fresh documentary evidence after the issues in the case have been settled, if it has been in their power or possession, but they may tender evidence on grounds upon which it was not tendered. Judge to admit or reject the application; the acts should be stated on the record as received.¹ In dealing with applications under this rule, it should be borne in mind that the main object of it is to prevent the fabrication of evidence during the trial to meet those unexpected questions which sometimes arise, that it is limited to documents within the power or possession of the parties, and that it never was intended to allow, without leave, the production of any more documentary evidence than had been already filed at the first hearing.² But the Court should call upon the parties to produce, or else the *stringent* terms of this order will not be enforced. Where a party who had not been called on by the Court, tendered documentary evidence the day after the issues had been framed, and there was nothing in the statement drawn up when fixing the issues shewing that any documents had been called for, it was held the evidence should have been received.³

3. The Court may at any stage of the suit reject any document which it considers irrelevant or otherwise inadmissible, recording the grounds of such rejection.

Rejection of irrelevant or inadmissible documents.

Act XIV of 1882, s. 140. This rule applies to H. C. and Prov. S C C.

Reject—The Judge, having called on the parties to produce their documentary evidence, must receive every document tendered by the parties; and, having inspected them, return such as he considers evidently irrelevant or inadmissible,⁴ or, if for want of time he is unable to inspect or consider them, he may allow them to be filed, and inspect and reject them afterwards.⁵ The documents retained by the Court cannot be used in evidence or put on the record until properly proved or admitted.

If, when evidence is taken before a Commissioner a document is tendered and objected to on any ground, the opposite party is not precluded from objecting to the document at the trial on any other ground.⁶

Where sanction is necessary.—Where anything must be done to obtain a document, it must be done by the party requiring it. Thus, the party, and not

¹ *Watson & Co. v. Kunhye*, (1868) 9 W. R., 294.

² *Gour Huree v. Pran Huree*, (1874) 21 W. R., 42.

³ *Mahbub Hossein v. Patani*, (1868) 1 B. L. B., 127.

⁴ *Roshun Jehan v. Inayat Hossein*, *Marsh.*, 127.

⁵ *Soodukhina v. Raj Mohun*, (1869) 11 W. R., 350. Documents irrelevant or inadmissible ought not to be placed on the record, *Imar Chunder v. Russeck Lall*, (1869) 11 W. R., 576. As to the duty of a Court in admitting or rejecting documents, see *Tametzooddy v. Busarut*, (1874) 21 W. R., 76.

⁶ *Ralli v. Gau Kim*, (1883) 9 Cal., 379.

the Court, must obtain the sanction of Government to an officer in the Telegraph Department producing a copy of a message that passed through his office.¹

Appeal.—No appeal lies from an order rejecting documents, nor can it be interfered with under the Charter Act.² but it may be impugned on appeal from the final decree.

Forms.—See Calcutta H. C. Circular No. 7, dated 2nd June, 1890, printed General Rules (civil) Vol. I, pp. 69-83. Punjab Chief Court—Judicial Circulars, No. 18, p. 22. Judicial Commissioner of Central Provinces, No. 14 of 1881; British Burmah Gazette, Nov. 1887, Part III, p. 149.

Question of admissibility when to be decided.—Questions as to the admissibility of evidence should be decided as they arise, and should not be reserved until judgment in the case is given.³

4. (1) Subject to the provisions of the next following sub-rule, there shall be endorsed on every document which has been admitted in evidence in the suit the following particulars, namely:—

Endorsements on documents admitted in evidence

- (a) the number and title of the suit,
- (b) the name of the person producing the document,
- (c) the date on which it was produced, and
- (d) a statement of its having been so admitted; and the endorsement shall be signed or initialled by the Judge.

(2) Where a document so admitted is an entry in a book, account or record, and a copy thereof has been substituted for the original under the next following rule, the particulars aforesaid shall be endorsed on the copy and the endorsement thereon shall be signed or initialled by the Judge.

Act XIV of 1882, s. 141. This rule applies to H. C. and Prov. S. C. C.

So much of this rule as relates to the signing by the Judge of endorsements on documents does not apply to the Chief Court of Lower Burmah—Government of India Notification, No. 1637, dated, 12th September, 1903.

A copy thereof.—This refers to O. VII, r. 17

with documentary evidence, the and value of evidence rest should or instance, accept secondary evidence has not been produced,⁴ nor documents as proved, because they have not been denied by the opposite party.⁵

¹ *Lekhraj v. Palee Ram*, (1870) 2 All. H. C., 210.

² *Erskine, petitioner*, (1872) 18 W. R., 511.

³ *Jadu Rai v. Bhuloharan*, (1890) 17 Calc., 173; *Ramjiban v. Oghoreuath*, (1893) 25 Calc., 401; 2 Calc. W. N., 188.

⁴ *Rama Lakshmi v. Sivanatha Perumal*, (1872) 14 Moo. I. A., 570, p. 588; 17 W. R., 553.

⁵ *id.*; *Ram Gopal v. Gordon Stuart*, (1872) 14 Moo. I. A., 453, p. 461; *Abbas Ali v. Yadeem Ramy*, (1841) 3 Moo. I. A., 156.

⁶ *Kirteebashi v. Rindham*, (1843) B. L. II, F. B., 658; *Reazoonissa r. Boookoo Chowdhram*, (1869) 12 W. R., 267.

5. (1) Save in so far as is otherwise provided by the Bankers' Books Evidence Act, 1891, where a document admitted in evidence in the suit is an entry in a letter-book or a shop-book or other account in current use, the party on whose behalf the book or account is produced may furnish a copy of the entry.

(2) where such a document is an entry in a public record produced from a public office or by a public officer, or an entry in a book or account belonging to a person other than a party on whose behalf the book or account is produced, the Court may require a copy of the entry to be furnished—

- (a) where the record, book or account is produced on behalf of a party, then by that party, or
- (b) where the record, book or account is produced in obedience to an order of the Court acting of its own motion, then by either or any party.

(3) Where a copy of an entry is furnished under the foregoing provisions of this rule, the Court shall, after causing the copy to be examined, compared and certified in manner mentioned in rule 17 of Order VII, mark the entry and cause the book, account or record in which it occurs to be returned to the person producing it.

Act XIV of 1882, s. 141 A. This rule applies to H. C. Prov. S. C. C.

Unstamped documents—Unstamped documents, or secondary evidence of the stamp and penalty,¹ Court, it should not be rejected as a good ground for special subsequently to the institution of a suit is valid, provided it be properly stamped when produced at the first hearing of the suit and when the Court is asked to receive it in evidence.² When a Court has occasion to admit a previously unstamped document in evidence it is necessary that the Court of first instance on payment of prescription the admission ex-

Unregistered documents.—An unregistered document is admissible for the purpose of obtaining specific performance and secondary evidence of it is

¹ *Haran Chunder v. Russick Chunder*, (1873) 20 W. R., 67

² *Atmaram v. Amir Chand*, (1865) 3 Bom. H. C., A. C., 92.

³ *Kalla v. Ilalki*, (1896) 18 All., 295

⁴ *Gopudani v. Narayithal*, (1889) 13 Bom., 493; *Punchannud v. Taramoni*, (1886) 12 Cal., 61; also see (1885) 8 Mad., 564.—(*Reference*) and (1892) 15 Mad., 259 (*Reference*)

admissible, if it remained unregistered without any fault of the plaintiff¹ Also for a collateral purpose *e.g.*, to prove admission of liability of the executant to prevent a claim from being barred by limitation,² or to prove in the case of a mortgage, the simple debt or a personal obligation,³ or to prove, in the case of a sale, a receipt or acknowledgment of money paid.⁴ A document merely giving a right to obtain another document, the registration of which is compulsory,⁵ or a subsequent written agreement to abate rent,⁶ or a document limiting or extinguishing the chance of acquiring a right to light and air,⁷ or a receipt purporting to extinguish part of a mortgage,⁸ or a receipt setting forth a settlement of a mortgage account,⁹ is admissible in evidence without registration.

Altered documents.—If a document appears to have been altered, the onus of proving its genuineness lies on the party claiming under it. If he can shew the nature of the document in its original state and account for the alteration, it is admissible. Thus, where a deed was tampered with, while in the custody of the record-keeper, their lordships on the Privy Council admitted it,

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l and
of his
But

this wholesome rule admits of exception if there be, independently of the instrument a corroborative proof strong enough to rebut the presumption which arises against an apparent and presumable falsifier of evidence. And such corroborative proof will be greatly strengthened, if there be reason to suppose that the opposite party has withheld evidence which would prove the original condition and import of the suspected document. Moreover, the peculiarity of the present case is that one of the issues to be determined is, what was the condition of the document when first produced by those who claim under it. The appellants may fairly contend that the rule above stated is not applicable to them, until the question has been decided against them.¹⁰

A material alteration in a document is, if fraudulently made sufficient to render it void. A party who has the custody of an instrument made for his benefit is bound to preserve it in its original condition, and any material alteration of it will vitiate the instrument.¹¹ But the alteration must be such as to cause the instrument on the face of it to operate differently from the original

¹ Nagappa v. Devu, (1891) 14 Mad., 55; Bengal Banking Cor. v. Maskertich, (1884) 10 Cal., 315; Barjorji v. Muncherji, (1881) 5 Bom., 143.

² Mugniram v. Gurmukh, (1899) 26 Cal., 334.

³ Vani v. Bani, (1896) 20 Bom., 533; Gomaji v. Subbarayappa, (1892) 15 Mad., 253; Butto Kristo v. Khettra Chandra, (1870) 6 B.; L. R., App., 69; Ulfatunnissa v. Hosain Khan, (1883) 9 Cal., 520.

⁴ Shub Prasad v. Anna Purna, (1869) 3 B. L. R., 451; 12 W. R., 435.

⁵ Pertap Chunder v. Mohendra Nath, (1890) 17 Cal., 291; Horniasji v. Keshav, (1894) 18 Bom., 13; Shridhar Ballal v. Chintaman, (1894) 18 Bom., 396; Chuni Lal v. Bomanji, (1883) 7 Bom., 310.

⁶ Satyesh Chunder v. Dhunput Singh, (1897) 24 Cal., 20; Obai Goundan v. Ramalinga, (1899) 22 Mad., 217.

⁷ Sultan Nawaz v. Rnstomji, (1896) 20 Bom., 704.

⁸ Sriram v. Kesrimal, (1896) 18 All., 333; Uppalakandi v. Kunnam Nihal, (1896) 19 Mad., 288.

⁹ Lakshman v. Damodar, (1900) 24 Bom., 609.

¹⁰ Khooh Couwur v. Moodnarsin, (1861) 9 Moo. I A., 1, p. 17. See also Garrard v. Lewis, 10 Q. B. D., 30; Suffell v. Bank of England, 7 Q. B. D., 270; 9 Q. B. D., 555; Leeds Bank v. Walker, 11 Q. B. D., 84; and see Mohesh Chunder v. Kamini Kumari, (1886) 12 Cal., 313; Venkatesh v. Baba Subraya, (1891) 15 Bom., 44; Govindasami v. Kappusami, (1889) 12 Mad., 239; Ramayyar v. Shanmugam, (1892) 15 Mad., 70, and the cases cited.

¹¹ Gogun Chander v. Dharonidhur, (1881) 7 Cal., 616.

instrument¹. When any interest in the property comprised in a mortgage deed at once vested in the plaintiff, and could not have been divested by a subsequent material alteration, the suit should be decreed on the ground that any reference in the plaint to the deed is not essential, and that it is not necessarily based on the altered instrument.²

Copies—An attested copy of a petition is admissible in evidence when the original is with the record of a different case and application had been made to

requires no stamp⁵

Stamp.—A copy of a document filed with the plaint does not require to be stamped.⁶ Copies of the original entries in an account book not in the handwriting of the debtor are not chargeable with any Court-fees.⁷

6. Where a document relied on as evidence by either party is considered by the Court to be inadmissible in evidence, there shall be endorsed thereon the particulars mentioned in clauses (a), (b) and (c) of rule 4, sub-rule (1), together with a statement of its having been rejected, and the endorsement shall be signed or initialled by the Judge.

Endorsements on documents rejected as inadmissible in evidence,

Act XIV of 1882, s. 142. This rule applies to H. C. and Prov. S. C. C.

So much of it as relates to the signing of document does not apply to the Chief Court of Lower Burma—Government of India Notification, No. 1637, of 12th Sept. 1903

In an appealable case, the Court ought not to reject evidence essential to the case of either party, if it can possibly admit it. At any rate, when the Court has doubt upon the matter and its decision is open to appeal, it is better to admit than to exclude doubtful documents⁸

7. (1) Every document which has been admitted in evidence, or a copy thereof where a copy has been substituted for the original under rule 5, shall form part of the record of the suit.

Recording of admitted and return of rejected documents

(2) Documents not admitted in evidence shall not form part of the record and shall be returned to the persons respectively producing them.

¹ *Oodley Chand v. Bhaskar*, (1882) 6 Bom., 371; *Anandji v. Nariad Spinning Co.*, (1876) 1 Bom., 329. See also *Christacharu v. Karimayya*, (1886) 9 Mad., 379 (F. B.); *Sitaram v. Daji Devaji*, (1887) 7 Bom., 418

² *Subrahmanya Ayyan v. Krishna*, (1900) 23 Mad., 137.

³ *Openra Mohun v. Poorna Chunder*, (1873) 19 W. R., 85.

⁴ *Tayabunnissa v. Kuwar Sham Kishore*, (1871) 7 B. L. R., 621; 15 W. R., 228.

⁵ *Kastur v. Fakir*, (1902) 26 Bom., 522.

⁶ *Krishnaji v. Dulaba*, (1891) 15 Bom., 687.

⁷ *Harichand v. Jivna Subharna*, (1887) 11 Bom., 526

⁸ *Kalkishore v. Bhuvan Chunder*, (1890) 18 Cal., 201, p. 203; L. R., 17 L. A., 159

Act XIV of 1882, s. 142 A This rule applies to H. C. and Prov S. C. C.

Documents which have not been proved but simply filed, as often happens in the mofussil, should not be put up with the record. The Judge should pass them over as unproved, and it is also the duty of the pleader for the opposite party to insist that they should not remain on the record at all¹. Where, in the course of argument on appeal, certain letters were tendered in evidence, which had not been marked or noted in the judgment, it was held they were not admissible, as no documents, though admitted in the answer to the notice to admit, were evidence, unless put in at the trial and formally marked by the Registrar². Where a document tendered in evidence in the Court of first instance was rejected as inadmissible, but was nevertheless allowed to remain on the record: *held*, that the mere fact of the document remaining on the record did not make it evidence in the appellate Court, but it must be tendered as evidence in the appellate Court and accepted thereby³.

8. Notwithstanding anything contained in rule 5 or rule 7 of this Order or in rule 17 of Order VII, the Court may, if it sees sufficient cause, direct any document or book produced before it in any suit to be impounded and kept in the custody of an officer of the Court, for such period and subject to such conditions as the Court thinks fit.

9 (1) Any person, whether a party to the suit or not, desirous of receiving back any document produced by him in the suit and placed on the record shall, unless the document is impounded under rule 8, be entitled to receive back the same,—

(a) where the suit is one in which an appeal is not allowed, when the suit has been disposed of, and

(b) where the suit is one in which an appeal is allowed, when the Court is satisfied that the time for preferring an appeal has elapsed and that no appeal has been preferred or, if an appeal has been preferred, when the appeal has been disposed of:

Provided that a document may be returned at any time earlier than that prescribed by this rule if the person applying therefor delivers to the proper officer a certified copy to be substituted for the original and undertakes to produce the original if required to do so:

Provided also that no document shall be returned which, by force of the decree, has become wholly void or useless.

(2) On the return of a document admitted in evidence a receipt shall be given by the person receiving it.

¹ Kallida Pershad v. Ram Hari, (1890) 5 Cal., 317.

² Watson v. Rodwell, 11 C. D., 153.

³ Har Gobind v. Nona Bahu, (1892) 14 All., 356.

Act XIV of 1882, sects 140 and 144. These rule apply to H. C. and Prov. S. C. C.

10. (1) The Court may of its own motion, and may in its discretion upon the application of any of the parties to a suit, send for, either from its own records or from any other Court, the record of any other suit or proceeding, and inspect the same.

Court may send for papers from its own records or from other Courts.

(2) Every application made under this rule shall (unless the Court otherwise directs) be supported by an affidavit showing how the record is material to the suit in which the application is made, and that the applicant cannot without unreasonable delay or expense obtain a duly authenticated copy of the record or of such portion thereof as the applicant requires, or that the production of the original is necessary for the purposes of justice.

(3) Nothing contained in this rule shall be deemed to enable the Court to use in evidence any document which under the law of evidence would be inadmissible in the suit.

* Act XIV of 1882, s. 137. This rule applies to H. C. and Prov. S. C. C.

This rule applies to appellate Courts.¹

In its discretion.—The Court is not now bound to send for a record.² In exercising the discretion allowed him, a Judge should first determine whether the document required is the record of a suit or proceeding in *another Court*; he cannot send for official papers to a public office as he could under the old law.³ and accordingly the Court should see whether the application merely of obtaining the the termination of the trial.⁴

A Judge may send for and inspect any document filed with any record in his own Court.⁵

Quare.—Is the Court of Wards a Court under this section.⁷

Form of order.—A Judge should pass a distinct order on the application;⁸ for if the documents are important and there is nothing on the record to

¹ Juggernath v. Mahomed, (1871) 15 W. R., 173.

² Heeramun Roy v. Taboour, (1867) 7 W. R., 109; Coraah v. Goornoo Churn, (1872) 18 W. R., 13; but see Golab Coomary, *in re*, (1870) 4 B. L. R., 36.

³ Juggernath v. Mahomed, (1871) 15 W. R., 173.

⁴ Soldee Jha v. Shoshchenath, (1871) 15 W. R., 150.

⁵ Krishna Churn v. Protah Chunder, (1891) 7 Cal., 560.

⁶ Banwaree Lall v. Kisto Behary, (1861) 1 W. R., 63.

⁷ Soldee Jha v. Shoshchenath, (1871) 15 W. R., 150.

⁸ Romun Kishen v. Kadir, (1866) 6 W. R., 79.

show that the application has been refused or the documents have been sent for and considered, the case may be remanded.¹

Apparal—But where A petitioned the Court to send for certain documents

Admissibility—The Judge sending for the record cannot use in evidence documents inadmissible under the Evidence Act,² nor need he send for the whole record, but only such papers as are contained in the application;³ and in all cases the party for whose benefit the documents have been used should be required to file copies on the record.⁴

11. The provisions herein contained as to documents shall, so far as may be, apply to all other material objects producible as evidence.

Provisions as to documents applied to material objects.

Act XIV of 1882, s 145 This rule applies to H. C and Prov. S. C. C.

¹ Ram Runjun v. Gopee Bullab, (1872) 18 W. R., 127.

² Chundi Charn v. Durga Churn, (1892) 12 C. L. R., 81.; 9 Calc., 260. But see Monmohinee v. Sreedahna, 14 W. R., 302.

³ Narappa v. Gapaya, (1864) 2 Bom. H. C., 341.

⁴ Janokee v. Shah Habeebul, W. R., 1864, p. 272.

⁵ Narappa v. Gapaya, (1864) 2 Bom. H. C., 341.

ORDER XIV.

*Settlement of Issues and Determination of Suit on Issues
of Law or on Issues agreed upon.*

1. (1) Issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other.

Framing of issues.

(2) Material propositions are those propositions of law or fact which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defence.

(3) Each material proposition affirmed by one party and denied by the other shall form the subject of a distinct issue.

(4) Issues are of two kinds : (a) issues of fact, (b) issues of law.

(5) At the first hearing of the suit the Court shall, after reading the plaint and the written statements, if any, and after such examination of the parties as may appear necessary, ascertain upon what material propositions of fact or of law the parties are at variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend.

(6) Nothing in this rule requires the Court to frame and record issues where the defendant at the first hearing of the suit makes no defence.

2 Where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined.

Act XIV of 1882, s. 146. These rules apply to H. C.

The law gives no power to summon the opposite party to give evidence on the settlement of issues ;¹ but the Court may examine his pleader.²

¹ Anund Chunder Banerjee v. Woornesh Chunder Roy, 1 Hyd., 147.

² Gunga Narain v. Tiluckram, (1887) L. R., 15 L. A., 119, p. 121; 15 Calc., 533.

An order made by a Judge on the original side at settlement of issues fixing a date for final disposal is not an order under Order XVII r. 1.¹

There is nothing in the Code of Civil Procedure which imposes upon the Judge the duty of allowing an issue to be raised on a point of law which he considers to be perfectly clear.²

Materials from which issues may be framed **3** The Court may frame the issues from all or any of the following materials :—

- (a) allegations made on oath by the parties, or by any persons present on their behalf, or made by the pleaders of such parties ;
- (b) allegations made in the pleadings or in answers to interrogatories delivered in the suit ;
- (c) the contents of documents produced by either party.

Act XIV of 1882, s. 147 This rule applies to H. C.

Materials for framing issues—This rule “mentions the various materials in addition to the plaint on which the issues may be framed. The obvious intention is to provide against failure of justice upon technical rules of pleadings, and with that intention, the Legislature makes it incumbent on the Court to frame issues on which the right decision of the case depends, and adds to the plaint other materials on which these issues may be framed.”³

On what fixed—The Courts are not bound rigidly to adhere to the allegations set forth in the plaint and written statements,⁴ but may frame the issues from the allegations made by the parties orally or otherwise,⁵ or from the statements of their pleaders,⁶ or from the answers to the questions put by the Court to elicit the material facts,⁷ although the plaint may be very informal,⁸ or by itself disclose no cause of action,⁹ or the real facts may differ from the statements contained in the plaint or written statements, or have not appeared in them,¹⁰ or the pleadings may be defective,¹¹ and make them more general than the answers of the pleader on specific points,¹² provided the state of facts and

¹ R. v. R., (1891) 14 Mad., 88.

² Imperial Banking and Trading Co. v. Pranjivan Das, (1864) 2 Bom. H. C., 272; 2nd Ed., 2nd S.

³ Gityana Sambindha v. Kandasami, (1887) 10 Mad., 375, (p. 502).

⁴ Apaya v. Rama, (1879) 3 Bom., 210.

⁵ Rohan Singh v. Surat Singh, (1881) L. R. 12 L. A., pp. 56-7.

⁶ Mahomed Mahmood v. Sofar Ali, (1885) 11 Cal., 407; Gunga Narain v. Tiluckram, (1889) 15 Cal., 513, L. R., 15 L. A., 119, see also Makintosh v. Temple, 2 Ind. Jur., N. S., 333; Kowsulya Dassee v. Ram Juggurnath, (1867) 8 W. R., 162.

⁷ Modhe v. Dongre, (1881) 5 Bom., at p. 614.

⁸ Pertabnaram v. Triloknath, (1885) 11 Cal., 186, p. 193.

⁹ Man Gobind Sircar v. Umbika Monee, (1871) 16 W. R., 218; Abdoolah v. Shaha Majeedooddeen, (1871) 15 W. R., 246;

¹⁰ Somder Narain v. Namdar, (1874) 21 W. R., 407; Kabeeroodden v. Nyan Bibee, (1867) 8 W. R., 314.

¹¹ Chinnammal Aiyar v. Vajya Ragunad, (1874) 8 Mad. H. C., 114.

¹² Radha Prasad v. Lal Sibab, (1891) 13 All., 53, p. 64; Kymini Debi v. Asutosh, (1887) L. R., 15 L. A., p. 163; and see Gunga Pershad v. Maharani, (1884) L. R., 12 L. A., 47, p. 59.

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¹ *R. v. R.*, (1891) 14 Mad., 88.

² *Imperial Banking and Trading Co. v. Pranjivan Das*, (1861) 2 Bom. H. C., 272 ; 2nd Ed., 2nd s.

³ *Gyana Sambindha v. Kandasami*, (1837) 10 Mad., 375, (p. 502).

⁴ *Apaya v. Rama*, (1879) 3 Bom., 210.

⁵ *Polian Singh v. Surat Singh*, (1831) L. R. 12 I. A., pp. 50-7.

⁶ *Mahomed Mahmood v. Sifar Ali*, (1895) 11 Cal., 407 ; *Gunga Narain v. Tiluckram*, (1893) 15 Cal., 513, L. R., 15 I. A., 119 ; see also *Makintosh v. Temple*, 2 Ind. Jur., N. S., 333 ; *Kowaulya Doss v. Ram Juggurnath*, (1867) 8 W. R., 162.

⁷ *Modhe v. Dongre*, (1831) 5 Bom., at p. 614.

⁸ *Pertabnarain v. Trilokinath*, (1895) 11 Cal., 186, p. 193.

⁹ *Man Gobind Sircar v. Umbika Monee*, (1871) 16 W. R., 218 ; *Abdoollah v. Shaha Mujeesooddeen*, (1871) 15 W. R., 296 ;

¹⁰ *Soondar Narain v. Nandhar*, (1874) 21 W. R., 407 ; *Kabeernooden v. Nyan Bhee*, (1867) 8 W. R., 354.

¹¹ *Cannammal Aiyar v. Vijaya Rajagopal*, (1871) 8 Mad., H. C., 114.

¹² *Radha Prasad v. Lal Siroh*, (1891) 13 All., 57, p. 61 ; *Kamini Dobi v. Asantosh*, (1887) L. R., 15 I. A., p. 163 ; and see *Gunga Pershad v. Maharani*, (1884) L. R., 12 I. A., 47, p. 50.

equities there set up are not inconsistent with the pleadings¹ Thus, where the cause of action stated in the plaint was that a document was a forgery, it was held wrong to raise an issue as to whether it had been executed under pressure.² But the Courts are not to raise an important and serious issue in a case for the parties, when they have not raised it themselves by their own pleadings in the cause.³

Issues agreed on.—And if a Court goes beyond the rights which are properly in issue between the parties, the decree of the Court is absolutely null and void.⁴ If both parties have agreed to abide by certain issues, they are bound by them,⁵ so much so that when a defendant, pleading limitation, rested it on the fact that he had been twelve years in possession, he was held barred in special appeal from saying that it did not dispose of the question of limitation.⁶

Co-defendants.—No issues can be decided between co-defendants, if the suit is dismissed,⁷ and the decision of issues between plaintiff and two defendants claiming under opposite titles is not decisive as between the defendants.⁸

Decision on issues.—In appealable cases, the Courts below should, as far as may be practicable, pronounce their opinions on all the important points.⁹ The omission to decide an issue of ownership in a suit mainly based on a rent note is a ground for reversing the decree of the lower Court.¹⁰ But, if a suit for ejectment by a landlord against his tenant can be dismissed on the ground of insufficiency of notice, any other issues raised in the suit should not be tried.¹¹

Decision on a point not in issue.—Parties are not bound by an opinion of the Court on a matter not in issue in the same manner as if the Judge had decided an issue formally and properly raised before him.¹²

Pleading: effect of not raising an issue: admission.—It was said by the Judicial Committee, in a suit tried before the Code of Civil Procedure,¹³ that they cannot apply the strict rule that averments not

¹ *Bizje v. Monohar Dass*, 2 Ind. Jur., N. S., 113; *Eshenchunder v. Shama-churn*, (1866) 11 Moo. I. A., 7. See also *Fischer v. Kamala*, (1865) 3 W. R., P. C. 33; 8 Moo. I. A., 170.

² *Mahomed Buksh v. Hoseini*, (1887) L. R., 15 I. A., 81; *Iyyappa v. Ramalakshamma*, (1890) 13 Mad., 549. See also *Jagdeep Narain v. Court of Wards*, (1874) 22 W. R., 469.

³ *Wallullah v. Muhammad Israrulloh*, (1888) 10 All., 627—and see *Nistarini Dossee v. Mukhun Loll*, (1872) 17 W. R., 432. But see *Parash Ram v. Miraji*, (1896) 20 Bom., 569.

⁴ *Robinson v. Dulcep Singh*, 11 C. D., 813.

⁵ *Shew Sukoy v. Waleed Ali*, (1870) 13 W. R., 203; *Moondar v. Hunooman*, (1869) 11 W. R., 277; *Beer Chunder v. Tarinee Chunder*, (1869) 11 W. R., 20.

⁶ *Kisto Mohun v. Noyan Tara*, (1868) 10 W. R., 389.

⁷ *Kevan v. Crawford*, 0 C. D., 29; *Bhugwan Chunder v. Dukhina Debis*, (1867) 8 W. R., 356; and see *Degumber Mitter v. Khetkur Mohun Mitter*, (1863) 2 W. R., 45.

⁸ *Kalee Kinkor v. Kisto Mungul*, (1869) 11 W. R., 462; contra—*Madhavi v. Kolu*, (1892) 15 Mad., 264.

⁹ *Tarakant v. Puddomoney*, (1866) 3 W. R., P. C., 63; 10 Moo. I. A., 476.

¹⁰ *Ramkor v. Gunguram*, (1872) 16 Bom., 545.

¹¹ *Barhamdeo Narain v. Mackenzie*, (1884) 10 Calc., 1095.

¹² *Nawal Nazim v. Amrao Begum*, (1874) 21 W. R., 59. See *Robinson v. Dhuleep Singh*, 11 C. D., 813.

¹³ *Anand Moys v. Sheel Chunder Roy*, (1863) 2 W. R., P. C., 19; 9 Moo. I. A., 201, followed in *Deonandan v. Meghu*, (1907) 5 Calc. L. J., 181. *Ahmedee Bezum v. Dulce Persad*, (1872) 18 W. R., 287; and see *Dwarkan Doss v. Jankee Doss*, (1849) 6 Moo. I. A., 89; *Mohima Chunder v. Ram Kishore*, (1873) 15 B. L. R., 153, *contra*—*Madhopermal v. Gajudhar*, (1885) 11 Calc., 111, p. 118; (1883) L. R., 11 I. A., 186.

traversed must be taken to be admitted ; but where, in a suit under the Code issues have been settled, averments upon which no issue is framed should be taken to be admitted, as the Court, before proceeding to frame and record the issues, is directed to enquire and ascertain upon what questions of law or fact the parties are at issue. And, in general it may be laid down, that only such averments should be made the subject of issues as are essential to support the cause of action and are denied by the defendant, or as are essential to support a plea and are denied by the plaintiff.¹ But it has been said more recently that the fact that no issue is raised as to matters which the plaintiff is bound to prove, does not justify the inference that the defendant intends to admit them. The duty of raising issues rests with the Court.² In a suit praying for an injunction restraining the defendant from interfering with the plaintiff's possession of certain land, the plaintiff in the plaint alleged obstruction by the defendant. It was not denied by the defendant in his written statement or put in issue at the hearing. *Held*, that it might be presumed that the defendant did not deny the fact of obstruction.³

Interpretation—In case of a vague issue, the judgment may be used to interpret it.⁴

Estoppel, mortgage, redemption—A pleading in a suit not between the same parties can never be an estoppel ; it may be an admission,⁵ and an admission by one defendant does not bind the others.⁶ A petition asking to revent the debtor a mortgage had pleadings, such mortgage from and in a certain way under statute, they cannot plead that they became possessed of the property otherwise than by the Act,⁷ and if a plaintiff sues persons apparently liable and defendants put in a defence, and afterwards attempt to enter another defence, when the suit against the proper persons is barred, he will not be allowed to do so.¹⁰

of one of them under a decree sale, and subsequently obtaining a sub-lease from the second sharer, he was liable to pay him and not plaintiff, it was held that the

¹ Birch v. Fuzzind Ali, (1871) 3 All. H. C., 303; but see Bhoobun Chunder Shome v. Ram djal, (1870) 14 W. R., 55.

² Ganoo v. Shridev Sideswar, (1902) 26 Bom., 360.

³ Apaji v. Apa, (1902) 20 Bom., 735.

⁴ Kamini Debi v. Asutosh Mukerji, (1884) L. R., 15 L. A., 159, p. 163; 16 Calc., 103.

⁵ Muzza Sri Ananda v. Pidaparti, (1885) L. R., 13 L. A., 32, p. 42.

⁶ Kali Dutt v. Abdul, 16 Calc., 627; (1888) L. R., 16 L. A., 96.

⁷ Mina v. Juggat, (1884) 10 Calc., 196; (1882) L. R., 10 L. A., 119.

⁸ Abdul Rahim v. Malhavay, (1890) 14 Bom., 78; and see Venkatratnam v. Reddiab, (1890) 13 Mad., 494. See also Kalli v. Caramalli, (1890) 14 Bom., 102, p. 111.

⁹ Overseers of Pathney v. London and S. W. Ry., 1 Q. B., (1891), 440.

¹⁰ Steward v. North Metn. Tram Co., 16 Q. B. D., 556.

¹¹ Furbooddeen Mullick v. Molaem, (1870) 11 W. R., 149.

be liable? A suit for rent in which the defendant sets up the title of a third party, raises only two issues, *viz.*: (1) does the relationship of landlord and tenant exist between the plaintiff and defendant? (2) are the alleged arrears of rent due and unpaid?²

Letters Patent.—The legality of an order granting permission to institute a suit under clause 12 of the Letters Patent may form the subject of an issue for trial in the suit so instituted.³

Malicious Prosecution—In a suit for instituting a case against another, the issues are whether the former complainant acted maliciously and without probable cause.⁴ And the onus is on the plaintiff to prove malice and absence of reasonable and probable cause.⁵

Possession—In a suit for possession of a tenure after foreclosure, between the mortgagee and the landlord as auction-purchaser in execution of a decree for rent, the whole question is, which of the two parties claiming is entitled to possession, and the issue to be decided is whether or no the tenure was sold subject to previous incumbrances.⁶

Against representative.—When a suit was brought against the defendant as the representative of a person deceased, and the Courts below found that the amount was due, but the defendant had not taken possession of any property of the deceased person: *held*, the Court should have determined the further question whether the defendants were legal representatives of the deceased and entitled to his estate.⁷

Easement.—As to the proper issues in a suit to establish an easement by prescription, when limitation is pleaded under s. 26, Act XV of 1877, see *Achul Mahta v. Rajun Mahta*.⁸

Omission to settle issues.—The omission to settle issues is not fatal to the trial of the suit, if it appears that the necessary points have been raised and discussed;⁹ and where both parties invoked the decision of the Court upon a question raised by the pleadings and the question was argued, it was held that the judgment upon it was not *ultra vires*, because an issue was not framed embracing the whole question;¹⁰ and so, if the parties have gone to trial well knowing what the real question is between them, and evidence has been taken, the error is not fatal;¹¹ and especially so, when this procedure has been adopted without objection;¹² but if the case is complex, and a settlement of

¹ *Missleback v. Luchmes Narain*, (1872) 17 W. R., 504.

² *Lodai Mollah v. Kally Dass Roy*, (1882) 8 Cal., 238. See also *Dayal Chand v. Nobin Chandra*, (1871) 5 D. L. R., 180.

³ *Nagimoney v. Janshiram*, (1893) 18 Mad., 142.

⁴ *Ram Buddhan Singh v. Sardar Dyal*, (1892) 17 W. R., 101.

⁵ *Raghavendra v. Kashinath Bhat*, (1893) 19 Bom., 717.

⁶ *Chunder Morce v. Mohesh Chunder*, (1869) 12 W. R., 460.

⁷ *Avul Khuli v. Andhu Set*, (1861) 2 Mad. H. C., 423.

⁸ *Achul Mahta v. Rajun Mahta*, (1891) 6 Cal., 812; and in case of a presumed grant, see *Rajrup Koer v. Abul Hossain*, (1891) 6 Cal., 394; *Punja Kuvarti v. Kuvart*, (1882) 6 Bom., 20; *Nasirbhai Amedbhai v. Badrudin*, (1892) 16 Bom., 533.

⁹ *Katchekaloyan v. Kachmyya*, (1867) 12 Moo. I. A., 495; *Muttayan v. Sangli*, (1897) 22 C. L. R., 169, p. 174; *Perladh Singh v. Broughton*, (1875) 24 W. R., 275.

¹⁰ *Soorjomonee Dey v. Sadhanund Mohapatra*, (1873) 20 W. R., 377.

¹¹ *Mitra v. Earl Roli*, (1869) 13 Moo. I. A., 573; 15 W. R., (P. C.), 15.

¹² *Mahomed Huseinollah v. Ahmed Ali*, (1894) 22 W. R., 449; *Sayed Muhammad v. Fattah Muhammad*, (1897) 22 Cal., 321; 15 W. R., 22 I. A., 4; *Secretary of State v. Dip Chand Poddar*, (1897) 24 Cal., 309.

issues is considered necessary, the case may be remanded on appeal for a new trial after settling and recording the points in dispute.¹

Appellate Courts—In appeal, the case must be dealt with not on the mere wording of the plaint, but on the issues settled for trial and the manner in which the case was tried by the first Court.² A point on which no question has been raised in the first Court and which is not in the line of defence taken there, should not be put in issue by the appellate Court.³ And where issues have not been settled, but the judgment states the points for consideration, then, although the written statement does not raise the same points, they will be looked on as the issues.⁴

If the first Court has fixed and tried the wrong issues, the appellate Court should lay down the proper issues, unless the issues decided have been agreed on by the parties,⁵ or the new issues would be a complete departure from the case set up in the lower Court.⁶ When the lower appellate Court framed a wrong issue, but it appeared from its judgment that there was a finding on the point which would have been raised, if the correct issue had been framed, the High Court refused to remand the case for a new finding on that issue.⁷

New Issues—Where a new and different issue is raised, it should be raised in such a way as to give the parties the fullest opportunity of producing evidence upon it, because if it is at all likely that, in consequence of the issues in the first Court, the parties are induced to abstain from giving evidence, it would not be right to decide against them on account of the want of evidence,⁸ and properly speaking, the Judge should, with some degree of formality, frame the issues and record whether the parties had desired to offer any evidence on them, but whether this is done or not, the fact that they may be allowed possibly be debarred from the issues laid down by the set aside a decision of the lower Court on a point which, though essential, has

4. Where the Court is of opinion that the issues cannot be correctly framed without the examination of some person not before the Court or without the inspection of

Court may examine witnesses or documents before framing issues.

¹ *Bewun Pershad v. Jankee Pershad*, (1866) 11 Moo. L. A., 25; *Jogeshnar Rao v. Doolun*, (1870) 2 All. H. C., 183; *Nilatatchi v. Vennakatachali*, (1862) 1 Mad. H. C., 131; but see *Anundo Lall v. Boyeanntram*, (1879) 4 C. L. R., 473.

² *Rop Singh v. Bussni*, (1883) L. R., 11 L. A., p. 155; 7 All. 1; *Moung v. Mah*, (1884) 10 Cal., 777; L. R., 11 L. A., 169, p. 120.

³ *Ram Narain v. Nilmonce*, (1874) 23 W. R., 169; See also *Brojo Soondur v. Futick Chunder*, (1872) 17 W. R., 407.

⁴ *Gung Pershad v. Maharanj*, (1881) L. R., 12 L. A., 47, p. 50.

⁵ *Beer Chunder v. Tarinee Chunder*, (1869) 11 W. R., 20.

⁶ *Punchanun Roy v. Toyluekho*, (1870) 14 W. R., 466. But see *Malhopershad v. Gujadhari*, (1885) 11 Cal., 111, p. 118.

⁷ *Ramchandra v. Ganesh*, (1897) 21 Bom., 325.

⁸ *Latoo Mundul v. Bhoobun*, (1872) 17 W. R., 361; *Ram Persaul v. Kristo Mohun*, (1872) 18 W. R., 297.

⁹ *Eshan Chunder v. Dhonye*, (1879) 11 W. R., 61. See however, *Latoo Mundul v. Bhoobun*, (1872) 17 W. R., 361.

¹⁰ *Mahomed Rasid v. Jadoo Mirdha*, (1873) 20 W. R., 401; and see *Official Trustee v. Krishna Chunder*, (1884) L. R., 12 L. A., 166; 12 Cal., 279.

¹¹ *Parash Ram v. Miraji*, (1896) 20 Bom., 569. But see "*On what fixed*" p. 591 *supra*.

in dispute between the parties before the Court but on the settlement of issues the Judge is to ascertain the question;¹ yet if a plaint and its proof lead to particular issues, the Court is bound to raise them and give relief, provided they do not come by surprise on the defendant,² but a plaintiff will not be allowed to set up one case and, having proved another, ask issues to be raised to suit the proof.³ In some cases, the Courts have gone beyond this and have allowed issues to be raised not within the scope of the pleadings, but this is a matter of discretion under the first portion of this section.⁴ A Court should not record a proceeding declaring its intention to frame additional issues, and leave the actual framing for the time of giving judgment,⁵ on the contrary, it should frame the issues, and fix a convenient day for their trial, regard being had to the facilities which the parties may have for producing their evidence.⁶ Where the parties to a suit accept issues wrongly laid down by the Court, they must be held to be bound by them.⁷

Already settled—When a Judge at the settlement of issues has refused to raise a certain issue, the question ought not to be re-opened at the trial by the then presiding Judge.⁸

Issues allowed—Every matter fairly within the scope of the plaint, if important for the decision of the substantive difference between the parties, should be framed into an issue, and the duty of framing them is thrown on the Court in order to render substantial justice, and to prevent a party suing from being remitted to a new suit, when, by a suitable order as to terms upon which amendment shall be made, the Court by framing additional issues can determine in the existing suit the real question in controversy between the parties.

Account settled—suit on items—Thus, where A sued on an account settled and failed to prove the alleged settlement, it was held that the suit should not have been dismissed, but that the Judge should have framed issues with regard to the items composing the account which were not barred, and given judgment on the merits.⁹

Partners—Plaintiffs sued as partners, and it appeared on the evidence that two of them only were partners when the cause of action arose, and the lower Court struck out the other names, it was held that this was wrong, and that the proper course would have been to amend the issues and raise the question whether the plaintiffs were or were not partners, and if it were found on the amended issue that only two of them were partners, when the cause of action arose, to have decreed in their favour.¹⁰

¹ *Arbuthnot & Co. v. Bett*, (1870) 14 W. R., 181.

² *Obhoy Churn v. Womes Chunder*, 2 Hyde, 263; or are not inconsistent with them—*Nehara Chunder v. Shama Churn*, (1866) 6 W. R., (P. C.), 57; *Sharoda Komparee v. Mohinee Mohan*, (1873) 20 W. R., 272; *Virasvami v. Ayyasvami*, (1862) 1 Mad. H. C., 471; *Nuzur Ally v. Ojoodhyaram*, (1863) 10 Moo. I. A., 552; *Neelbe v. Dongre*, (1881) 5 Bom., 609, p. 614; *Damodar v. Purmananadda*, (1883) 7 Bom., 155, p. 161; *Narayan v. Hari*, (1889) 13 Bom., 661.

³ *Obhoy Churn v. Womes Chunder*, 2 Hyde, 263.

⁴ *Nehara Roy v. Radha Pershad*, (1879) 4 C. L. R., 353; 5 Calc., 64.

⁵ *Kamal Kamini v. Obhoy Churn*, (1871) 15 W. R., 151.

⁶ *Sreeshuree Mundul v. Jadoonath*, (1868) 10 W. R., 160.

⁷ *Shew Sukoy v. Wajid Ali*, (1870) 13 W. R., 205. See also *Sheojuttun v. Anwar Ali*, (1870) 13 W. R., 189.

⁸ *See the case of Nehara Roy v. Radha Pershad*, (1879) 4 C. L. R., 353; 5 Calc., 64; and *Robinson v. Duleep*, (1879) 13 W. R., 189. The court may be set aside on

⁹ *Kishnu Pershad v. Bhovance Deen*, (1866) 1 Agra (F. B.), 47; *Dwarka Doss v. Jankee Doss*, (1849) 6 Moo. I. A., 88; *Obhoy Churn v. Womes Chunder*, 2 Hyde, 263.

¹⁰ *East Indian Railway Co. v. Jordan*, (1870) 14 W. R., (O. J.), 11.

Misdescription of plaintiff.—In a suit for possession of land, where plaintiff described himself as the son of B, and defendant alleged that the land never belonged to B, but had been settled in the name of an idol and was then in possession of S, under whom he (defendant) held it under a lease and mortgage-deed, and the plaintiff, on the day on which the suit was finally disposed of, petitioned that he was the son of S, and was allowed to amend his plaint,—it was held that the Court should not have disposed of the case on that day, but should have framed issues and allowed the defendants every opportunity to produce evidence.¹

Misjoinder of defendants.—And so, if a suit is brought against two persons, the Court can raise an issue whether one of them is solely liable, and, on finding him solely liable, pass a decree against him.²

Possession, foreclosure.—In a suit for possession, defendant pleaded limitation, but his witness unexpectedly disclosed that he was a mortgagee; it was held that it was the duty of the Court, when the mortgage was disclosed, to frame an issue on the subject;³ and where a person sued as a purchaser, but defendant denied the purchase, and the oral evidence proved the transaction was a mortgage, it was decided that the Court was bound to inquire into it by amending the issues.⁴ Where a plaintiff fails to show that a mortgage created by certain persons as executors and executrix of a Hindu will, has been validly created by them in that capacity, the Court will, unless it is manifestly inequitable to do so, allow him to raise an issue that the mortgage was validly created by the parties in another character.⁵

Not allowed.—In a suit for damages, there was a reference in the plaint to a contract to pay rent; *held*, an issue could not be framed so as to recover rent.⁶ Where from the way in which the issues were framed and the pleadings worded, it was clear that no alternative plea was set up in defence, a fresh issue on such alternative plea should not be allowed.⁷

Evidence.—The issues fixed, and not the pleadings, ought to guide the parties as to production of evidence.⁸

Order of disposal.—The Judge may dispose of the issues in any order,⁹ but separately, if possible.¹⁰

6 Where the parties to a suit are agreed as to the question of fact or of law to be decided between them, they may state the same in the form of an issue, and enter into an agreement in writing that, upon the finding of the Court in the affirmative or the negative of such issue,—

Question of fact or law may by agreement be stated in form of issues.

¹ *Doorga Narain v. Brojer Kishore*, (1875) 23 W. R., 172.

² *Bince Mallab v. Bipro Dasa*, (1871) 15 W. R., 69.

³ *Muzboot Singh v. Chunder Masha*, (1871) 16 W. R., 44.

⁴ *Sundol Lal v. Promanno Moyee*, (1873) 19 W. R., 333.

⁵ *Nilkant v. Pearl Mohan*, (1869) 3 B. L. R., D. J., 7; (1869) 11 W. R., O. J., 21.

⁶ *Narain v. Hari*, (1869) 13 Bom., 661.

⁷ *Mulochuree v. Shoudaminnee*, (1867) 7 W. R., 306. See also *Jowadunnissa v. Jhama Lal*, (1875) 23 W. R., 154.

⁸ *Hiro Sunduree v. Amena*, (1866) 5 W. R., Act N., 72.

⁹ *Sitapath Dasa v. Dayadromath Dasa*, (1875) 23 W. R., 51.

¹⁰ *Umbika Soodlatte v. Woodin*, (1867) 3 W. R., 226.

- (a) a sum of money specified in the agreement or to be ascertained by the Court, or in such manner as the Court may direct, shall be paid by one of the parties to the other of them, or that one of them be declared entitled to some right or subject to some liability specified in the agreement ;
- (b) some property specified in the agreement and in dispute in the suit shall be delivered by one of the parties to the other of them, or as that other may direct ; or
- (c) one or more of the parties shall do or abstain from doing some particular act specified in the agreement and relating to the matter in dispute.

Act XIV of 1882, s. 150 This rule applies to H. C. See Order XXXIV in the first schedule to 38 and 39 Vict., cap. 77 (the Supreme Court of Judicature Amendment Act)

Where the issues are selected and agreed upon by the parties, they cannot be amended save by mutual consent.¹

In a suit for possession of land, the plaintiff and defendants agreed that a pleader might be appointed as a Commissioner to ascertain who held the land on either side of the *khul* in dispute and agreed that if the defendants were found in possession of such land, they should get a decree, while if defendant No. 1 was found in possession, the suit should be dismissed ; a Commissioner was appointed and the suit decreed in accordance with his report. *Held*, that the agreement was valid, and the defendants could not be allowed to resile from it.²

Court, if satisfied that agreement was executed in good faith may pronounce judgment.

7. Where the Court is satisfied, after making such inquiry as it deems proper,—

- (a) that the agreement was duly executed by the parties,
- (b) that they have a substantial interest in the decision of such question as aforesaid, and
- (c) that the same is fit to be tried and decided,

it shall proceed to record and try the issue and state its finding or decision thereon in the same manner as if the issue had been framed by the Court ;

and shall upon the finding or decision on such issue, pronounce judgment according to the terms of the agree-

¹ *Hamilton v. Staley*, 23 Sol. Jo., 478 ; see "ISSUES AGREED ON," O. XIV, r. 3, p. 593

² *Bahir Das v. Nobin Chandra*, (1902) 29 Cal., 300 ; 6 Cal. W. N., 121.

ment ; and, upon the judgment so pronounced, a decree shall follow.

Act XIV of 1882, s. 151. This rule applies to H. C.

May pronounce judgment—A special case cannot be amended after hearing, but if a decision on a point of law is given on it under a mistake of act, the Court is not bound by the decision unless it has been adopted by subsequent orders, but may disregard it, direct the action to go to trial, and direct inquiries to ascertain the real facts.¹

The word "may" means "shall" and the Judge is bound to give judgment according to the agreement, although specific performance of it might ordinarily be refused.²

¹ Tomlin v. Underhay, 22 C. D., 495.

² Greubler Co. v. Scott, (1892) 16 Bom., 202, p. 216.

ORDER XV.

Disposal of the Suit at the first hearing.

1. Where at the first hearing of a suit it appears that the parties are not at issue on any question of law or of fact, the Court may at once pronounce judgment.

Parties not at issue
Act XIV of 1882, s. 152

This rule applies to H. C.

Voluntary appearance—If the defendants voluntarily appear in Court and confess judgment, no summons necessary for their appearance, and the Court should at once give judgment for the plaintiffs.¹

Wrong person—When the plaintiff sues the right person, but serves the summons on another person of a similar name, who appears and denies liability, the suit should be dismissed with costs.²

2. Where there are more defendants than one, and any one of the defendants is not at issue with the plaintiff on any question of law or of fact, the Court may at once pronounce judgment for or against such defendant and the suit shall proceed only against the other defendants.

One of several defendants not at issue.
Act XIV of 1882, s. 153.

This rule applies to H. C.

In an action commenced against several joint debtors, judgment recovered against one of them who admits the claim does not bar the further prosecution of the suit against the others.³

3. (1) Where the parties are at issue on some question of law or of fact, and issues have been framed by the Court as hereinbefore provided, if the Court is satisfied that no further argument or evidence than the parties can at once adduce is required upon such of the issues as may be sufficient for the decision of the suit, and that no injustice will result from proceeding with the suit forthwith, the Court may proceed to determine such issues, and, if the finding thereon is sufficient for the decision, may pronounce judgment accordingly, whether the summons has been issued for the settlement of issues only or for the final disposal of the suit:

¹ Bank of Bengal v. Currie, (1869) 3 B. L. R., 403; 12 W. R., 432.

² London, Bombay and Mediterranean Bank v. Mahomed Ibrahim, 4 Bom., 619.

³ Dick v. Dhunji Jatha, (1901) 25 Bom., 378.

Provided that, where the summons has been issued for the settlement of issues only, the parties or their pleaders are present and none of them objects.

(2) Where the finding is not sufficient for the decision, the Court shall postpone the further hearing of the suit, and shall fix a day for the production of such further evidence, or for such further argument as the case requires.

Act XIV of 1882 s. 154.

This rule applies to H. C. and the first para. to Prov. S. C. C.

Parties are at issue.—The Courts are bound to proceed on the facts alleged in the plaint, and cannot refuse to try issues of fact upon the merits on the ground of the legal effect of the facts alleged, except on the assumption that they can be and are proved. This assumption is, however, limited to the consideration of the legal effect of the facts pleaded in bar.¹ A Judge cannot dispose of a suit at first hearing if a party appears and objects to the adoption of that procedure.²

Settlement of issues.—When a summons has been issued for the settlement of issues only, a Judge should not proceed and try the cause, unless under the circumstances laid down in this section, for otherwise he might preclude a party from adducing evidence in support of his case³ but if the evidence adduced is decisive of the matter in dispute, then the Judge may dispose of the cause unless either of the parties distinctly objects and asks for time to produce evidence in support of his case.⁴

4. Where the summons has been issued for the final disposal of the suit and either party fails to produce evidence without sufficient cause to produce the evidence on which he relies, the Court may at once pronounce judgment, or may, if it thinks fit, after framing and reordering issues, adjourn the suit for the production of such evidence as may be necessary for its decision upon such issues.

Act XIV of 1882 s. 155.

This section applies to H. C. and (except as to pronouncement of judgment) to Prov. S. C. C.

Plaintiff sued on a bond to recover a sum of money. He filed no written statement, and the case was fixed for final disposal on the 23rd of April, when defendant, admitted execution of the bond, but said that it had been delivered as a security to the plaintiff to borrow money and apply it to a special purpose, which he had not done. On this, plaintiff's pleader stated that he was taken by surprise, that he had no instructions how to meet the defence, and asked for a postponement, which was refused: held, the postponement should have been granted.⁵

¹ *Nazur Ali v. Opanthayaram Khan*, (1863) 10 Moo. I. A., 510.

² *Krishnabhupati v. Rama Murti*, (1893) 16 Mad., 109.

³ *Jeevan v. Goolab Khan*, (1869) 1 All. H. C., 147.

⁴ *Sorenulro Pershad v. Jugabindho*, (1871) 22 W. R., 426.

⁵ *Ameer Ali v. Run Bahadur*, (1867) 7 W. R., 81.

ORDER XVI.

Summoning and Attendance of Witnesses.

1. At any time after the suit is instituted, the parties may obtain, on application to the Court or to such officer as it appoints in this behalf, summonses to persons whose attendance is required either to give evidence or to produce documents.

Summons to attend to give evidence or produce documents¹

See Act XIV of 1852, s. 159. The words "or sent" were added by Act VII of 1888, s. 15

This rule applies to H. C. and Prov. S. C. C.

Summons to attend.—Adjournment and summoning witnesses are distinct matters. Application to summon may be made at any stage of the case before hearing.¹ The Court is bound to issue summonses when asked for as a matter of course,² without reference to the number of applications previously made for that purpose,³ unless, perhaps they are summoned in such numbers or in such a manner as indicates a vexatious desire of obstructing the course of justice,⁴ or the application has been made at a time when it is *absolutely impossible* that the witness can be brought in time to be examined before the party calling them closes his case,⁵ but though summonses have been granted, if the witnesses do not appear at the trial, the Court will proceed, unless an application is made to adjourn;⁶ and even then the Court is not bound to grant an adjournment unless on good cause shown.⁷ See note under O XVII r. 3 post. Where a person making an application to a Civil Court for witnesses to be summoned has negligently or with intention to delay the hearing postponed the making of his application for a summons until a time when it would be impossible to obtain the attendance of the witnesses at the hearing, the Court might properly refuse to adjourn the hearing, but nevertheless it would be the duty of the Court to order the summons asked for to issue, as the Court is not given a discretion

Where an application to de one of the grounds of the refusal did not affect the merits of the case. If it did affect them, the ground of appeal would be a good one.⁸

¹ Bai Kali v. Alarakh, (1891) 15 Bom., 86; Pandurang v. Kesbavji, (1882) 6 Bom., 742; Krishna Churn v. Protap Chunder, (1891) 7 Cal., 560.

² Gora Chand v. Raj Koomar, (1866) 5 W. R., 111; Brojo Nath v. Protap Chunder, (1874) 22 W. R., 296; Ahmad v. Mahamad, (1895) 9 Bom., 308; Huree Dass v. Moazzum Hossein, (1871) 8 B. L. R., App. 16; 15 W. R., 447.

³ Anurup Chandra v. Hiramani Das, (1869) 3 B. L. R., App. 38; 11 W. R., 418.

⁴ Ram Phul v. Wahed Ali, (1870) 11 W. R., 66.

⁵ Rajendro Narain v. Kumud Narain, (1878) 3 C. L. R., 569; Indro Chunder v. Daulop, (1868) 9 W. R., 530; Abdool Ali v. Mullick Sudderooddeen, (1870) 14 W. R., 493.

⁶ Nund Mohun v. Goluck Nath, (1869) 11 W. R., 99.

⁷ Abdool Kadir v. Abu Mirdha, (1875) 24 W. R., 200; Bai Kali v. Alarakh, (1891) 15 Bom., 86.

⁸ Bhagwat Das v. Debi Din, (1894) 16 All., 218.

to s. 257 of the Criminal Procedure
to summon a witness, when the
made for the purpose of vexation or

The local Government may, under s. 133, exempt persons of rank from attendance.

Practice.—Parties who have the benefit of legal advice ought to be left to manage their own cases without interference from the Court. Where the evidence of a witness or the production of a document is material to plaintiff's case, it is his business to move the Court to take the necessary steps in the matter;¹ and though in cases where the process of the Court is abused, any person affected can bring the matter before the Court, a mere witness summoned to give evidence has no right to apply to the Court to discharge the order.²

on, the
exam-
aintiffs

Persons incompetent to be witnesses.—A Munsiff ought not to be called on to depose as to what took place before him in the course of a trial which he was conducting as a Munsiff.³ In a suit after an arbitration award is set aside, the arbitrator cannot be examined as a witness as to the grounds of his decision, but only to prove any admission made before him.⁴

Revision.—Where the Court of first instance refused to issue summonses and decided the case on the other evidence and this decision was upheld on appeal, the High Court in Bombay set the order aside on revision.⁵

2 (1) The party applying for a summons shall, before the summons is granted and within a period to be fixed, pay into Court such a sum of money as appears to the Court to be sufficient to defray the travelling and other expenses of the person summoned in passing to and from the Court in which he is required to attend, and for one day's attendance.

Experts
(2) In determining the amount payable under this rule, the Court may, in the case of any person summoned to give evidence as an expert, allow reasonable remuneration for the time occupied both in giving evidence and in performing any work of an expert character necessary for the case.

Scale of expenses
(3) Where the Court is subordinate to a High Court regard shall be had, in fixing the scale of such expenses, to any rules made in that behalf.

¹ Nolin Chunder v. Anungo Munjaree, (1875) 23 W. R., 83.

Act XIV of 1882, s. 160

This rule applies to Prov S C C, but not to the Chartered High Courts in the exercise of their ordinary or extra-ordinary original civil jurisdiction—see O XLIX, r. 3

A party need not pay any sum into Court until the Court has fixed what is reasonable,¹ and the sum fixed must have reference to the travelling expenses or other charges of a similar nature; and where a witness who had incurred no expense in travelling asked for compensation for loss of time, the application was refused.² It should be sufficient to cover the witnesses' expenses to and from the Court and for one day's attendance.³ No separate action will lie for such expenses.⁴

People of rank and wealth are entitled to travelling and other expenses suitable to their circumstances.⁵

3 The sum so paid into Court shall be tendered to

Tender of expenses to witness the person summoned, at the time of serving the summons, if it can be served personally.

Act XIV of 1882, 161

This rule applies to H. C. and Prov S C. C.

After the list of witnesses has been filed, and the cost of service, &c, deposited, the Court's officers and not the party, are responsible for the service and return of process;⁶ but where the applicant is guilty of laches himself, he could not be allowed to set up the delay in the office as a ground for the non-production of his witnesses.⁷

4. (1) Where it appears to the Court or to such officer

Procedure where in sufficient sum paid in as it appoints in this behalf that the sum paid into Court is not sufficient to cover such expenses or reasonable remuneration, the Court may direct such further sum to be paid to the person summoned as appears to be necessary on that account, and, in case of default in payment, may order such sum to be levied by attachment and sale of the moveable property of the party obtaining the summons; or the Court may discharge the person summoned without requiring him to give evidence; or may both order such levy and discharge such person as aforesaid.

(2) Where it is necessary to detain the person sum-

Expenses of witnesses detained more than one day. moned for a longer period than one day, the Court may, from time to time, order the party at whose instance he was sum-

¹ Mohun Mundur v. Brij Bhokun, (1863) 9 W. R., 123.

² Nawab Nazim v. Prosononarain, 2 H.J., 236.

³ Dubois de Saran v. Hurriah Chunder, (1866) 3 W. R., Ref., 6

⁴ Id.

⁵ Chunder Sekhur v. Jadab Chunder, (1873) 19 W. R., 78.

⁶ Musstee Khanum v. Hoooom Bibee, (1871) 15 W. R., 88.

⁷ Bonomali v. Woomesh Chunder, (1831) 7 Cal., 730.

moned to pay into Court such sum as is sufficient to defray the expenses of his detention for such further period, and, in default of such deposit being made, may order such sum to be levied by attachment and sale of the moveable property of such party; or the Court may discharge the person summoned without requiring him to give evidence; or may both order such levy and discharge such person as aforesaid.

Act XIV of 1882, s. 162.

This rule applies to H. C. and Prov. S. C. C.

If it does not appear from the record that expenses have been deposited, and a witness does not attend, because his travelling charges have not been tendered to him, the party to blame will suffer.¹

A witness is entitled to be paid his expenses by the party at whose instance he has been called, although he has not applied for them before giving his evidence,² or gives evidence for the other side.³

5. Every summons for the attendance of a person to give evidence or to produce a document shall specify the time and place at which he is required to attend, and also whether his attendance is required for the purpose of giving evidence or to produce a document, or for both purposes; and any particular document, which the person summoned is called on to produce, shall be described in the summons with reasonable accuracy.

Time, place and purpose of attendance to be specified in summons.

Act XIV of 1882, s. 163.

This rule applies to H. C. and Prov. S. C. C.

A written summons distinctly describing the nature of the document required must be issued on a party required to produce it; a verbal order to his pleader is not such a summons as is contemplated by law, and is not sufficient.⁴

When a witness has been summoned to give evidence in a case which is not reached, it is not necessary to issue a fresh summons. He need only be warned when his attendance will be required.⁵

In fixing the time for the attendance of a public officer as a witness or in

printed, Civil Rules, p. 4.

¹ Ishen Chunder & Ors v. Nath, (1872) 18 W. R., 15.

² London, Bombay and Mediterranean Bank v. Mohamed Ibrahim, (1880) 4 Bom., 619.

³ Bullock, *in re*, (1901) 28 Bom., 647.

⁴ Durgamonee Dasse v. Benolemonsee Dasse, W. R., 1861, p. 164.

⁵ Baldevayadu v. Cherchuramaya, (1901) 21 Mad., 290.

⁶ Anonymous, 6 Mad. H. C. App., 6.

Act H. C., C. O. No. 1 of 17th January, 1897, printed Civil Rules, p. 12.

Forms of summonses — See schedule I, Appendix B No. 13.

6. Any person may be summoned to produce a document, without being summoned to give evidence; and any person summoned merely to produce a document shall be deemed to have complied with the summons if he causes such document to be produced instead of attending personally to produce the same.

Act XIV of 1882, s. 164

This rule applies to H. C. and Prov. S. C. C.

A broker who has effected a policy and has a lien on it for his premium, may be compelled by the assured to produce it at the trial of an action against the underwriters.¹

Power to require persons present in Court to give evidence or produce document

7. Any person present in Court may be required by the Court to give evidence or to produce any document then and there in his possession or power.

8. Every summons under this Order shall be served as nearly as may be in the same manner as a summons to a defendant, and the rules in Order V as to proof of service shall apply in the case of all summonses served under this rule.

Act XIV of 1882, ss. 165, 166.

These rules apply to H. C. and Prov. S. C. C.

See *Premchand Roy v. Becharam Mookerjee*,² and notes to Order V, ante.

9. Service shall in all cases be made a sufficient time before the time specified in the summons for the attendance of the person summoned, to allow him a reasonable time for preparation and for travelling to the place at which his attendance is required.

10 (1) Where a person to whom a summons has been issued either to attend to give evidence or to produce a document fails to attend or to produce the document in compliance with such summons, the Court shall, if the certificate of the serving-officer has not been verified by affidavit, and may if it has been so verified, examine the serving-officer on oath, or cause him to be so examined by another Court, touching the service or non-service of the summons.

¹ *Hunter v. Leathley*, 10 B. & C., 853.

² *Premchand Roy v. Becharam Mookerjee*, (1886) 6 W. R., 126.

moned to pay into Court such sum as is sufficient to defray the expenses of his detention for such further period, and, in default of such deposit being made, may order such sum to be levied by attachment and sale of the moveable property of such party; or the Court may discharge the person summoned without requiring him to give evidence; or may both order such levy and discharge such person as aforesaid.

Act XIV of 1882, s 162.

This rule applies to H. C. and Prov. S. C. C

If it does not appear from the record that expenses have been deposited, and a witness does not attend, because his travelling charges have not been tendered to him, the party to blame will suffer.¹

A witness is entitled to be paid his expenses by the party at whose instance he has been called, although he has not applied for them before giving his evidence,² or gives evidence for the other side.³

5. Every summons for the attendance of a person to give evidence or to produce a document shall specify the time and place at which he is required to attend, and also whether his attendance is required for the purpose of giving evidence or to produce a document, or for both purposes; and any particular document, which the person summoned is called on to produce, shall be described in the summons with reasonable accuracy.

Act XIV of 1882, s 163

This rule applies to H. C. and Prov. S. C. C.

A written summons distinctly describing the nature of the document required must be issued on a party required to produce it; a verbal order to his pleader is not such a summons as is contemplated by law, and is not sufficient.⁴

When a witness has been summoned to give evidence in a case which is not reached, it is not necessary to issue a fresh summons. He need only be warned when his attendance will be required.⁵

printed, Civil Rules, p 4

¹ Ishen Chunder v. Onath Nath, (1872) 18 W. R. 15.

² London, Bombay and Mediterranean Bank v. Mahomed Ibrahim, (1880) 4 Bom. 610.

³ Bullock, *in re*, (1901) 24 Bom. 647.

⁴ Durgamooee Doss v. Benolemonoo Doss, W. R., 1861, p 161.

⁵ Guldarajadu v. Cherukuramaya, (1901) 24 Mad. 200.

⁶ *Anonymous*, 6 Mad., H. C. App., 6.

⁷ *Abn* H. C., C. O. No. 1 of 17th January, 1897, printed Civil Rules, p. 12.

Forms of summonses — See schedule I, Appendix B No. 13

6 Any person may be summoned to produce a document, without being summoned to give evidence; and any person summoned merely to produce a document shall be deemed to have complied with the summons if he causes such document to be produced instead of attending personally to produce the same.

Summons to produce document.

Act XIV of 1882, s. 164

This rule applies to H. C. and Prov. S. C. C.

A broker who has effected a policy and has a lien on it for his premium, may be compelled by the assured to produce it at the trial of an action against the underwriters.¹

Power to require persons present in Court to give evidence or produce document

7. Any person present in Court may be required by the Court to give evidence or to produce any document then and there in his possession or power.

8 Every summons under this Order shall be served as nearly as may be in the same manner as a summons to a defendant, and the rules in Order V as to proof of service shall apply in the case of all summonses served under this rule.

Summons how served.

Act XIV of 1882, ss. 165, 166

These rules apply to H. C. and Prov. S. C. C.

See *Premchand Roy v. Becharam Mookerjee*,² and notes to Order V, ante

9. Service shall in all cases be made a sufficient time before the time specified in the summons for the attendance of the person summoned, to allow him a reasonable time for preparation and for travelling to the place at which his attendance is required.

Time for serving summons.

10 (1) Where a person to whom a summons has been issued either to attend to give evidence or to produce a document fails to attend or to produce the document in compliance with such summons, the Court shall, if the certificate of the serving-officer has not been verified by affidavit, and may if it has been so verified, examine the serving-officer on oath, or cause him to be so examined by another Court, touching the service or non-service of the summons.

Procedure where witness fails to comply with summons

¹ *Hunter v. Leathley*, 10 B. & C., 838.

² *Premchand Roy v. Becharam Mookerjee*, (1896) 6 W. R., 120.

release property and dispose of a case without allowing the party to shew cause, his decision was set aside.¹

12. The Court may, where such person does not appear, or appears but fails so to satisfy the Court, impose upon him such fine not exceeding five hundred rupees as it thinks fit, having regard to his condition in life and all the circumstances of the case, and may order his property, or any part thereof, to be attached and sold or, if already attached under rule 10, to be sold for the purpose of satisfying all costs of such attachment, together with the amount of the said fine, if any ;

Provided that, if the person whose attendance is required pays into Court the costs and fine aforesaid, the Court shall order the property to be released from attachment.

Act XIV of 1882, s. 170.

This rule applies to H. C. and Prov S. C. C.

Fine when imposed—Before a Judge should proceed to fine a person under this rule and order the sale of his property, he should be careful to see that all the formalities of attachment, might be sufficient.

Criminal Procedure—be set aside if the Judge issued processes of proclamation and attachment without recording on what grounds he was satisfied that the evidence was material, and that the party had absconded or concealed himself in order to evade service,² or if there was any doubt whether the proclamation was properly issued and there was no evidence to shew that the party did not appear within the time fixed by the proclamation.³ A nazir's report is not legal evidence on which to base a conviction.⁴

A witness is not bound to attend if the trial is fixed for a Sunday.⁵

A suit will not lie to set aside a sale under this rule;⁶ but the claimant is not barred by the sale, and may bring an action against the purchaser to establish his right to the property.⁷

Appeal—An order for attachment under rule 10 is appealable and an order under the corresponding section of Act XIV of 1882 was also appealable. This rule is omitted in O. XLIII post.

2. The provisions with regard to the attachment and sale of property in the execution of a decree shall, so far as they are applicable, to apply to any attachment and sale under this

¹ Jhandoo Singh & Co. *petitioners*, (1868) 5 W. R., Cr., 8.

² Bishonath Sircar, *petitioners*, (1865) 3 W. R., Cr., 63.

³ Showdayal Singh v. Griban, (1866) 6 W. R., Cr., 73.

⁴ Nilkant Bhattacharjee, *petitioners*, W. R., 1864, Mis., 9.

⁵ Queen v. Hargobind Datta Sircar, (1871) 8 H. L. R., App., 12.

⁶ Bakhoojee Singh v. Government, (1867) 8 W. R., 207.

⁷ Queen v. Chumroo Roy, (1867) 7 W. R., Cr., 35.

Order as if the person whose property is so attached were a judgment-debtor.

This is a new provision and nearly ratifies the existing practice.

14 Subject to the provisions of this Code as to attendance and appearance and to any law for the time being in force, where the Court at any time thinks it necessary to examine any person other than a party to the suit and not called as a witness by a party to the suit, the Court may, of its own motion, cause such person to be summoned as a witness to give evidence, or to produce any document in his possession, on a day to be appointed, and may examine him as a witness or require him to produce such document.

Court may of its own accord summon as witnesses strangers to suit

Act XIV of 1882, sect. 171.

This rule applies to H. C. and Prov. S. C. C.

A witness called by the Court is liable to be cross-examined by any of the parties to the suit.¹

15 Subject as last aforesaid, whoever is summoned to appear and give evidence in a suit shall attend at the time and place named in the summons for that purpose, and whoever is summoned to produce a document shall either attend to produce it, or cause it to be produced, at such time and place.

Duty of persons summoned to give evidence or produce document

16 (1) A person so summoned and attending shall, unless the Court otherwise directs, attend at each hearing until the suit has been disposed of.

When they may depart.

(2) On the application of either party and the payment through the Court of all necessary expenses (if any), the Court may require any person so summoned and attending to furnish security to attend at the next or any other hearing or until the suit is disposed of and, in default of his furnishing such security, may order him to be detained in the civil prison.

Act XIV of 1882, ss. 172, 173.

These rules apply to H. C. and Prov. S. C. C.

This rule gets rid of a difficulty felt in a case,² in which it was held that when a case was adjourned for further hearing before the witnesses had been examined, the Court could not bind them down to attend again.

¹ *Tarini Charan v. Saroda Sundari*, (1869) 3 B. L. R., A. C., 145; 11 W. R., 468; see also *Gooroodoss v. Greedhar*, (1869) 11 W. R., 110; *Shurfaraz v. Dhunoo*, (1871) 16 W. R., 237.

² *Venkatappa v. Papammah*, (1869) 5 Mad. H. C., 132.

Prosecution under the Indian Penal Code—Where a summons did not mention the place at which, or the time of the day when the attendance of the person summoned was required, such person could not be lawfully punished under s. 174 of the Penal Code for non-attendance in obedience to such summons,¹ nor when the presiding officer of the Court is himself absent.² Before a conviction can be had, it must be shown that the person summoned had notice of the summons,³ and that he had wilfully disobeyed,⁴ or intentionally omitted to attend,⁵ or that he wilfully departed from the place where he had attended before the time at which it was lawful for him to depart.⁶

No witness to be ordered to attend in person unless resident within certain limits.

19 No one shall be ordered to attend in person to give evidence unless he resides—

- (a) within the local limits of the Court's ordinary original jurisdiction, or
- (b) without such limits but at a place less than fifty or (where there is railway or steamer communication or other established public conveyance for five-sixths of the distance between the place where he resides and the place where the Court is situate) less than two hundred miles distance from the Court-house.

Act XIV of 1882 s 176. This rule applies to H. C and Prov. S. C. C.

20 Where any party to a suit present in Court refuses, without lawful excuse, when required by the Court, to give evidence or to produce any document then and there in his possession or power, the Court may pronounce judgment against him or make such order in relation to the suit as it thinks fit.

Consequence of refusal of party to give evidence when called on by Court

Act XIV 1882, s. 177.

This rule applies to H. C. and Prov. S. C. C. See note under r. 21, *infra*

The party must be present in Court; he must refuse without lawful excuse; and the document must then and there be in his actual possession or power. Even then the Court may exercise its discretion, and is not bound to give a substantial reason, ordinary circumstances have been given, accounts relevant

¹ *Empress v Ram Saran*, (1883) 5 All., 7.

² *Queen Empress v. Krishappa*, (1897) 20 Mad., 31.

³ *Shib Pershad in the matter of*, (1872) 17 W. R. Cr., 33.

⁴ *Queen v Ungun Lall*, 1 N. W., 121. 1873, 303.

⁵ *Sreenath Ghose, in the matter of*, (1863) 10 W. R., Cr., 33.

⁶ *Queen v. Sutherland*, (1870) 14 W. R., Cr. 20.

⁷ *Dhuput Singh v. Prem Bibee*, (1875) 24 W. R., 72.

and material (partnership accounts),¹ or to answer a material question, and does not endeavour to purge his contempt,² the suit may be dismissed.

When a defendant had been summoned as a witness and failed to attend,³ or to produce a document and failed to do so,⁴ the Court was justified in giving a decree in favour of the plaintiff.

The decision of the Court in passing judgment against a party for non-

be proved was solely and exclusively within the knowledge of such other party.⁵

Lawful excuse.—Lawful excuse will more or less depend on the circumstances of each case, and the decision in one case can scarcely be a guide to the decision in another, unless the facts of the case are given, so that the Court may see precisely on what materials the decision was come to.⁶ This rule generally refers to such an excuse as, under the Evidence Act, would justify a refusal to give evidence or produce the document required.⁷ See note under O. X, r. 4, *ante*.

Probate—This section applies to probate cases, but it will not justify the Judge in dispensing with proof of the execution of a will.⁸

Appeal—An order under this rule is appealable under O. XLIII, r. 1, (b).

21. Where any party to a suit is required to give evidence or to produce a document, the provisions as to witnesses shall apply to him so far as they are applicable.

Rules as to witnesses
to apply to parties sum-
moned.

This rule applies to H. C. and Prov. S. C. C.

Save in the cases referred to in r. 20 and O. X, r. 4 a case cannot be decided against a party for merely disobeying an order to attend.

¹ Katakam v. Bhupalam, (1868) 4 Mad. H. C., 142.

² Jochty Ramji v. Awaker, (1866) 3 Mad. H. C., 220.

³ Brahmamoyee Dasso v. Kristu Mohun, (1877) 2 Cal., 222.

⁴ Tarachand v. Bostub Churn, (1871) 16 W. R., 120.

⁵ Kacheenath v. Dwarkanath, (1871) 2 B. L. R., 215; 17 W. R., 720.

⁶ Doorga Dutt v. Jhenguor Jha, (1872) 18 W. R., 63.

⁷ Lekh Raj v. Palsee Pahi, (1869) 1 All. H. C., 223, 241.

⁸ Rayji Ranchod v. Vishnu, (1885) 11 Bom., 241.

ORDER XVII.

Adjournments

1. (1) The Court may, if sufficient cause is shown, at any stage of the suit grant time to the parties or to any of them, and may from time to time adjourn the hearing of the suit.

Court may grant time and adjourn hearing.

(2) In every such case the Court shall fix a day for the further hearing of the suit, and may make such order as it thinks fit with respect to the costs occasioned by the adjournment:

Costs of adjournment

Provided that, when the bearing of evidence has once begun, the hearing of the suit shall be continued from day to day until all the witnesses in attendance have been examined, unless the Court finds the adjournment of the hearing beyond the following day to be necessary for reasons to be recorded.

Act XIV of 1882, s. 156

This rule applies to H. C. and Prov. S. C. C.

A Civil Court is not competent to bind witnesses by recognizances to attend on a future day. See however, Order XVI, r. 16

Under Act VIII, 1859, a verbal order of the Court to witnesses requiring them to attend on a future day would not justify the issue of a warrant for the apprehension of such witnesses, if they failed to attend in obedience to such verbal order,¹ but as to the present law, see Order XIV, rr. 16 and 17.

In *Surjyanous v. Kali Kanta*,² the question of the proper exercise of the discretion of lower Courts to grant time to parties to produce further evidence has been discussed

Surjyanous v. Kali Kanta, (1869) 5 Mad. H. C., 132.

Dadabhai v. Sorabji, (1865) 3 Bom. H. C., 53.

Ameer Ali v. Run Eshadoor, (1867) 7 W. R., 84.

¹ Venkatsappa v. Papamma, (1869) 5 Mad. H. C., 132.

² (1901) 28 Cal., 37.

³ Dadabhai v. Sorabji, (1865) 3 Bom. H. C., 53.

⁴ Ameer Ali v. Run Eshadoor, (1867) 7 W. R., 84.

the 5th, but the case was not taken up on the day fixed for hearing, as the Judge left the station on the 8th, for an uncertain period (putting the Court in charge of the Subordinate Judge), and on his return he decided the suit on a day not fixed for its hearing, although the objector applied for time to file his documents, it was considered that the objector had shewn sufficient cause for an adjournment.¹

Not sufficient cause—Defendant was aware some time previous to the trial that his case was coming on. He got ill some ten or twelve days before hearing, but instead of asking for a commission, put in a medical certificate at the trial that he was confined to his bed by lumbago. It was held insufficient to support an application for an adjournment, and the suit was decreed against him.²

Costs—A plaintiff failed in an *ex parte* suit to bring forward sufficient evidence to entitle him to a decree, and asked for an adjournment in order to obtain further evidence; the Court granted an adjournment on the terms that the plaintiff should bear the whole costs of the hearing.³

Order.—Once an order for an adjournment has been made, it should not be rescinded on review, unless on good and sufficient cause shewn and in the presence of the other party.⁴

Appeal—Orders under this rule are not open to appeal—see Order XLIII; but their propriety can be questioned in an appeal from the final decree (s. too).⁵ Judges in appeal are not inclined to interfere with inferior Courts in the exercise of the discretion allowed them to grant or refuse an adjournment.⁶

Does lie—An order made on the settlement of issues fixing a day for final hearing is not an order under this rule and is appealable if made by a single Judge on the original side.⁷ An order refusing to examine witnesses tendered is appealable.⁸

2 Where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Order IX or make such other order as it thinks fit.

Procedure if parties fail to appear on day fixed

Act XIV of 1887, s. 157.

This rule applies to H. C. and Prov. S. C. C.

See note to O. IX, r. 13.—O. IX, r. 13 applies to every case in which a decree is passed *ex parte* against a defendant either under O. IX, r. 6 for non-appearance at the first hearing or under this rule for non-appearance at an adjourned hearing.⁹

¹ Bectaram v. Bheo Gollam, (1872) 18 W. R., 325.

² Elias v. Jorawar Mull, (1875) 21 W. R., 292.

³ Shanks v. Savage, (1881) 7 Cal., 177.

⁴ Bishen Perkash v. Rattan Geer, (1873) 20 W. R., 3.

⁵ Bishen Perkash v. Rattan Geer, (1873) 20 W. R., 3.

⁶ Elias v. Jorawar Mull, (1875) 21 W. R., 292.

⁷ R. v. R., (1891) 14 Mad., 88.

⁸ Mont Lal Bhandarkhaya v. Khirats Dasi, (1897) 20 Cal., 740. See also Taylor v. Sarat Chunder, (1897) 20 Cal., 745, note.

⁹ Jonardya Boley v. Ramdhane Singh, (1896) 23 Cal., 734. In this case, the ruling to the contrary in *Sital Hari v. Heera Lal*, (1894) 21 Cal., 269, was set aside. See also *Byatt v. Sherman*, (1876) 1 Mad., 287; *Ramaya v. Rangayya*, (1881) 7 Mad., 41; *Alwar v. Sohammal*, (1887) 10 Mad., 270; *Tira Lal v. Hirailal*, (1887) 7 All., 578; *Bhagwan Das v. Hira*, (1897) 10 All., 255; *Middreth v. Sayaji Paraji*, (1896) 20 Bom., 250.

Does not apply—This rule does not apply, unless a day has been fixed for hearing under r. 1¹ O. XVII, rr. 1-2 do not apply to an adjournment which is not made at the instance of the parties, but which is necessitated by the rules of Court which regulates the disposition of its own business.²

Distinct from rule 3—The distinction between this and the following rule is that where there is a default in the appearance of the parties and their pleaders on the date fixed for the adjourned trial of a suit, a decree may be passed under this section, and subsequently the case may be revived under O. IX, r. 9 but where time has been given to one of the parties to do an act and he fails, the order passed is under O. XVII r. 3, and the matter cannot be revived, but is only subject to review of judgment or to appeal.³ An order dismissing a suit at an adjourned hearing for non-appearance of the plaintiff and his pleader is an order under O. XVII, r. 2 and its consequential O. IX, r. 8 and not O. XVII r. 3, and is appealable.⁴

3. Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the Court may, notwithstanding such default, proceed to decide the suit forthwith.

Court may proceed notwithstanding either party fails to produce evidence, etc

Act XIV of 1882, s. 158.

This rule applies to H. C. and Prov. S. C. C.

Cause attendance—"It is the business of the Court, on receiving an application for a summons to a witness, or for a commission to examine a witness, to consider whether it is likely that the summons can be served or the commission executed so as to bring the witness or his examination before the Court on the day fixed for the hearing. A party has a legal right to ask the assistance of the Court in these matters, and the Court should grant it as a matter of course. It is for the party and not for the Court to consider whether he can derive any advantage from his application. If he has delayed so long that he fails to get the process executed in sufficient time, he, of course, must take the consequence of his delay, and the Court will not adjourn the case to remedy his neglect. Unless it appears clearly that it

the witness or the return to the commission might be in Court on the day to which it may be adjourned. If the party to a suit thinks it worth his while to incur the expense of taking a process on the chance of deriving benefit from it, I would not prevent his doing so. I would only take care that he did not use the late issue of the process as an excuse for delaying the final hearing of the case."⁵ See the note under O. XVI, r. 1.

¹ *Sestaram v. She Gollam*, (1872) 18 W. R., 325.

² *Toolsyn* hat cons.
titulos r Prasad,
(1899) 217; 4
Calc.

³ *Ryall v. Sherman*, (1876) 1 Mad., 287; *Venkataramaya v. Anumukonda*, (1884) 7 Mad., 41; *Ambalavana v. Subramania*, (1870) 6 Mad. H. C., 262; *Alhar v. Seshammal*, (1887) 10 Mad., 270.

⁴ *Shrimant Sagajirao v. Smith*, (1896) 20 Bom., 736. See note on O. IX, r. 6.

⁵ *Hureo Dass v. Meer Moazzum*, (1871) 15 W. R., 447.

Object of the section.—See notes under r. 2 *ante*.

This rule appears to contemplate a case where any one party and not both,¹ has expressly obtained time to produce his evidence, or to procure the attendance of his witnesses, and has failed to do so. It does not refer to adjournments by the Court at its own motion;² and where a case was dismissed for default in paying in the Commissioner's fee and no time was granted, the order was considered to have been passed under Order (X, r. 8, and not under this rule;³ so when after taking evidence but without entering on the merits, the Court dismissed the suit on the ground that the stamp was insufficient and plaintiff would not make up the deficiency; *held*, the order was not passed under this rule; but see Order VII, r. 11.⁴ But where a defendant's pleader, who had obtained an adjournment to obtain certain documents, failed and was still in default when the case was called on, and a decree was given to plaintiff, the decision was considered to fall within this rule;⁵ and where the vakil of the plaintiff on the second hearing of the case applied for a summons against a witness, and on the case coming on, was, owing to the absence of his witness, unprepared to go on, and the case was dismissed, the case was considered to have been disposed of under this rule.⁶

A widow applied for a succession certificate to her late husband. The application was opposed by his brother who claimed to have been undivided from him. The matter came on for hearing, but was adjourned on his application, he being ordered to pay the costs. He failed to pay the costs, and the certificate was issued to the widow. *held*, that this rule was inapplicable in the absence of a specific order making the payment of costs a condition precedent to the hearing of the evidence of the party in default.⁷ A Court has no power to dismiss summarily a plaintiff's suit merely because the plaintiff has omitted to comply with an order directing him to pay in a certain sum as the cost of preparing a map. It is the duty of the Court to go on and decide the case on such material as it has before it.⁸ On a date to which the hearing had been adjourned the plaintiff failed to appear when the case was called on. The Court dismissed the suit for default of prosecution. *Held*, that the appellate Court was right in remanding the suit to be disposed of under this rule.⁹

No new suit—The effect of a decision under the corresponding provision of Act VIII of 1859 was to bar a second suit, even by a minor, unless on the ground of fraud.¹⁰ And see note under r. 2 *ante*.

Execution proceedings.—By reason of s. 4, Act VI of 1893, this rule does not apply to proceedings in execution. The dismissal of a petition of execution for default therefore does not bar a fresh application.¹¹

¹ *Alwar v. Seshammal*, (1887) 10 Mad., 270.

² *Pearee Mohun v. Shama Churn*, (1873) 19 W. R., 73.

³ *Sahib v. Mahomed*, (1899) 13 Mad., 510; *Venkataramaya v. Anumukonda*, (1881) 7 Mad., 41.

⁴ *Muhammad v. Muhammad*, (1889) 11 All., 91.

⁵ *Rangasamy Mulellise v. Srirangam*, (1868) 4 Mad. H. C., 251.

⁶ *Rangaswamy*, (1868) 4 Mad. H. C., 56.

⁷ *Amma*, (1898) 21 Mad., 403.

⁸ *Amma*, (1901) 24 All., 462.

⁹ *Singh*, (1903) 25 All., 191.

¹⁰ *v. Mahalskshammam*, (1887) 10 Mad., 272. See *Sahib v.* (1894) 13 Mad., 510.

¹¹ *v. Annappayya*, (1895) 18 Mad., 131; *Akramesha v. Valudess*, (1894) 18 Bom., 429. But see *Phoku v. Parthi*, (1897) 15 All., 49. See also *Sahib Singh v. Bhakkar Singh*, (1897) 17 All., 81.

ORDER XVIII.

Hearing of the Suit and Examination of Witnesses.

1 The plaintiff has the right to begin unless the defendant admits the facts alleged by the plaintiff and contends that either in point of law or on some additional facts alleged by the defendant the plaintiff is not entitled to any part of the relief which he seeks, in which case the defendant has the right to begin.

Act XIV of 1882, s 179

This rule applies to H C and Prov. S C C

Right to begin.—In a suit for partition of certain property and money-claimed material is that before which goes to the root of the case, defendant begins ;³ but this rule does not apply to appeals, and if in appeal the respondent objects that no appeal lies, the appellant begins.⁴

High Court.—The Common Law practice in respect of the right to begin has always been followed by the High Court ;⁵ and where a party did not go into evidence, but had not intimated his intention not to do so, the other side was entitled to rely.⁶

Onus of proof.—The test is to determine which party will win if no evidence is given, or if no more evidence is given than is given at any particular stage of the case, and wherever a person asserts affirmatively as part of his case that a certain state of facts is present or is absent or that a particular thing is insufficient for a particular purpose, he is bound to prove it positively, and the rule is not relaxed, even where the facts lie peculiarly within the knowledge of the opposite party ;⁷ but no question of *onus* of proof arises where there is evidence from which an inference decisive of the case can be drawn by the persons entitled to find the facts.⁸

¹ Aghore Nauth v Prem Chund, (1880) 7 C. L. R., 274.

² Lall Mohun v Peary Chand, 1 Ind. Jur., N. S., 383.

³ Fatmabai v Aishabai, (1898) 12 Bom., 451.

⁴ Rustomji v. Kessowji, (1881) 8 Bom., 287.

⁵ Rangunmoney Dossee v Brij Lal Dey, Cory, 25.

⁶ Virasvami v. Appasvami, (1862) 1 Mad. H. C., 375

⁷ Abrath v. Nor. Eastn. Ry. Co, 11 Q. B. D., 440; id., 11 App. Cas., 247; Hurryhur Mookhopadhyay v Nobokishto Mookerjee, (1871) 14 Moo. I. A., 152; Sartaj v. Deoraj, (1887) L. R., 15 I. A., 51, p. 65

⁸ Speight v. Gaunt, 22 C. D., 727, p. 766; "Vindomora," owners of, v. Lamb, App. Cas. (1891), 1, p. 7. See in regard to *transferability of an estate*—Sartaj v. Deoraj, (1887) L. R., 15 I. A., 51; to a *right to retain possession of an intermediate tenure*—Secretary of State v. Luchmeswar Singh, (1883) L. R., 16 I. A., 6; 16 Cal., 223; of a *ryot's right*—Mohima Chunder v. Mohesh Chunder (1888) L. R., 16 I. A., 23; 16 Cal., 473; Appa Rau v. Subbanna,

2 (1) On the day fixed for the hearing of the suit or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove.

(2) The other party shall then state his case and produce his evidence (if any) and may then address the Court generally on the whole case.

(3) The party beginning may then reply generally on whole case.

3. Where there are several issues, the burden of proving some of which lies on the other party, the party beginning may, at his option, either produce his evidence on those issues or reserve it by way of answer to the evidence produced by the other party; and, in the latter case, the party beginning may produce evidence on those issues after the other party has produced all his evidence, and the other party may then reply specially on the evidence so produced by the party beginning; but the party beginning will then be entitled to reply generally on the whole case.

Act XIV of 1882, ss 179, 180.

These rules apply to H. C and Prov. S. C. C.

Review.—Upon the hearing of an application for review of judgment, upon which an order has been passed directing the opposite party to show cause why the application should not be granted counsel for the opposite party should begin¹

How many counsel heard—A plaintiff must be represented by one pleader or set of pleaders and cannot be represented severally by different pleaders²

On motion—It is not the practice to hear more than one counsel or vakil in support of original motions or applications against which no cause has been shewn in the first instance³

When there are two sets of defendants, and their interests are the same, both should address the Court before any evidence is taken.⁴

(1890) 13 Mad. 61; Fakir Abdulla v. Bulaji, (1890) 14 Bom. 458, p. 461; or to resume a fatherly tenure—Koylaskashun v. Gokoolmoni, (1882) 8 Cal. 220; Bacharam v. Peary Mohun, (1883) 9 Cal. 813; Narayultra v. Bishun Chandra.

¹ Ghansham v. Lal Singh, (1887) 9 All. 61.

² Jankilal v. Atmacam, (1871) 4 Bom. H. C. 211.

³ Barla Sankar Das v. Jaisankar, R. L. R., Sup. Vol. 600

⁴ Dukshina Mohun Roy, in re, (1892) 29 Cal., 32.

4. The evidence of the witnesses in attendance shall be taken orally in open Court in the presence and under the personal direction and superintendence of the Judge.

Witnesses to be examined in open Court

Act XIV of 1882, s. 181

This rule applies to H. C., and Prov. S. C. C.

As to Oudh—see Act XVIII of 1876, s. 19

Purda ladies—Purda ladies, not claiming exemption under s. 132, should be allowed to remain in their palanquins in Court while giving their evidence;¹

public.⁵

Examination of witnesses.—It is not the business of the Court to determine what witnesses shall be examined, the parties must select them, summon them, and, if they do not attend, move the Court to secure their attendance,⁶ and when they are present, call upon the Court to examine such of them as they may offer for examination,⁷ notwithstanding that the nazir may have reported that they are in attendance.⁸ On the other hand, it is the duty of the Judge to examine every witness tendered, though he has not been summoned or his name has not been entered in the list,⁹ unless it is clear that the intention of the person producing the witness is to delay or obstruct justice.¹⁰ He should not select a certain number for examination,¹¹ nor send some away, because he had examined as many on one side, as on the other,¹² or because he thinks their evidence will probably not be of much value,¹³ or because he is satisfied on the evidence already recorded,¹⁴ or because they would only prove the same facts as already deposed to.¹⁵ As to the general duties of the Courts in connection with the examination of witnesses, if they are not properly examined through the incompetency of those who have the management of the suit.¹⁶

Appeal.—But if the Judge refuses to examine them as unnecessary, or tells the party so, and the party does not tender them, the appellate Judge should not, if the matter is brought to his notice, decide the case without hearing the

¹ *Rukia Danu v. Roberts*, B. L. R., S. N. 5

² *Hurro Soondery Chowdhraji, in re*, (1879) 4 Cal., 20; *Din Tarini Debi, in re*, (1888) 15 Cal., 775.

³ *Basant Bibi, in re*, (1890) 12 All., 69.

⁴ *Faridunissa, in re*, (1883) 5 All., 92. As to the case of an accused, see *Barumoti Adhikarini v. Budram Kalita*, (1891) 21 Cal., 538.

⁵ *Kistomohun Mookerjee v. Adarmony Dabee*, 2 Hyde, 88. In regard to cases of contempt, see *Padavay Chetti, ex parte*, (1864) 2 Mad. H. C., 319; *Lekh Raj v. Palee Ram*, (1869) 1 All. H. C., Ed. 1873, 241.

⁶ *Nund Mohun v. Goluck Nath*, (1869) 11 W. R., 99.

⁷ *Morno Moyee v. Bheem Coommar*, (1866) 6 W. R., 231; *Soonder Narain v. Namdar*, (1874) 21 W. R., 407.

⁸ *Deen Dyal v. Danee Roy*, (1870) 13 W. R., 185.

⁹ *Rakhal Doss v. Protap Chunder*, (1860) 12 W. R., 455.

¹⁰ *Khoorgo Roy v. Shib Tohul*, (1872) 17 W. R., 172.

¹¹ *Ramdhan Mandal v. Raj Ballab*, (1870) 6 B. L. R., App., 10.

¹² *Gopee Ojha v. Hur Gohul*, (1869) 12 W. R., 229.

¹³ *Loolo Singh v. Rajendur Laha*, (1867) 8 W. R., 361; *Ibham v. Suleman*, (1885) 9 Bom., 146.

¹⁴ *Brij Soondur Roy v. Kameonnissa*, (1875) 23 W. R., 63.

¹⁵ *Jeswant Singjee v. Jet Singjee*, (1837) 2 Moa. L. A., 427.

¹⁶ *Rim Gutty v. Muntaj Bibee*, (1865) 1 B. L. R., S. N., xx; 10 W. R., 230.

witnesses,¹ provided he is satisfied that the witnesses were present, and a *bona fide* application for their examination was made,² and this, looking at the general practice, should be proved by a copy of the petition and refusal to examine, and not by affidavit.³ But in order to establish such a plea as that he was not allowed an opportunity to adduce evidence, a party must show that he tendered witnesses or other evidence and that his tender was rejected on the ground alleged.⁴

Further evidence when allowed.—It is in the discretion of the court of first instance to allow a party to call further evidence after he has closed his case;⁵ but it should not be allowed without some good reason.⁶ A plaintiff has no right to complain that he had no opportunity of producing rebutting evidence, when he was summoned on behalf of defendant, and did not attend;⁷ and where such evidence is allowed, it should be confined to matters which the party proposing to contradict would have been allowed himself to prove in evidence.⁸

Leaving Court.—There should be cogent reasons to necessitate the Court to order principals to leave the Court, while the evidence of a witness is being recorded. The other witnesses should leave the Court.⁹

Account books.—Under the rules of the High Court, account books not translated cannot be referred to in an appeal without the special leave of the Court.¹⁰

5. In cases in which an appeal is allowed the evidence of each witness shall be taken down in writing, in the language of the Court, by or in the presence and under the personal direction and superintendence of the Judge, not ordinarily in the form of question and answer, but in that of a narrative, and, when completed, shall be read over in the presence of the Judge and of the witness, and the Judge shall, if necessary, correct the same, and shall sign it.

How evidence shall be taken in appealable cases.

Act XIV of 1882, s. 182.

This rule does not apply to Prov S. C. C., or to the Chartered High Courts or the Panjab Chief Court, or to the Judicial Commissioner, N. W. Frontier Province, in the exercise of their Original Civil Jurisdiction—s. 120 (1), O. XLIX, r. 3, s. 638, former Code, Punjab Courts Act (XVIII of 1884) s. 16 (2), and s. 45 (2) of the N. W. Frontier Province Law and Justice Regulation, 1901 (VIII of 1901) O. XLIX, r. 3.

¹ *Ram Jewan v. Radha Pershad*, (1871) 16 W. R., 109; *Hurish Chunder v. Gopal Chunder*, (1873) 20 W. R., 203; *Khuda Bakhsh v. Imam Ali*, (1887) 9 All., 339.

² *Keenoo Singh Roy v. Kahan Chunder Roy*, (1866) 6 W. R., 213; *Surm v. Ubbiman*, (1870) 2 All. H. C., 209.

³ *Rameswar Bhattacharjee v. Shih Narain*, (1870) 14 W. R., 419; *Goormo Dass v. Parun Mundal* (1869) 12 W. R., 363; but see *Parmschari Prasad v. Mahomed Syud*, (1881) 6 Cal., 604, p. 611.

⁴ *Baksh Ali v. Joyanot*, (1869) 11 W. R., 219; *Chunder Nath v. Anundmojee*, (1869) 11 W. R., 229.

⁵ *Bakhal Dass Mundal v. Protap Chunder*, (1864) 12 W. R., 455.

⁶ *Harro Monon Dass v. Oonookool Chunder*, (1867) 8 W. R., 461.

⁷ *Radha Jeeban v. Grew Chunder Roy*, (1867) 8 W. R., 461.

⁸ *Galam Ali v. Aga Khan*, (1869) 6 Bom. H. C., 53.

⁹ *Bil Trenath v. Isoreepersaud*, 2 Hyde, 219.

¹⁰ *Stalhub Pershad v. Foul Coomaree*, (1873) 19 W. R., 121.

As to Oudh—see Act XVIII of 1876 s. 19, Central Provinces—see Act II of 1879 s. 2. Burmah—see Lower Burmah Court's (Act XI of 1889) s. 16

This rule applies to cases under Act X, 1870¹

The direction to take down evidence is imperative; and where the provisions of this rule have not been followed, as if the evidence has not been read over and signed, the whole proceeding is irregular, and the evidence cannot be read in appeal², or admitted in a trial for perjury based on it³. So where evidence has been recorded in the absence of the opposite party, it will be rejected, if objected to,⁴ and in special appeal the case will be remanded to have the evidence properly recorded, provided the objection has been taken in regular appeal.⁵

Where a party never had the opportunity either to examine or to cross-examine the witnesses or to rebut their testimony by fresh evidence,⁶ or when he was refused permission to cross-examine a witness,⁷ the evidence is not legally admissible for or against him and unless a defendant has subjected himself to cross-examination, no statement which he may volunteer can be used as any evidence in his own case.⁸

Where a will is contested, the proceedings should take, as nearly as may be, the form of a regular suit; and where a Judge granted a probate it was held to be a serious defect, that he took down only memoranda of the evidence, and not the testimony of witnesses in the language in ordinary use in proceedings before the Court.⁹

Where the evidence in an insolvency proceeding was not recorded, it was not competent to the Court to refer to the Commissioner's notes of evidence.¹⁰

6 Where the evidence is taken down in a language

When deposition to be interpreted. and the witness does not understand the language in which it is taken down, the evidence as taken down in writing shall be interpreted to him in the language in which it is given.

Act XIV of 1882, s. 183.

This rule does not apply to Prov S. C. C., or to High Courts or to the Panjab Chief Court or to the Judicial Commissioner N. W. Frontier Province, in the exercise of their Original Civil Jurisdiction. See note to O. XLIX. r. 3. As to Oudh—see Act XVI of 1876, s. 19 and s. 151-155 and r. 5, *supra*.

¹ *Heysham v. Bhola Nath Mullick*, (1872) 17 W. R., 221.

² *Ajudhia Prasad, in the matter of*, (1871) 7 B. L. R., 75; *Lakhmidas Hansraj, in re*, (1867) 5 Bom. H. C., 63.

³ *Empress v. Mayadeb Gossami*, (1881) 6 Cal., 762; (s. c.) 8 C. L. R., 292.

⁴ *Bommarauze v. Rangasamy Mudaly*, (1849) 6 Moo. I. A., 232, see also *Queen v. Issur Raut*, (1867) 8 W. R., Cr., 63.

⁵ *Lal Mohamed v. Peer Nuzur*, (1872) 18 W. R., 112.

⁶ *Gorachand v. Ram Narain*, (1868) 9 W. R., 537; *Gooroo Doss v. Greedhur*, (1869) 11 W. R., 110.

⁷ *Pikaktar v. Jakirram*, (1869) 2 B. L. R., App., 12.

⁸ *Shurfuraz v. Dhunoo*, (1871) 16 W. R., 257.

⁹ *Saroda Soondureo v. Muddan Mohun*, (1875) 24 W. R., 162.

¹⁰ *Abdool v. Mahomed*, (1891) 14 Mal., 404. See also *Ajudhia Prasad, in the matter of* 7 B. L. R., 74; 15 W. R., O. J., 16. For observations on the improper manner in which the evidence in cases is generally taken in the subordinate Courts, see *Phul Kumar v. Surjan*, (1883) 4 All., 249.

witnesses,¹ provided he is satisfied that the witnesses were present, and a *bona fide* application for their examination was made,² and this, looking at the general practice, should be proved by a copy of the petition and refusal to examine, and not by affidavit.³ But in order to establish such a plea as that he was not allowed an opportunity to adduce evidence, a party must show that he tendered witnesses or other evidence and that his tender was rejected on the ground alleged.⁴

Further evidence when allowed.—It is in the discretion of the court of first instance to allow a party to call further evidence after he has closed his case;⁵ but it should not be allowed without some good reason.⁶ A plaintiff has no right to complain that he had no opportunity of producing rebutting evidence, when he was summoned on behalf of defendant, and did not attend;⁷ and where such evidence is allowed, it should be confined to matters which the party proposing to contradict would have been allowed himself to prove in evidence.⁸

Leaving Court.—There should be cogent reasons to necessitate the Court to order principals to leave the Court, while the evidence of a witness is being recorded. The other witnesses should leave the Court.⁹

Account books.—Under the rules of the High Court, account books not translated cannot be referred to in an appeal without the special leave of the Court.¹⁰

5. In cases in which an appeal is allowed the evidence of each witness shall be taken down in writing, in the language of the Court, by or in the presence and under the personal direction and superintendence of the Judge, not ordinarily in the form of question and answer, but in that of a narrative, and, when completed, shall be read over in the presence of the Judge and of the witness, and the Judge shall, if necessary, correct the same, and shall sign it.

Act XIV of 1882, s. 182.

This rule does not apply to Prov S C C., or to the Chartered High Courts or the Panjab Chief Court, or to the Judicial Commissioner, N. W. Frontier Province, in the exercise of their Original Civil Jurisdiction—s. 120 (1), O. XLIX, r. 3, s. 638, former Code, Punjab Court's Act (XVIII of 1884) s. 16 (2), and s. 46 (2) of the N. W. Frontier Province Law and Justice Regulation, 1901 (VII of 1901) O XLIX, r. 3.

¹ Ram Jewun v. Radha Pershad, (1871) 16 W. R., 109; Hurish Chunder v. Gopal Chunder, (1873) 20 W. R., 203; Khuda Bakhsh v. Imam Ali, (1887) 9 All., 339.

² Keenoo Singh Roy v. Eshan Chunder Roy, (1866) 6 W. R., 213; Surm v. Ubhman, (1870) 2 All. H. C., 209.

³ Ramesur Bhattacharjee v. Shib Narain, (1870) 14 W. R., 419; Gooroo Dass v. Puran Mundul, (1869) 12 W. R., 363; but see Parmeshari Prashad v. Mahomed Byad, (1881) 6 Cal., 603, p. 611.

⁴ Baksh Ali v. Joyanutt, (1869) 11 W. R., 213; Chunder Nath v. Anundmoyee, (1869) 11 W. R., 239.

⁵ Rakhal Dass Mundul v. Protap Chunder, (1868) 12 W. R., 455.

⁶ Harro Monoo Doss v. Onookool Chunder, (1867) 9 W. R., 461.

⁷ Radha-Jeebun v. Greca Chunder Roy, (1867) 8 W. R., 461.

⁸ Gulam Ali v. Aga Khan, (1869) 6 Bom. H. C., 97.

⁹ Bad Irenath v. Isore-persaud, 2 Hyde, 219.

¹⁰ Madhub Pershad v. Fool Coomatee, (1873) 19 W. R., 121.

exercise of their Original Civil Jurisdiction See note to r. 5, *supra* O XLIX, r. 3 It is not in force in the Central Provinces—Act II of 1879, s. 2 modified in Oudh—Act XVIII of 1876, s. 19

10 The Court may, of its own motion or on the application of any party or his pleader, take down any particular question and answer, or any objection to any question, if there appears to be any special reason for so doing.

Any particular question and answer may be taken down

Act XIV of 1882, s. 186.
This rule applies to H. C., but not to Prov. S. C. C. and is in force in a modified form in Oudh—Act XVIII of 1876, s. 19 O XLIX, r. 3

11. Where any question put to a witness is objected to by a party or his pleader, and the Court allows the same to be put, the Judge shall take down the question, the answer, the objection and the name of the person making it, together with the decision of the Court thereon.

Questions objected to and allowed by Court.

Act XIV of 1882, s. 187.
This rule does not apply to Prov. S. C. C. or to the High Courts or the Punjab Chief Court, or to the Judicial Commissioner, N. W. Frontier Province in the exercise of their Original Civil Jurisdiction See note to O XLIX, r. 5 Modified in Oudh—Act XVIII of 1876, s. 19

Objection when made—Objections to the admission of evidence should be made in the first Court in which it is possible to object, or they will not be listened to in the Court of appeal,¹ and if evidence has been admitted without objection in the lower Court, it must be weighed and not rejected by the appellate Court.²

12 The Court may record such remarks as it thinks material respecting the demeanour of any witness while under examination.

Remarks on demeanour of witnesses.

Act XIV of 1882, s. 188.

This rule applies to H. C., but not to Prov. S. C. C. modified in Oudh—Act XVIII of 1876, s. 19

The evidence of a defendant called as a witness by the plaintiff so far as his credit is concerned, must be judged in the same way, and on the same principles, as the evidence of any other witness is judged, and the plaintiff must stand or fall, as regards the proof of that fact, according as the evidence of the defendant on whom he relies is worthy of credit or the reverse.³

¹ *Kissen Kaminee v. Ram Chunder*, (1869) 12 W. R., 13; *Bommarauze v. Rangasamy Mudaly*, (1849) 6 Moo. 1 A., 232; *Sheetul Pershad v. Junmejoy*, (1869) 12 W. R., 244; *Godayi v. Mears* (1863) 10 W. R., 50; *Chadee Singh v. Beharee Tewarie*, (1868) 10 W. R., 91; *Mukdoomunissa v. Nokhy Singh*, (1875) 24 W. R., 296; *Anar Mollah v. Hilla*, (1868) 10 W. R., 139; *Protap Chunder v. Collector of Goalpara*, (1874) 22 W. R., 216.

² *Bodhnaram Singh v. Omrao*, (1869) 13 Moo. 1 A., 529; *Padmayati v. Doolar Singh*, (1846) 4 Moo. 1 A., 285; *Chamraj v. Dinkar*, (1887) 11 Bom., 320.

³ *Mathura Das v. Jetha Jarchand*, (1897) 2 Cal. W. N., xcix.

13. In cases in which an appeal is not allowed, it shall not be necessary to take down the evidence of the witnesses in writing at length; but the Judge, as the examination of each witness proceeds, shall make a memorandum of the substance of what he deposes, and such memorandum shall be written and signed by the Judge and shall form part of the record.

Memorandum of evidence in unappealable cases.

Act XIV of 1882, s. 189.

This rule does not apply to High Courts or the Panjab Chief Court or to the Judicial Commissioner, N. W. Frontier Province, in the exercise of their Original Civil Jurisdiction. See note to r. 5 *supra*; O. XLIX, r. 3. It is not in force in the Central Provinces—see Act II of 1879, s. 2. As to Oudh—see Act XVIII, 1876, s. 19, and s. 3, *ante*. It applies to Prov. S. C. C. The rule is also applicable to suits for the recovery of rent or not—s. 148 (f), Act VIII of 1885 between landlord and tenant in agriculture taken in the form prescribed by s. (I of 1877), s. 29.

In Bengal, there is no fixed practice, but as a rule, the memorandum is written legibly in the vernacular of the Judge, or in English, if he is sufficiently acquainted with that language, and signed by the Judge and dated. A Judge of a Small Cause Court is bound to take down in the language of the witnesses the substance of what each deposes.¹

Giving a short abstract of the whole evidence is not a compliance with this rule.²

14. (1) Where the Judge is unable to make a memorandum as required by this Order, he shall cause the reason of such inability to be recorded, and shall cause the memorandum to be made in writing from his dictation in open Court.

(2) Every memorandum so made shall form part of the record.

Act XIV of 1882, s. 190

This rule applies to Prov. S. C. C.; to *all* rent suits in Bengal—Act VIII of 1885, s. 143 (2); not to the Chartered High Courts or the Panjab Chief Court or to the Judicial Commissioner, N. W. Frontier Province in the exercise of their Original Civil Jurisdiction—see note to r. 5, *supra*; Order XLIX 3. Modified in Oudh—Act XVIII of 1876, s. 19, and in the Central Provinces—Act II of 1879, s. 2.

This rule seems to contemplate some personal inability. Press of business should not, unless under exceptional circumstances, be accepted as a reason for the inability of any officer to record his memorandum.

¹ *Amrita Shaha v. Panchkora Shaha*, (1896) 1 Cal. W. N., cxxix.

² *Amrita v. Panchkora*, (1903) 9 Cal. W. N., 418; foll. *Chithnu v. Sri Charan*, (1905) 9 Cal. W. N., 429.

15. (1) Where a Judge is prevented by death, transfer or other cause from concluding the trial of a suit, his successor may deal with any evidence or memorandum taken down or made under the forgoing rules as if such evidence or memorandum had been taken down or made by him or under his direction under the said rules and may proceed with the suit from the stage at which his predecessor left it.

(2) The provisions of sub-rule (1) shall, so far as they are applicable, be deemed to apply to evidence taken in a suit transferred under section 24.

This rule applies to Prov S C C ; not to the Chartered High Courts of the Punjab Chief Court or to the Judicial Commissioner N. W. Frontier Province in the exercise of their Original Civil Jurisdiction—see note to r. 5, *supra* ; Order XLIX, 3 Modified in Central Provinces—Act II of 1879, s. 2

Irregularities—The general rule is, that a Judge cannot rely on evidence taken in another Court, but is bound to record his own evidence, and decide upon it,¹ reading over their previous depositions to the witnesses in a criminal case, and asking them if they are true, is wrong,² but in civil suits the necessity to examine persons who have already given evidence in a previous case may be waived by the parties assenting,³ and so the irregularity is waived if the parties agree to treat the former record as incorporated in the latter,⁴ and where such an agreement has been entered into, the witnesses should not be re-examined without some good reason being adduced.⁵ Where the Judge died before it was case⁶ is died, framed

16. (1) Where a witness is about to leave the jurisdiction of the Court, or other sufficient cause is shown to the satisfaction of the Court why his evidence should be taken immediately, the Court may upon the application of any party or of the witness, at any time after the institution of the suit, take the evidence of such witness in manner hereinbefore provided.

(2) Where such evidence is not taken forthwith and in the presence of the parties, such notice as the Court

¹ *Ali Buksh v. Sumteeroodeen*, (1869) 12 W. R., 477.

² *Queen v. Kalundar Doss*, (1870) 2 All. H. C., 100.

³ *Syad Mahomed v. Oomdah*, (1869) 13 W. R., 131; see *Soorendro Pershad v. Nundun Misser*, (1874) 21 W. R., 196.

⁴ *Jugutendur Banwareo v. Din Dyal*, (1864) 1 W. R., 310; *Jadu Rai v. Kamzrak*, (1886) 8 All., 576.

⁵ *Sreenath Roy v. Goluck Chunder*, (1871) 15 W. R., 348.

⁶ *Sukram v. Kala Kahar*, (1869) 3 B. L. R., 103. But see *Gour Chunder v. Manick Ram*, (1870) 13 W. R., 76.

⁷ *Naranbhai v. Narohankar*, (1887) 4 Bom. H. C., 93;

⁸ *Jagram Das v. Narain Lal*, (1883) 7 All., 857; *Afzalunnissa v. Al Ali*, (1886) 8 All., 35. See r. 17, *infra*.

13. In cases in which an appeal is not allowed, it shall not be necessary to take down the evidence of the witnesses in writing at length; but the Judge, as the examination of each witness proceeds, shall make a memorandum of the substance of what he deposes, and such memorandum shall be written and signed by the Judge and shall form part of the record.

Memorandum of evidence in unappealable cases.

Act XIV of 1882, s. 189.

This rule does not apply to High Courts or the Panjab Chief Court or to the Judicial Commissioner, N. W. Frontier Province, in the exercise of their Original Civil Jurisdiction. See note to r. 5 *supra*; O. XLIX, r. 3. It is not in force in the Central Provinces—Act VIII of 1879, s. 2. As to Oudh—see Act as to Prov. S. C. C. The rule is also Revised whether an appeal is allowed

between landlord and tenant in agricultural taken in the form prescribed by s. 189, (I of 1877), s. 29

In Bengal, there is no fixed practice, but as a rule, the memorandum is written legibly in the vernacular of the Judge, or in English, if he is sufficiently acquainted with that language, and signed by the Judge and dated. A Judge of a Small Cause Court is bound to take down in the language of the witnesses the substance of what each deposes.¹

Giving a short abstract of the whole evidence is not a compliance with this rule.²

14 (1) Where the Judge is unable to make a memorandum as required by this Order, he shall cause the reason of such inability to be recorded, and shall cause the memorandum to be made in writing from his dictation in open Court.

(2) Every memorandum so made shall form part of the record

Act XIV of 1882, s. 190.

This rule applies to Prov. S. C. C.—Act VIII of 1885, s. 143 (2); not to the Chartered or to the Judicial Commissioner, N. W. their Original Civil Jurisdiction—see r Modified in Oudh—Act XVIII of 1876, s. 19, and in the Central Provinces—Act II of 1879, s. 2.

This rule seems to contemplate some personal inability. Press of business should not, unless under exceptional circumstances, be accepted as a reason for the inability of any officer to record his memorandum.

¹ *Amrita Shaha v Panchkori Shaha*, (1896) 1 Cal. W. N., cccxix.

² *Amrita v. Panchkori*, (1905) 9 Cal. W. N., 418; foll. *Clithou v. Sri Charan*, (1905) 9 Cal. W. N., 421.

15. (1) Where a Judge is prevented by death, transfer or other cause from concluding the trial of a suit, his successor may deal with any evidence or memorandum taken down or made under the forgoing rules as if such evidence or memorandum had been taken down or made by him or under his direction under the said rules and may proceed with the suit from the stage at which his predecessor left it.
- (2) The provisions of sub-rule (1) shall, so far as they are applicable, be deemed to apply to evidence taken in a suit transferred under section 24.

This rule applies to Prov S C C.; not to the Chartered High Courts of the Punjab Chief Court or to the Judicial Commissioner N. W. Frontier Province in the exercise of their Original Civil Jurisdiction—see note to r. 5, *supra*; Order XLIX, 3 Modified in Central Provinces—Act II of 1879, s. 2

Irregularities—The general rule is, that a Judge cannot rely on evidence taken in another Court, but is bound to record his own evidence, and decide upon it,¹ reading over their previous depositions to the witnesses in a criminal case, and asking them if they are true, is wrong;² but in civil suits the necessity to examine persons who have already given evidence in a previous case may be waived by the parties assenting,³ and so the irregularity is waived if the parties agree to treat the former record as incorporated in the latter,⁴ and where such an agreement has been entered into, the witnesses should not be re-examined without some good reason being adduced.⁵ Where the Judge died before writing his judgment, but signed an entry in a book decreeing the suit, it was held that his successor had not acted without jurisdiction in re-opening the case.⁶ The present rule relaxes the general rule in case—(1) where the Judge has died, or (2) has been removed,⁷ or the case has been transferred, and has been framed to avoid the effect of the decision in *Jagann v. Narain Lal*.⁸

16. (1) Where a witness is about to leave the jurisdiction of the Court, or other sufficient cause is shown to the satisfaction of the Court why his evidence should be taken immediately, the Court may upon the application of any party or of the witness, at any time after the institution of the suit, take the evidence of such witness in manner hereinbefore provided.

(2) Where such evidence is not taken forthwith and in the presence of the parties, such notice as the Court

¹ *Ah Buksh v. Sumteeroodjeen*, (1869) 12 W. R., 477.

² *Queen v. Kalundat Does*, (1870) 2 All. H. C., 100.

³ *Syud Mahomed v. Oomdab*, (1869) 13 W. R., 181; see *Soorendro Pershad v. Nundun Meher*, (1874) 21 W. R., 196.

⁴ *Jagutendur Bunwaree v. Din Dyal*, (1864) 1 W. R., 310; *Jadu Rai v. Kanizak*, (1886) 8 All., 576.

⁵ *Screenath Roy v. Goluck Chunder*, (1871) 15 W. R., 348.

⁶ *Sakram v. Kala Kahar*, (1869) 3 B. L. R., 105. But see *Gour Chunder v. Manick Ram*, (1870) 13 W. R., 76.

⁷ *Naranbhai v. Naroshankar*, (1887) 4 Bom. H. C., 93;

⁸ *Jagann Das v. Narain Lal*, (1883) 7 All., 857; *Afzalunnissa v. Al Ali*, (1886) 8 All., 33. See r. 17, *infra*.

thinks sufficient, of the day fixed for the examination, shall be given to the parties.

(3) The evidence so taken shall be read over to the witness, and, if he admits it to be correct, shall be signed by him, and the Judge shall, if necessary, correct the same and shall sign it, and it may then be read at any hearing of the suit.

Act XIV of 1882 s. 192.

This rule applies to Prov. S. C. C. ; but not (so far as relates to the manner of taking evidence) to the Chartered High Courts or the Panjab Chief Court or the Judicial Commissioner, N. W. Frontier Province in the exercise of their Original Civil Jurisdiction—see note to r. 5, *ante*—O. XLIX, r. 3.

An examination under this rule being on the same footing as the examination of a witness in a cause must be conducted by counsel¹ and before the Court : not before a commissioner.²

17. The Court may at any stage of a suit recall any witness who has been examined and may (subject to the law of evidence for the time being in force) put such questions to him as the Court thinks fit.

Court may recall and examine witness

18. The Court may at any stage of a suit inspect any property or thing concerning which any question may arise.

Power of Court to inspect.

Act XIV of 1882, s. 193

These rules apply to H. C. and Prov. S. C. C. Rule 18 is new ; see R. S. O. 50 rr. 3 and 4.

Inspection by the judge does not do away with the necessity of evidence and will not support an injunction.³

¹ Hoffman v. Fraimjee, *Corryton*, 7.

² Edwards v. Muller, (1870) 5 R. L. R., 232

³ London G. O. Co. v. Lavell, (1911) 1 Ch., 133 (C. H.)

ORDER XIX.

Affidavits.

1. Any Court may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing, on such conditions as the Court thinks reasonable :

Power to order any point to be proved by affidavit.
 Provided that where it appears to the Court that either party *bonâ fide* desires the production of a witness for cross examination, and that such witness can be produced, an order shall not be made authorizing the evidence of such witness to be given by affidavit.

Act XIV of 1882, s. 194

Rules of the Supreme Court, 1883, O 37, r. 1

This rule applies to H. C. and Prov. S. C. C

Practice — Affidavits cannot be used without an order of Court, nor at all, if the opposite party desires the production of the witness for cross-examination.¹ The supreme Court would not admit an affidavit to correct the certificate of an officer of Court to shew it was wrong.²

Form of affidavit.—Each consists of three formal parts : (1) title, (2) the name and place of abode of the deponent ; (3) the jurat. The title should give

must be given), and the day of the month on which it was made, and should shew that the person before whom it was sworn had jurisdiction.

Stamp Act, 1899 —An affidavit for the immediate purpose of being used or filed in any Court or before the officer of any Court is exempted from stamp duty under the Indian Stamp Act, 11 of 1899. See Schedule I, art 4, exemption, and *Sheshamma, in re*³

Court fees Act (1870)—Affidavits are subject to a duty of one rupee in all Subordinate Courts, under the Court Fees Act, except those made by process servers regarding the manner of service of processes, and those made by any public officer in virtue of his office. No fee is also necessary for proof of service of processes. Nor it is intended that any fee should be levied on an affidavit to prove evidence of service of process by a witness, sworn by the person who accompanies the process-server for the purpose of identifying the witness. When a special Commissioner is appointed to administer an oath on an affidavit a fee of five rupees is however payable in Court-fee stamps.⁴

¹ Blackburn v. Union v. Brooks, 7 C. D., 65, but see De Mora v. Cunha, 32 C. D., 141.

² Gooroochurn v. Goluckamoney, Fulton, 167.

³ Sheshamma, in re, (1898) 12 Bom., 276

⁴ See Rule 10, chap VI, Vol. I, p. 133, of the Civil Rules of the Calcutta High Court.

2. (1) Upon any application evidence may be given by affidavit, but the Court may, at the instance of either party order the attendance for cross-examination of the deponent.

(2) Such attendance shall be in Court, unless the deponent is exempted from personal appearance in Court, or the Court otherwise directs.

Act XIV of 1882, s. 195

R. S. O. 38, r. 1. This rule applies to H. C. and Prov. S. C. C.

Cross-examination.—In interlocutory proceedings, cross-examination will not be allowed on affidavit, because it would defeat the object of the whole proceedings, which is despatch. In final proceedings cross-examination will be allowed.

Affidavit in reply.—Instead of a cross-examination, plaintiff will be allowed to file an affidavit meeting matter which has been first raised in defendant's affidavit. A party will be allowed to bring new matter before the Court by a replying affidavit.¹

"Exempted."—See ss. 132, 133.

3. (1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications, on which statements of his belief may be admitted: provided that the grounds thereof are stated.

(2) The costs of every affidavit which shall unnecessarily set forth matters of hearsay or argumentative matter, or copies of or extracts from documents, shall (unless the Court otherwise directs) be paid by the party filing the same.

Act XIV of 1882, s. 196. R. S. O. 38, r. 3

This rule applies to H. C. and Prov. S. C. C.

Irregularity.—Leave to file informal affidavits cannot be obtained from a Court of appeal.² An affidavit couched in the form "I, A. B., of &c., say" instead of in the usual form "I, A. B. make oath and say" is inadmissible.³

Objections.—It would appear that objections to irregular affidavits should be taken when the affidavits are put in, as objections to a deposition taken by commission for irregularity should be made when the deposition is tendered in evidence and not by an interlocutory motion to take it off the record.⁴ An objection for length and irrelevancy should be made at the time of hearing.⁵

¹ *Peacock v. Harpur*, 7 C. D., 619.

² *Glover v. Greenbank*, W. N., 1876, p. 157.

³ *Allen v. Taylor*, L. R., 10 Eq., 52.

⁴ *De Brito v. Hallett*, L. R., 15 Eq., 213.

⁵ *Owens v. Emmens*, W. N., 1875, pp. 210, 231.

ORDER XX.

Judgment and Decree.

1. The Court, after the case has been heard, shall
Judgment when pronounced pronounce judgment in open Court, either
 at once or on some future day, of which
 due notice shall be given to the parties or their pleaders.

Act XIV of 1882, s. 198.

This rule applies to Prov. S. C. C., but not to the Chartered High Courts or the Panjab Chief Court or the Judicial Commissioner, N. W. Frontier Provinces in the exercise of their Original Civil Jurisdiction—O. XLIX, r. 3; Act XVIII of 1884, s. 16 (2), and s. 46 (2) of the N. W. Frontier Province Law and Justice Regulation, 1901, (VIII of 1901)

The meaning of this rule is that judgment must be given upon evidence

So also the recorded impression in the mind of a Judge based on partial evidence while the suit was remanded was held not a judgment³

In Bombay, the mofussil practice of disregarding this provision has been strongly disapproved of⁴

2. A Judge may pronounce a judgment written but not pronounced by his predecessor.
Power to pronounce judgment written by Judge's predecessor

This applies to Prov. S. C. C.; but not to the Chartered High Courts in the exercise of their Original Civil Jurisdiction—s. 120. It follows the decision in the case of *Parbatty v. Higgin*,⁵ See O. XVIII, r. 15; Order XLIX, r. 3

A judgment cannot be questioned because the judge who tried the suit wrote it after he was transferred⁶. A Judge took leave and then wrote out his judgment which was delivered by his successor; held valid under this provision.⁷ See r. 8, *post*.

¹ *Naranbhai v. Naroshankar*, (1867) 4 Bom. H. C., 102

² *Bai Kanku v. Shiva Toya*, (1893) 17 Bom., 624.

³ *Buloram v. Isur Chandler*, (1875) 23 W. R., 77.

⁴ *Bai Dolu v. Hargvandas* (1906) 30 Bom., 455; 8 Bom. L. R., 229.

⁵ *Parbatty v. Higgin*, (1872) 17 W. R., 475.

⁶ *Girjashankar v. Gopalji* (1906) 30 Bom., 241; 7 Bom. L. R., 931; *Sundar Koer v. Chandreshwar*, (1907) 34 Calc., 293

⁷ *Rani Sundar Koer v. Chandreshwar*, (1907) 11 Calc. W. N., 501; 34 Calc., 293; approved in *Satyendra Nath Roy v. Srimati Thakurani Ghatwain* (1908) 12 Calc. W. N., 632 (F. B.) 7 Calc. L. J., 666.

2. (1) Upon any application evidence may be given by affidavit, but the Court may, at the instance of either party order the attendance for cross-examination of the deponent.

Power to order attendance of deponent for cross examination.

(2) Such attendance shall be in Court, unless the deponent is exempted from personal appearance in Court, or the Court otherwise directs.

Act XIV of 1882, s. 195.

R. S. O. 38, r. 1. This rule applies to H. C. and Prov. S. C. C.

Cross-examination.—In interlocutory proceedings, cross-examination will not be allowed on affidavit, because it would defeat the object of the whole proceedings, which is despatch. In final proceedings cross-examination will be allowed.

Admitted in evidence. Instead of a cross-examination, plaintiff will be allowed which has been first raised in defendant's bring new matter before the Court by a

"Exempted."—See ss 132, 133

3. (1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications, on which statements of his belief may be admitted: provided that the grounds thereof are stated.

(2) The costs of every affidavit which shall unnecessarily set forth matters of hearsay or argumentative matter, or copies of or extracts from documents, shall (unless the Court otherwise directs) be paid by the party filing the same.

Act XIV of 1882, s. 196. R. S. O. 38, r. 3

This rule applies to H. C. and Prov. S. C. C.

Irregularity.—Leave to file informal affidavits cannot be obtained from a Court of appeal.¹ An affidavit couched in the form "I, A. B., of &c., say" instead of in the usual form "I, A. B. make oath and say" is inadmissible.²

Objections.—It would appear that affidavits should be taken when the affidavits are commission for irregularity should be evidence and not by an interlocutory objection for length and irrelevancy should be made at the time of hearing.³

¹ Peacock v. Harpur, 7 C. D., 619.

² Glover v. Greenbank, W. N., 1876, p. 157.

³ Allen v. Taylor, L. R., 10 Eq., 52.

⁴ De Bevoise v. Hillel, L. R., 15 Eq., 213.

⁵ Owens v. Emmens, W. N., 1875, pp. 210, 231.

ORDER XX.

Judgment and Decree

1. The Court, after the case has been heard, shall pronounce judgment in open Court, either at once or on some future day, of which due notice shall be given to the parties or their pleaders.

Judgment when pronounced.

Act XIV of 1882, s. 198.

This rule applies to Prov S C C, but not to the Chartered High Courts or the Panjab Chief Court or the Judicial Commissioner, N. W. Frontier Provinces in the exercise of their Original Civil Jurisdiction—O XLIX, r. 3; Act XVIII of 1884, s. 16 (2), and s. 46 (2) of the N. W. Frontier Province Law and Justice Regulation, 1901, (VIII of 1901).

The meaning of this rule is that judgment must be given upon evidence

So also the recorded impression in the mind of a Judge based on partial evidence while the suit was remanded was held not a judgment⁵

In Bombay, the mofussil practice of disregarding this provision has been strongly disapproved of⁴

Power to pronounce judgment written by Judge's predecessor

2 A Judge may pronounce a judgment written but not pronounced by his predecessor.

This applies to Prov S C C; but not to the Chartered High Courts in the exercise of their Original Civil Jurisdiction—s. 120. It follows the decision in the case of *Parbutty v. Higgin*,⁵ See O XVIII, r. 15; Order XLIX, r. 3

A judgment cannot be questioned because the judge who tried the suit wrote it after he was transferred.⁶ A Judge took leave and then wrote out his judgment which was delivered by his successor; held valid under this provision.⁷ See r. 8, *post*

¹ *Naranbhai v. Naroshankar*, (1867) 4 Bom. H. C., 102

² *Bai Kanku v. Shiva Toya*, (1893) 17 Bom., 624.

³ *Buloram v. Issur Chunder*, (1875) 23 W. R., 77.

⁴ *Bai Dolu v. Hargavandas* (1906) 30 Bom., 435; 8 Bom. L. R., 229.

⁵ *Parbutty v. Higgin*, (1872) 17 W. R., 475.

⁶ *Girjashankar v. Gopalji* (1906) 30 Bom., 241; 7 Bom. L. R., 931; *Sundar Koer v. Chandreshwar*, (1907) 31 Calc., 293

⁷ *Rani Sundar Koer v. Chandreshwar*, (1907) 11 Calc. W. N., 501; 24 Calc., 293; approved in *Satvendra Nath Roy v. Srimati Thakurani Ghatwain* (1908) 12 Calc. W. N., 682 (F. R.); 7 Calc. L. J., 666.

3. The judgment shall be dated and signed by the Judge in open Court at the time of pronouncing it and, when once signed, shall not afterwards be altered or added to, save as provided by section 152 or on review.

Act XIV of 1882, sect. 202.

This rule applies to Prov. S. C. C., but not to the Chartered High Courts or the Punjab Chief Court or to the Judicial Commissioner, N. W. Frontier Province, in the exercise of their Original Civil Jurisdiction—see note to r. 1, *supra*, Order XLIX, r. 3.

Date of judgment—This means the date on which the judgment is delivered.¹ See "date of decree" r. 7, *infra*.

Shall not be altered—This section prohibits the Judge from adding to his judgment. Under Act VIII, the High Court at Calcutta decided that, though the Code did not authorise the reserved grounds of other grounds for a decision which he had arrived, provided the further grounds did not alter the ground on which the decision proceeded.² But it seems doubtful whether such a mode of procedure would now be countenanced by the Privy Council. Their lordships, referring to a somewhat similar practice, said: "The rule requires the reasons given by the Judges to be communicated to the Registrar," and the observations made by Lord Kingsdown, in delivering the judgment of the Committee in *Brown v. Gugg*,³ show that these reasons ought to be stated publicly at the hearing below, and should not be reserved to influence the decision of the Court of Appeal.⁴

Wrong judgments.—It is the duty of every Judge to proceed as far as the practice of his Court will allow him to recall and cancel any invalid order which he has made *per incuriam*.⁵

English practice—In England, a Judge may always reconsider his decision until the order is drawn up.⁶

Termination of suit.—The termination of a suit mentioned in art. 89, Act XV of 1877, is when judgment is given in the Court in which the action is commenced.⁷

Conflicting rulings—A Judge should follow the ruling of the High Court to which he is subordinate.⁸

4 (1) Judgments of a Court of Small Causes need not

Judgments of Small Cause Courts. contain more than the points for determination and the decision thereon.

¹ *Mamtazul Huq v. Nirdhai*, (1883) 9 Cal., 711.

² *Snadden v. Tield, Finlly & Co.*, (1867) 7 W. R., 286.

³ *Brown v. Gugg*, 2 Moo. P. C. Cas., 363.

⁴ *Richer v. Voyer*, 5 L. R. P. C. Cas., 491.

⁵ *Tuffazal Hossain v. Bishunath Prasad*, (1871) 7 B. L. R., 186; 14 Moo. I. A., 10, p. 48. See, on this point, *Lachman Singh v. Mohan*, (1879) 2 All., at p. 501; and compare *Muhammad v. Abdul*, (1885) L. R., 10 I. A., 101; *Blake v. Harvey*, 29 C. D., 87, p. 873.

⁶ *St. Nazaire Co., in re*, 12 C. D., at p. 91.

⁷ *Lakshmin v. Govind Shrinji*, (1887) 7 Bom., 518; *Watkins v. Fox*, (1893) 22 Cal., 950.

⁸ *Swaminath v. Kashinath*, (1891) 15 Bom., 419; *Balaji Ganesh v. Sakharan Parashram*, (1893) 17 Bom., 555.

(2) Judgments of other Courts shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision.

Act XIV of 1882, s. 253

This rule applies to Prov S C C, but not to the Chartered High Courts or the Panjab Chief Court or to the Judicial Commissioner, N W Frontier Province in the exercise of their Original Civil Jurisdiction—see note to s. 33, and r. 1, *supra* or to the Chief Court of lower Burmah, O XLIX, r. 3

Courts of Small Causes.—If the judgment of a Small Cause Court is defective, the High Court can set aside the decree and direct a trial on the merits¹. A decree founded on a judgment not in accordance with this rule is not according to law; therefore, the High Court under s. 25 of the Provincial Small Cause Courts Act (IX of 1887) has jurisdiction to pass such order in the matter as it thinks fit². This paragraph governs Courts invested with small Cause Court power³.

Judgment, what is.—The opinions of judges who have heard the case but cease to be Judges of the High Court before judgment is pronounced, cannot be treated as judgments but as mere minutes or memoranda⁴.

Judgment, effect of.—It is extremely doubtful whether there exists in India (exclusive of the particular jurisdictions which are exercised by the Courts in matters of probate and the like—Evidence Act, s. 41; and those which, in case of war, might be exercised in matters of prize) any ordinary Courts capable of giving what can be technically called a judgment *in rem*,⁵ the Mofussil Courts cannot⁶.

similar in character.⁸

Evidence.—Such judgments are admitted in evidence against them the character of the enjoyment of possession in fact at the time of the migration.⁹

¹ *Mulik Rahmat v. Shiva Prasad*, (1891) 13 All., 531.

² *Jasoda v. Banmansha*, (1899) 23 Bom., 334.

³ *Narayan v. Bhaga*, (1907) 31 Bom., 314.

⁴ *Mahomed Akil v. Asadunnisa*, (1868) 9 W. R., 1; *Brand v. Hammersmith and City Railway Company*, L. R., 2 Q. B., 223. But see cases under r. 2, *supra*.

⁵ *Jogendur Doh v. Fumader Deb*, (1872) 17 W. R., 101; 11 B. L. R., 244.

⁶ *Kanhya Lal v. Radha Churn*, (1867) 7 W. R., 339; *Gangadhar Roy v. Uma-sondery*, (1867) 7 W. R., 347; *Yarakalanma v. Anakala*, (1864) 2 Mad. H. C., 276; *Kattama Nauchear v. Shivagangah*, (1863) 2 W. R., P. C., 31.

⁷ *Balaji v. Dharma*, (1864) 2 Bom. H. C., 363.

⁸ *Soorendronath v. Parmanund*, (1870) 15 W. R., 342.

⁹ *Gujin Lal v. Fattah Lal*, (1881) 6 Cal., 171.

¹⁰ *Jinnatullah v. Romoni*, (1888) 15 Cal., 237.

¹¹ *Peari Mohun v. Debnemoyi*, (1883) 11 Cal., 743; *Rameshar Persad v. Koonj Behari*, (1879) 4 Cal., 633; L. R., 6 I. A., 33.

¹² *Hira Lal v. Hilsa*, (1882) 11 C. L. R., 523; and see *Collector of Gorakhpur v. Palakdhari*, (1899) 12 All., 1; *Palakdhari Singh v. Collector of Gorakhpur* (1893) 15 All., 267.

¹³ *Neill v. Duke of Devonshire*, 8 App. Cas., 135, p. 163. See *Bijnath*

3. The judgment shall be dated and signed by the Judge in open Court at the time of pronouncing it and, when once signed, shall not afterwards be altered or added to, save as provided by section 152 or on review.

Act XIV of 1882, sect 202

This rule applies to Prov. S. C. C. ; but not to the Chartered High Courts or the Punjab Chief Court or to the Judicial Commissioner, N. W. Frontier Province, in the exercise of their Original Civil Jurisdiction—see note to r 1, *supra*, Order XLIX, r 3.

Date of judgment—This means the date on which the judgment is delivered. See "date of decree" r 7, *infra*

Shall not be altered.—This section prohibits the Judge from adding to his judgment. Under Act VIII, the High Court at Calcutta decided that, though the Code did not say that the reasons for a judgment were to be added for a decision, it was not expressly prohibited. It was held that such additional grounds for a decision

which he had arrived, provided the further grounds did not alter the ground on which the decision proceeded. But it seems doubtful whether such a mode of procedure would now be countenanced by the Privy Council. Their lordships, referring to a somewhat similar practice, said: "The rule requires the reasons given by the Judge to be stated in the judgment." *See in Brown v Gu* (1871) 12 Q. B. 181, where the Court of Appeal held that the Judge's reasons for his decision were not to be added to the judgment after it had been pronounced.

Wrong judgments.—It is the duty of every Judge to proceed as far as the practice of his Court will allow him to recall and cancel any invalid order which he has made *per incuriam*.¹

English practice—In England, a Judge may always reconsider his decision until the order is drawn up.²

Termination of suit—The termination of a suit mentioned in art. 89, Act XV of 1877, is when judgment is given in the Court in which the action is commenced.³

Conflicting rulings—A Judge should follow the ruling of the High Court to which he is subordinate.⁴

4 (1) Judgments of a Court of Small Causes need not contain more than the points for determination and the decision thereon.

Judgments of Small Cause Courts

¹ *Mamtazul Huq v. Nurbhai*, (1883) 9 Cal., 711.

² *Snadden v. Todd*, *Finlay & Co.*, (1867) 7 W. R., 286.

³ *Brown v. Gwy*, 2 Moo. P. C. Cas., 365.

⁴ *Richer v. Voyer*, 5 L. R. P. C. Cas., 431.

⁵ *Tuffazal Hossain v. Raghunath Prasad*, (1871) 7 B. L. R., 180; 14 Moo. L. A., 40, p. 48. See, on this point, *Iachman Singh v. Mohan*, (1870) 2 All., at p. 505, and compare *Muhammad v. Abdul*, (1889) L. R., 10 L. A., 101; *Blake v. Harvey*, 29 C. D., 847, p. 873.

⁶ *St. Nazaire Co., in re*, 12 C. D., at p. 91.

⁷ *Balkrishna v. Govind Shrivasth*, (1883) 7 Bom., 518; *Watkins v. Fox*, (1895) 22 Cal., 970.

⁸ *Swaminathan v. Natchinath*, (1893) 15 Bom., 419; *Balaji Ganesh v. Sakharani Parashram*, (1893) 17 Bom., 555.

(2) Judgments of other Courts shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision.

Act XIV of 1882, s. 233

This rule applies to Prov S C C, but not to the Chartered High Courts or the Panjab Chief Court or to the Judicial Commissioner, N W Frontier Province in the exercise of their Original Civil Jurisdiction—see note to s. 33, and r. 1, *supra* or to the Chief Court of lower Burma, O XLIX, r. 3

Courts of Small Causes—If the judgment of a Small Cause Court is defective, the High Court can set aside the decree and direct a trial on the merits¹. A decree founded on a judgment not in accordance with this rule is not according to law; therefore, the High Court under s. 25 of the Provincial Small Cause Courts Act (IX of 1887) has jurisdiction to pass such order in the matter as it thinks fit². This paragraph governs Courts invested with small Cause Court power³.

Judgment, what is—The opinions of judges who have heard the case but cease to be Judges of the High Court before judgment is pronounced, cannot be treated as judgments but as mere minutes or memoranda⁴.

Judgment, effect of—It is extremely doubtful whether there exists in

not⁵

of both, though the subject matter of the dispute is similar, and the evidence is similar in character.⁶

Evidence—Such judgments do not conclude other parties and should not be admitted in evidence against them,⁷ or unless to prove a custom;⁸ or to show the character of the enjoyment of the possessor;⁹ or the landlord;¹⁰ or the possession in fact at the time of the litigation.¹¹

¹ Malik Bahmat v. Shiva Prasad, (1891) 13 All., 533.

² Jasoda v. Bamansha, (1899) 23 Bom., 334.

³ Narayan v. Bhaga, (1907) 31 Bom., 314.

⁴ Mahomed Akil v. Asadunnissa, (1868) 9 W. R., 1; Brand v. Hammersmith and City Railway Company, L. R., 2 Q. B., 223. But see cases under r. 2, *supra*.

⁵ Jogendur Deb v. Fumnder Deb, (1872) 17 W. R., 104; 11 B. L. R., 244.

⁶ Kanhya Lall v. Radha Churn, (1867) 7 W. R., 333; Gungadhar Roy v. Uma-soondery, (1870) 7 W. R., 317; Yarakalama v. Anakals, (1864) 2 Mad. H. C., 276; Kattama Nauchear v. Shivagungh, (1865) 2 W. R., P. C., 31.

⁷ Balaji v. Dharma, (1861) 2 Bom. H. C., 363.

⁸ Soorendronath v. Parmanund, (1870) 15 W. R., 342.

⁹ Gujja Lall v. Pattel Lall, (1881) 6 Cal., 171.

¹⁰ Jinnatullah v. Romoni, (1888) 15 Cal., 233.

¹¹ Pearl Mohun v. Drobninoy, (1885) 11 Cal., 745; Rameshur Persad v. Koonj Behari, (1879) 4 Cal., 633; L. R., 6 I. A., 33.

¹² Hira Lal v. Hill, (1892) 11 C. L. R., 523; and see Collector v. Palakdhari, (1899) 12 All., 1; Palakdhari Singh v. Collector of (1893) 15 All., 261.

¹³ Neill v. Duke of Devonshire, 8 App. Cas., 135, p. 163. See

3. The judgment shall be dated and signed by the Judge in open Court at the time of pronouncing it and, when once signed, shall not afterwards be altered or added to, save as provided by section 152 or on review.

Act XIV of 1882, sect. 202

This rule applies to Prov. S. C. C.; but not to the Chartered High Courts or the Punjab Chief Court or to the Judicial Commissioner, N. W. Frontier Province, in the exercise of their Original Civil Jurisdiction—see note to r. 1, *supra*, Order XLIX, r. 3.

Date of judgment—This means the date on which the judgment is delivered.¹ See "date of decree" r. 7, *infra*

Shall not be altered—This section prohibits the Judge from adding to his judgment. Under Act VIII, the High Court at Calcutta decided that, though the Code did not authorize the recording of any further grounds for a decision or of any addition to a judgment once delivered, such a course was not expressly forbidden, and a Judge might lawfully append to his judgment such additional reasons as might tend more fully to show the correctness of the decision at which he had arrived, provided the further grounds did not alter the ground on which the decision proceeded.² But it seems doubtful whether such a mode of procedure would now be countenanced by the Privy Council. Their lordships, referring to a somewhat similar practice, said: "The rule requires the reasons given by the Judges to be communicated to the Registrar," and the observations made by Lord Kingsdown, in delivering the judgment of the Committee in *Brown v Gwy*,³ show that these reasons ought to be stated publicly at the hearing below, and should not be reserved to influence the decision of the Court of Appeal.⁴

Wrong judgments.—It is the duty of every Judge to proceed as far as the practice of his Court will allow him to recall and cancel any invalid order which he has made *per incuriam*.⁵

English practice—In England, a Judge may always reconsider his decision until the order is drawn up.⁶

Termination of suit.—The termination of a suit mentioned in art. 89, Act XV of 1877, is when judgment is given in the Court in which the action is commenced.⁷

Conflicting rulings—A Judge should follow the ruling of the High Court to which he is subordinate.⁸

4 (1) Judgments of a Court of Small Causes need not contain more than the points for determination and the decision thereon.

Judgments of Small Cause Courts

¹ *Mamtazul Huq v. Nurbhas*, (1883) 9 Cal., 711.

² *Snadden v. Todd, Findlay & Co.* (1867) 7 W. R., 286.

³ *Brown v Gwy*, 2 Moo P. C. Cas., 363.

⁴ *Richer v. Voyer*, 5 L. R. P. C. Cas., 481.

⁵ *Tuffazal Hossain v. Baghunath Prasad*, (1871) 7 B. L. R., 180; 14 Moo L. A., 40, p. 48. S. e., on this point, *Lachman Singh v. Mohan*, (1879) 2 All., at p. 505, and compare *Muhammud v. Abdul*, (1885) L. R., 10 L. A., 101; *Blake v. Harvey*, 29 C. D., 827, p. 833.

⁶ *St. Nazaire Co., in re*, 12 C. D., at p. 91.

⁷ *Balkrishna v. Govind Shivanji*, (1887) 7 Bom., 518; *Watkins v. Fox*, (1893) 22 Cal., 979.

⁸ *Kwanirao v. Kashinath*, (1891) 15 Bom., 419; *Balaji Ganesh v. Sakharan Parashram*, (1893) 17 Bom., 555.

give evidence in a case merely by making a statement of fact in his judgment. If he intends the Courts to act upon his statement he is bound to make that statement in the same manner as any other witness¹ In a case in which the principal point at issue was the legitimacy of the plaintiff, and the Judge was influenced by the resemblance he bore to the person he claimed as his father, who had been personally known to the Judge, it was held that the decision of the Judge upon the personal resemblance could not be received or acted on by a Court of Appeal² But where the Judge declared that certain persons were unworthy of credit, inasmuch as he knew them to be professional witnesses, and the Judges of the Suddar Dewanny Council said "Their lordships think it right to state that in that censure they do not at all concur It is of great importance that the Judge should know the character of the parties, and it is of great advantage to the decision of the case that it is heard by a Judge acquainted with the character of the parties produced as witnesses, and who is capable, therefore, of forming an opinion upon the credit due to them"³.

Construction—In construing a judgment, if a difficulty is found in reconciling the conclusion ultimately arrived at with a previous part of the judgment, such part must be rejected⁴.

5. In suits in which issues have been framed, the Court shall state its finding or decision on each issue with the reasons therefor, upon each separate issue, unless the finding upon any one or more of the issues is sufficient for the decision of the suit.

Act XIV of 1882, s. 204

This rule does not apply to Prov. S. C. C., or to the Chartered High Courts, or the Panjab Chief Court in the exercise of their Original Civil Jurisdiction, O XLIX, r. 3, and Act XVIII of 1884, s. 16 (2), or to the Chief Court of Lower Burma, see Notification No. 1737 A of Nov. 1st, 1900, Gazette of India, 1900, Pt. I, p. 730.

Be sufficient for the decision of the suit.—These words do not prevent a Judge deciding all the issues raised in the suit⁵.

In appealable cases, the Lower Courts should, as far as practicable, pronounce an opinion on all the important points, since by omitting to do so a case may have to be remanded by the Privy Council, which might otherwise be finally decided on appeal.⁶

The judgment in a cause should be founded upon a case either to be found in the pleadings, or involved in or consistent with the case thereby made.⁷ It is not open to a Judge to decide a case in the defendant's favour on a point not

¹ *Rousseau v. Pinto*, (1867) 7 W. R., 189.

² *Jeswant Singjee v. Jet Singjee*, (1841) 3 Moo. I. A., 260; See also *Meethun v. Bushier Khan*, (1866) 11 Moo. I. A., 213, p. 221; 7 W. R., P. C., 27.

³ *Baman Doss v. Tarinee*, (1857) 7 Moo. I. A., 203, and see the remarks in the case of *Mahomed Buksh v. Hossaini*, (1887) L. R., 15 I. A., 81 p. 91.

⁴ *Bykunt Chunder v. Dhunpnt Singh*, (1873) 19 W. R., 101. See "INTERPRETATION," r. 6, *infra*.

⁵ *Devarakonda v. Devarakonda*, (1882) 4 Mad., 131.

⁶ *Ts...* P. C., 63; *Ismail Khan Mahomed*, 60. But see *Barhamdeo Narain v. Lal v. Bonomali*, (1885) 11 Calc., (1904) 26 All., 234. See note to r. 4, *supra*.

⁷ *Lahen Chunder v. Shamachurn*, (1886) 11 Moo. I. A., 7; 6 W. R., P. C., 57; *Mylapore Iyasawny v. Yeo Kay*, (1857) 14 Calc., 802.

Contract.—When the plaintiffs are entitled to ask for the performance of the part of the contract in which they are interested and the defendant claims execution of the whole, to which the plaintiffs do not object, the Court ought to pass a decree directing execution of the whole contract instead of rejecting the claim.¹

Contribution.—In a suit for contribution the decree should, if possible, declare the liability of each of the defendants.² A joint decree should not be given.³

Costs.—The costs of proceedings in execution of a rent-decree should not be added to the decree so as to make it appealable under s 58, Act VIII of 1869.⁴

Cross appeal.—Where two parties appeal, so that one is a cross-appeal to the other, there should be only one final decree between the parties.⁵ Plaintiff's suit being dismissed in the lower Court, he appealed, and got a decree for a portion of his claim with costs: respondent got costs for the portion disallowed: held, that the respondent could not take out execution for his costs, as there was only one decree, and that he could only execute for the sum remaining after deducting them from the amount awarded to him.⁶

Damages.—Where plaintiffs with separate interests sue for and obtain damages, the decree should not be a joint one for a lump sum, but should apportion the damages;⁷ and such a decree should assess them and not leave them to be ascertained in execution of the decree.⁸

Debtor and creditor.—For directions by the Privy Council for taking account and preparing decree in a case between debtor and creditor, see *Partab Bahadur v. Chitpal Singh*.⁹

Declaration to succeed to a mutt.—Time may be given to qualify for the position.¹⁰

were, was held bad.¹¹

Easement.—The declaration of a right to have a roof projecting over another man's land and discharging water on it, includes as an accessory right the right to enter and repair.¹²

¹ *Hari Raghunath v. Krishnaji Anant*, (1893) 19 Bom., 546.

² *Bhurut Pandey v. Munthora Koor*, (1875) 23 W. R., 421.

³ *Mohadeo Misser v. Lahoree*, (1875) 21 W. R., 250; *Damasoondaree v. Anund-moyee*, (1863) 3 W. R., 170; *Palamlur v. Bhirub Nath*, (1871) 15 W. R., 52; *Ottobillah v. Asceran*, (1867) 7 W. R., 191; *Kristo Coomar v. Anund Moyee*, 7 W. R., 300; *Nobin Mohun v. Gopal Chunder*, (1869) 11 W. R., 534; *Kristo Monce v. Baroda Dassea*, (1870) 14 W. R., 143; *Muridan Ali v. Tufaz-zul Hossain*, (1871) 16 W. R., 78.

⁴ *Kadumbini Dabha v. Koylish*, (1891) 6 Cal., 574. As to the manner of entering costs in an appeal decree, see *Mothoora Mohun v. Hury Kisbore Roy*, (1872) 18 W. R., 286.

⁵ *Rughoobun Sahay v. Asloo*, 20 W. R., 291.

⁶ *Isur Chunder v. Mun Mohun*, 12 W. R., 304.

⁷ *Triloke Nath v. Hurdatt*, (1868) 9 W. R., 299.

⁸ *Munecram v. Muscehun*, (1870) 13 W. R., 139.

⁹ *Partab Bahadur v. Chitpal Singh*, (1892) 19 Cal., 174, L. R., 19 1. A., 33.

¹⁰ *Rangachariar v. Yegny*, (1899) 13 Mad., 521.

¹¹ *Parthi Pal v. Guman*, (1890) 17 Cal., 973; L. R., 17 1. A., 107.

¹² *Dhunpat Singh v. Narain Peshad*, (1873) 20 W. R., 64; *Suput Singh v. Imrit*, (1880) 3 Cal., 730.

¹³ *Ram Phul v. Bhugwan*, (1869) 12 W. R., 326.

¹⁴ *Hayogroova v. Sami*, (1892) 15 Mad., 286.

Encroachment by building on land of another.—The decree in a suit for possession of a land, encroached upon by a stranger by the erection of a building on it, should state that the plaintiff should recover the land, with liberty to the defendant forthwith to commence to remove his building, and to restore the property to its original condition within a certain period, in default of which the plaintiff would be at liberty to remove the building at the expense of the defendant.¹

Foreclosure and sale—See App. D. Nos 6-10.

Hindu widow—Proper provision for the maintenance of a Hindu widow must be made in the decree before the adopted son or other legal heir may be allowed to recover the family property from her,² or before a mortgagee with notice may be permitted to take possession.³

Improvements—In a suit for possession of immoveable property, enquiries as to the value of improvements must be held before decree, and cannot legally be reserved for determination in the execution department.⁴

Legal representative.—In a suit against a legal representative, the decree should state that it is against the defendant in that character.⁵

Maintenance—A decree for maintenance should not only declare the sum payable in future, but also direct it to be paid;⁶ but if it does not,⁷ or it does, and the decree gets barred, a new suit will lie on it as a mere declaratory decree.⁸

A decree for maintenance in favour of a Hindoo widow may be set aside or suspended for unchastity.⁹ Her subsequent unchastity may be alleged and proved as answer to the widows suit to enforce her right.¹⁰

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¹ Premji v. Cassum Juma, (1896) 20 Bom., 298.

² Jannabai v. Raychand, (1883) 7 Bom., 225; Yellawa v. Bhimangarada, (1894) 18 Bom., 452.

³ Rachawa v. Shivayogapa, (1894) 18 Bom., 679.

⁴ Nellaya v. Vadakipat, (1878) 3 Mad., 382.

⁵ Girdharilal v. Bai Shiv, (1884) 8 Bom., 309; Viraragavanma v. Samudrala, (1883) 8 Mad., 208; and see Gururappa v. Thimma, (1887) 10 Mad., 316; Sathuvayyan v. Mathusami, (1889) 12 Mad., 325.

⁶ Vishnu v. Manjamma, (1885) 9 Bom., 108; Ashutosh v. Lakhmoni, (1892) 19 Cal., 139; and see Mansa v. Jivan, (1887) 9 All., 33.

⁷ Vinayak v. Abaji, (1888) 12 Bom., 416.

⁸ Sabhanatha v. Subba, (1884) 7 Mad., 80.

⁹ Vishnu v. Manjamma, (1885) 9 Bom., 108.

¹⁰ Daulta Kuari v. Meghu Tiwari, (1893) 15 All., 352.

¹¹ Purmessuree Dutt v. Joynath, (1871) 15 W. R., 326.

¹² Zoynul Abdeen v. Phoolash, (1871) 15 W. R., 126;

¹³ Janokee Nath v. Joy Kishen, (1871) 15 W. R., 4.

¹⁴ Krihtokishore v. Roop Lal, (1882) 8 Cal., 637.

¹⁵ Nubo Kristo v. Parbutty Churn, (1870) 13 W. R., 23; Goluck Chunder v. Gunga Narain, (1872) 18 W. R., 111.

¹⁶ Mosoodun Lal v. Bheekaree, (1866) 6 W. R., 218, 109; Pillai v. Pillai, (1874) L. R., 2 I. A., 228.

¹⁷ Nain Singh v. Jawahur Singh, (1869) 1 All. H. C., 167.

mesne profits;¹ and costs will not be allowed in execution even in Privy Council cases, if not expressly declared, though mesne profits may;² nor interest on costs,³ but it is not necessary in an appeal decree that the specific sums which go to make up the costs should be set forth.⁴

Partition.—A decree in a partition suit merely declaring the share of the plaintiff and some of the defendants, reserving all other questions involved in the suit, was held to be irregular in form.⁵

Persons liable.—In the Mofussil Courts, the person declared liable must be a party to the record, though perhaps it may be otherwise on the original side of the High Court, if the parties commit contempt.⁶ Though one defendant should not generally be made to pay another defendant's costs;⁷ he may be made to do so, if he colludes with the plaintiff and makes him bring a suit for his benefit, and also to pay his own costs.⁸

Possessory suit.—Where a decree under s. 9 of the Specific Relief Act (1877) directed that the costs of removing huts and filling up excavations should be paid by the defendant, it was held that this portion of the decree was bad.⁹

Probate.—A suit in British India by the executors of the will of a native of Cutch was dismissed on its appearing that the plaintiffs were only furnished with probate issued from a native Court. *Held*, that the plaintiffs were not entitled to a decree without taking out probate or letters of administration in British India or a certificate under Act VII of 1889.¹⁰

Relief.—A plaintiff suing for a share in property should not get more than he has asked for,¹¹ subject, however, to this: that the appellate Court may vary the decree, in accordance with matters admitted, which have occurred subsequently.¹² A plaintiff who has sued for a declaration that the defendants have no right in

the limit of its jurisdiction to entertain a suit.¹³ A plaintiff should not get a decree for relief which he has not asked for; so when he has sued to establish his right to property and for an injunction, he should not get a decree declaring his right to an easement.¹⁴ When a plaintiff sues on one cause of action, and gives evidence which, if establishing anything, establishes another cause of action

¹ Mahomed Yakoub v. Mahomed, (1874) 23 W. R., 533.

² Leelanand Singh v. Court of Wards, (1870) 14 W. R., 387.

³ Muddun Thakoor v. Morrison, (1872) 18 W. R., 233; Forester v. Secretary of State, (1877) L. R., 41 A., 127.

⁴ Mothoora Mohan v. Hury Kishore Roy, (1873) 18 W. R., 286.

⁵ Krishna Ram v. Rajyopal, (1895) 18 Mad., 73. See also Gyan Chunder v. Durga Churn, (1881) 7 Cal., 318. Bhoolunmayi v. Shurut Sandery, (1886) 12 Cal., 275.

⁶ Jointee Chunder Sein v. Anundo Lall, (1870) 14 W. R., A. O., 1.

⁷ Ram Chunder v. Kisto-Kamnee, (1868) 10 W. R., 191.

⁸ Bhyroo Itaut v. Deo Narain, Marsh., 608.

⁹ Tilak Chandra v. Fatik Chandra, (1898) 23 Cal., 503.

¹⁰ Manasing v. Amad Kunhi, (1891) 17 Mad., 14.

¹¹ Baisal v. Amra, (1882) 6 Bom., 391; Narasimha v. Appa Rau, (1893) 18 Mad., 324.

¹² Saktharam v. Hari, (1882) 6 Bom., 113.

¹³ Wamanrao v. Rustomji, (1897) 21 Bom., 701.

¹⁴ Jaloomony Dabee v. Hafez, (1882) 8 Cal., 294; Gauri Prasad v. Bely, (1883) 9 Cal., 112.

¹⁵ Mulho Das v. Ramji Patak, (1891) 16 All., 286.

¹⁶ Samlayya v. Gopalakrishnamma, (1872) 13 Mad., 489.

his suit should be dismissed.¹ A plaintiff having failed to establish a *kanom* on which the suit is based should not be allowed to fall back upon some other, as to which the defendant has made admissions.² Relief may be prayed for in the alternative.³ Under certain circumstances, in a suit for exclusive possession, a decree for joint possession may be given, but not unless the plaintiff asks for it and shows that he is entitled to it.⁴ Exclusive possession can only be awarded on proof of exclusive title.⁵ Where a plaintiff has sued for possession on the ground that the defendant was his tenant, he may be given a decree on proving that the defendant is a licensee, and that his possession was permissive.⁶

Rent Possession—If the plaintiff has assessed the rent on certain lands at Re 1-8 per beegah, he should not be awarded Rs 2 by the decree;⁷ and where a person sued to recover land on a lease, defendant pleaded a sale, and the lease was found not to be genuine, but the land was decreed on the ground that, though there had been a sale, it had not been consented to by the proper parties and was invalid; it was held that, as no issue had been raised as regards the sale and the plaintiff rested his claim on other grounds which had failed, the suit should have been dismissed.⁸ In a suit to recover possession of property held under a lease which had expired after the action had been brought, the decree should not be for possession, but should declare that the plaintiff is entitled to possession up to the expiry of the lease.⁹ After the sale of a share in an estate under Act XI of 1859, a suit was brought to establish a mokarari lease, as an incumbrance upon the share in the hands of the purchaser. The lease having been established as to so much only of the lands as were covered by the title proved, the decree below, although no question of apportionment had been raised was conditional that the whole rent reserved should be paid. Held, that this condition should have been omitted, the amount of rent being determinable by a future proceeding, if necessary.¹⁰

Imperfect decrees—A decree holder can receive only what is entered in the decree, and if the terms of the decree are so uncertain that it is impossible to ascertain what has been decreed, evidence cannot afterwards be taken to amend the uncertainty in the decree. The law expressly allows certain matters to be ascertained in execution, and beyond these, it is the duty of the Judge to take care that his decree is so precise that it is capable of execution without leaving it to the Court in execution, to decide what the Judge intended to decree;¹¹ but if, on reference to the record, the defect in the record can be so far met as to render the decree capable of execution, it should be executed,¹² and in execution a decree cannot be altered or varied.¹³

A decree declaring that the defendant has a right of occupancy on payment of a proper rent, without defining the rent, is defective.¹⁴ and so is a decree award-

¹ *Mudhinosoodan v. Hills*, (1868) 10 W. R., 243.

² *Krishna Pillai v. Rangasami Pillai*, (1895) 18 Mad., 462.

³ *Perimal v. Kaveri*, (1893) 16 Mad., 121.

⁴ *Antu Singh v. Mandil Singh*, (1893) 15 All., 412; *Nana v. Appa*, (1896) 20 Bom., 627; *Wahid Alam v. Safat Alam*, (1890) 12 All., 559.

⁵ *Parashram v. Miraji*, (1893) 20 Bom., 569; *Nana v. Appa*, (1895) 20 Bom., 627.

⁶ *Abdul Gham v. Bism*, (1907) 25 All., 256. See note to r. 12 *post*.

⁷ *Ghyrullah v. Kishorenath*, (1866) 5 W. R., Act X, 60.

⁸ *Palaniyandi v. Muttusami*, (1864) 2 Mad. H. C., 411.

⁹ *Umanund Roy v. Sreekishen*, (1867) 7 W. R., 249.

¹⁰ *Imambandi v. Kamleswari*, (1887) 14 Cal., 109; L. R., 13 I. A., 160.

¹¹ *Dwarkanath Halder v. Kamalakanth*, (1869) 3 B. L. R., App., 128; and see *Joytara Dissan v. Mahomed Mobarack*, (1882) 8 Cal., 975.

¹² *Jawalur Mal v. Kistur Chand*, (1891) 13 All., 313; and see "INTERPRETATION," *infra*.

¹³ *Pillai v. Pillai*, (1874) L. R., 2 I. A., 219; *Forester v. Secretary of State*, (1877) L. R., 4 I. A., 137; *Seth v. Murh*, (1877) L. R., 5 I. A., 78; 3 Cal., 602.

¹⁴ *Kaleo Narain v. Chunder Narain*, (1874) 23 W. R., 228.

ing mesne profits at the rate admitted by the defendants, and larger mesne profits contingent on a higher rate being proved in execution;¹ or for possession of a specific quantity of land without defining the boundaries;² although when they are only ineffectively defined, the acts of the parties may be such as to fix them;³ or for exclusive possession of land not in the sole possession of the judgment-debtors, and the shares of the different shareholders have not been defined;⁴ or

in plaint
e plaint;⁵
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The plaint filed for possession of a certain part of mortgaged land up to

that the order so amending the decree was open to revision.⁷

Remedy.—Where the decree is imperfect, and the Judge who pronounced it has left the district, and it is impossible to draw up a decree from the judgment, it seems there is no alternative but to order a new trial.⁸

When void—The decree determines the right between the parties; and in order to determine what it really decides, it is often essential to see what are the rights in dispute between the parties, and what were alleged between them; because if a decree gives rights which are not properly in issue, it is absolutely null and void.⁹

Decree against party deceased during suit.—When a decree has been passed against a deceased party, in ignorance of his death, it has been held by the Allahabad and Bombay High Courts that the decree is a valid decree. But the Calcutta High Court has decided that when a suit is instituted and decree is passed against a person who was dead at the time the suit was instituted, the decree cannot be executed against his legal representatives. But when in an appeal pending before the Privy Council, a widow, one of the defendants died, the appeal was decided and a decree was passed, the plaintiff being left to add necessary parties in the Court below.¹² As to executory proceedings, see s 50

¹ Lotfoollah v. Nuseebun, (1868) 10 W. R., 24.

² Kanga Chandra v. Kanyo Lall, (1879) 4 Cal., 69.

³ Secretary of State v. Darbhoy Singh, (1892) 19 Cal., 312; L. R., 19 I. A., 67.

⁴ Prosunno Coomer v. Adda-suree, (1872) 18 W. R., 43.

⁵ Muhammad Sulaiman v. Muhammad Yar, (1894) 6 All., 30.

⁶ Ram Soondur v. Tarack Chunder, (1873) 10 W. R., 23.

⁷ Hasan Shah v. Sheo Prasad, (1893) 15 All., 121.

⁸ Kishen Dyal v. Abdul Latif, (1873) 10 W. R., 267.

⁹ Robinson v. Duleep Singh, 11 C. D., at p 823; and see Joytara Dassoo Mahomed, (1882) 8 Cal., 975; Omrito Lall v. Hamdun, (1872) 18 W. R., 503.

¹⁰ Chetan Charan v. Balbhadra, (1899) 21 All., 314; Ramacharya v. Anantacharya (1897) 21 Bom., 314; President and Members of Orphan Board v. Va Rreenen, 1 Knapp, P. C., 83, p 90.

¹¹ Girdulro Nath Tagore v. Hurenath Roy, (1869) 10 W. R., 455; 14 B. L. R. 231, note.

¹² Surendro Keshub Roy v. George Swandery, (1892) 19 Cal., 513; L. R., 19 I. A., 108; and Janardhan Krishna v. Ramchandra Vithal, (1892) 26 Bom., 31.

Representative parties—During the pendency of a suit brought by A for immoveable property, A died and his only son was allowed to represent him. It was held that in the decree he should be described as “substituted appellant as representative of his father A”¹

Interpretation—In construing a decree, the terms of which are ambiguous such construction must, if possible, be adopted as will make the decree one in accordance with law, and not a decree such as the Court making it had no power to pass,² but a decree cannot be extended in execution beyond the real meaning of its terms.³ The construction of a decree must be governed by the pleadings and judgment⁴ and not by the plaint.⁵ The pleadings may be looked at,⁶ also the judgment⁷ but not a note of the judgment.⁸

Mortgage—Under the Transfer of Property Act the plaintiff can get a

terms of the judgment-debtor's written statement” incorporates the terms of it.⁹ A decree for “the plaintiff's claim with costs” means the claim as laid in the

¹ *Ran Biji v. Jagatpal*, (1891) 18 Cal., 111. See Rules of Supreme Court, 1833, O. 17, r. 1.

² *Amolak Ram v. Lachon Narain*, (1897) 19 All., 174

³ *Budan v. Ramechandra*, (1887) 11 Bom., 537

⁴ *Robinson v. Dulcep Singh*, 11 C. D., at p. 823; *Lachman Singh v. Mohan*, (1879) 2 All., 497; *Jawahir Mal v. Kistur Chand*, (1891) 13 All., 343; *Sankara v. Kelu*, 14 Mad., 29; *Kali Krishna v. Secretar*, 108, Cal., 108; *L. R.*, 15 I. A., 186; *Shri Ganer*, p. 183; *Beemabai v. Yaminabai*, (1890) 19 Cal., 159; *L. R.*, 18 I. A., 163. 638; (1892)

⁵ *Nubo Kishore v. Anund Mohun*, (1872) 17 W. R., 19; *Muhammad Saluman v. Muhammad Yur*, (1884) 6 All., 30.

⁶ *Lachon Narain v. Jwala Nath*, (1896) 18 All., 311

⁷ *Shivlal Kalidas v. Jumaklal Nathu*, (1894) 18 Bom., 542; *Lakshmi Kantayamm v. Inuganti Rajagopa*, (1897) L. R., 23 I. A., 102.

⁸ *Sumar Ahmed v. Haji Ismail*, (1878) 1 Bom., 153.

⁹ *Raj Singh v. Parmanand*, (1889) 11 All., 486; *Sonatan Shah v. Newaz*, (1889) 16 Cal., 423

¹⁰ *Thamman Singh v. Ganga Ram*, (1879) 2 All., 342; *Harsukh v. Meghraj*, (1879) 2 All., 345; *Janki Prasad v. Baldeo Narain*, (1889) 3 All., 216

¹¹ *Neerunjun v. Oopendro*, (1872) 10 B. L. R., 57.

¹² *Ram Nandan v. Lal Dhar*, (1889) 3 All., 775.

¹³ *Soude Shrinivasapa v. Krishnapa*, (1887) 11 Bom., 177; but see *Thamman Singh v. Ganga Ram*, (1879) 2 All., 342.

¹⁴ *Shah Aleh Ahmed v. Bany Singh*, (1872) 18 W. R., 277

¹⁵ *Rani Lochun v. Munsoor*, (1868) 10 W. R., 96.

¹⁶ *Gopce Kissen v. Brindaban Chunder*, (1873) 19 W. R., 41.

ing mesne profits at the rate admitted by the defendants, and larger mesne profits contingent on a higher rate being proved in execution¹ or for possession of a specific quantity of land without defining the boundaries;² although when they are only ineffectively defined, the acts of the parties may be such as to fix them,³ or for exclusive possession of land not in the sole possession of the judgment-debtors, and the shares of the different shareholders have not been defined;⁴ or

suit and after decree until the satisfaction of the debt held, that it was illegal for the Court to decree the claim for interest by way of amendment of its decree and that the order so amending the decree was open to revision.⁵

Remedy.—Where the decree is imperfect, and the Judge who pronounced it has left the district, and it is impossible to draw up a decree from the judgment, it seems there is no alternative but to order a new trial.⁶

When void.—The decree determines the right between the parties; and in order to determine what it really decides, it is often essential to see what are the rights in dispute between the parties, and what were alleged between them; because if a decree gives rights which are not properly in issue, it is absolutely null and void.⁷

Decree against party deceased during suit—When a decree has been passed against a deceased party, in ignorance of his death, it has been held by the Allahabad and Bombay High Courts that the decree is a valid decree.⁸ But the Calcutta High Court has decided that when a suit is instituted and a decree is passed against a person who was dead at the time the suit was instituted, the decree cannot be executed against his legal representatives.⁹ But when in an appeal pending before the Privy Council, a widow, one of the defendants died, the appeal was decided and a decree was passed, the plaintiff being left to add necessary parties in the Court below.¹⁰ As to execution proceedings, see s. 50

¹ Lotfoollah v. Nuseebun, (1868) 10 W. R., 24.

² Kargal Chundra v. Kanye Lall, (1879) 4 Calo., 69.

³ Secretary of State v. Darbijoy Singh, (1892) 19 Calo., 312; L. R., 19 I. A., 69.

⁴ Prosunno Coomer v. Addressuree, (1872) 18 W. R., 43.

⁵ Muhammad Sulaiman v. Muhammad Yar, (1884) 6 All., 30.

⁶ Ram Soondur v. Taruck Chunder, (1873) 19 W. R., 23.

⁷ Hasan Shah v. Sheo Prasad, (1893) 15 All., 121.

⁸ Kishen Dyal v. Abdool Lutef, (1873) 19 W. R., 267.

⁹ Robinson v. Duleep Singh, 11 C. D., at p. 823; and see Joytara Dassie v. Mahomed, (1882) 8 Calo., 975; Omrito Lall v. Ramdhun, (1872) 18 W. R., 503.

¹⁰ Chetan Charan v. Balhadr, (1899) 21 All., 314; Ramacharya v. Anantscharya, (1897) 21 Bom., 314; President and Members of Orphan Board v. Van Reenen, 1 Knapp, P. C., 83, p. 96.

¹¹ Girendro Nath Tagore v. Hironath Roy, (1863) 10 W. R., 455; 14 B. L. R., 331, note.

¹² Surendro Keshub Roy v. Doorga Soondery, (1892) 19 Calo., 513; L. R., 19 I. A., 168; and Janardhan Krishna v. Ramchandra Vithal, (1902) 26 Bom., 317.

It was held that no separate order under s. 90 of the Transfer of Property Act was necessary before selling the non-mortgaged property.¹

Partition—In a suit for partition, a compromise was filed, agreeing that certain ascertained property should be divided in certain proportions, and certain other property not then ascertained should be divided in the same manner. The Court declared that a decree should pass in the terms of the compromise. *Held*, that it could only be executed against the ascertained property and was merely declaratory in regard to the property unascertained.²

Time—The mention in a decree of a time when a decree becomes enforceable is not a condition, but indicates a term from which limitation runs.³

In a suit for pre-emption, the first Court allowed one month for payment. In appeal filed after the expiry of the period, the decree was confirmed; but no period mentioned. *held*, that the month must be calculated from the date of decree in appeal,⁴ but where in a redemption decree the time was fixed and an appeal was preferred, but withdrawn by permission, time ran as in the decree of the lower Court.⁵

The fact that an appeal had been presented would not enlarge the time for payment of the sum decreed, or prevent the decree from being executed.⁶

Effect of decree—A decree, though not according to law, if not appealed against, is binding.⁷

A decree once made is conclusive between the parties,⁸ and a Court executing it cannot go behind it.⁹

As a rule, a decree is only binding between the parties, principal and *pro forma*,¹⁰ (see note under O XXI r. 100) and their representatives; after decree, representatives cannot open up the original proceeding,¹¹ and it creates an obligation on the parties to execute it.¹² *Held*, a decree is enforceable so long as the decree is not set aside.¹³

O 11, r. 1.

¹ *Amolak Ram v. Lachmi Narain*, (11 under the procedure in s. 53, Act XX,

² *Budan v. Ramchandra*, (1887) 11 Bom.

³ *Robinson v. Duleep Singh*, 11 C. (1879) 2 All. 497, *Jawahir Bankara v. Kulu*, 14 Mad. 20, 109, *Kali Krishna v. Secret. 79* 4 C. L. R., 97.

⁴ L. R., 15 I. A., 186; *Sabri Ganes*

⁵ *Beemabai v. Yamunabai*, (1890)

19 Cal. 159; L. R., 15 I. A., 186; 11 All. 316; but see *Kodai Singh v. Jaisri*,

⁶ *Naba Kishore v. Anand Muhammad Yar*, (15) 15 Bom. 370; *Chudamani v. Ishwargar*, (1892) 16 Bom.

⁷ *Lachmi Narain v. J.*

⁸ *Shivlal Kalidas* (1893) 17 Bom. 547.

⁹ *Iyamm v. Ina Pratapa*, (1895) L. R., 23 I. A., 37; 19 Mad. 249

¹⁰ *Sumar Abma Brajendra Kumar*, (1902) 29 Cal. 810; 6 Cal. W. N. 838

¹¹ *Raj Singh and Singh v. Rameshwar Koor*, (1911) 6 Cal. W. N., 796

¹² *Calc.*, *Chickchutty v. Gobind Chunder Roy*, 1 Shome, 244

¹³ *Thaimma* (1879) anjun v. Munder Koor, (1875) 23 W. R., 127

¹⁴ *Neer v. Raghu*, (1881) 8 Bom. 303; *Tatya v. Balaji*, (1887) 7 Bom., 330

¹⁵ *Raj Chunder Biswas v. Naba Kisser Mookerjee*, W. R., 1864, p. 159

¹⁶ *Sole Munjore v. Rajhi Soondrez*, (1875) 23 W. R., 283; *Nursingh Doss v. Kumrooddeen*, (1873) 21 W. R., 412.

¹⁷ *Lachmianath Singh v. Madho Doss*, (1870) 2 All. H. C., 70

¹⁸ *Asmi Bibee v. Ram Kant*, (1873) 19 W. R., 251; *Akhe Ram v. Nand Kishore*, (1876) 1 All., 238.

It was held that no separate order under s. 90 of the Transfer of Property Act was necessary before selling the non-mortgaged property.¹

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In a suit for pre-emption, the first Court allowed one month for appeal. In appeal filed after the expiry of the period, the decree was confirmed. *Held*, that the month must be calculated from the date of the decree, and for debts was preferred, but withdrawn by permission, time ran as in the first Court.⁴

The fact that an appeal had been presented would not exempt the debtor from payment of the sum decreed, or prevent the decree from being enforced.⁵

Effect of decree—A decree, though not according to law, is binding on the parties.⁶

A decree once made is conclusive between the parties.⁷

As a rule, a decree is only binding on the parties.⁸

form,⁹ (see note under O XXI r. 100) and the Court is not bound by the findings of fact made by the parties.¹⁰

obligation superseding that existing before.¹¹

the decree is not set aside in a suit instituted by the same party.¹²

interest, with interest from the date of the decree.¹³

if the Court is satisfied that the decree is not binding on the parties.¹⁴

the Court is not bound by the findings of fact made by the parties.¹⁵

the Court is not bound by the findings of fact made by the parties.¹⁶

the Court is not bound by the findings of fact made by the parties.¹⁷

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the Court is not bound by the findings of fact made by the parties.²⁰

the Court is not bound by the findings of fact made by the parties.²¹

the Court is not bound by the findings of fact made by the parties.²²

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the Court is not bound by the findings of fact made by the parties.²⁵

in *Bhawani Prasad v Kalla*¹ has been questioned in the Madras High Court.² The question how far sons are bound by a decree against the father must be decided with reference to the particular facts of each case. If the father is manager and the question in issue is one which equally affects him and the other members of the family, and if the suit is properly defended, the adjudication will bind all the persons interested with the father. Sons will still more clearly be bound if being of full age, and knowing of the litigation, they acquiesce in the conduct of it by the father.³ There is no distinction in principle between a mortgage given for an antecedent debt and a mortgage given for a debt then incurred. In either case, the debt is binding on the son and the enforcement of the security exonerates the son from the burden of his father's debt.⁴

Kurta—A decree against the kurta of a family, or the guardian of a minor binds the estate when the charge is one that a prudent owner would make in order to benefit the estate,⁵ and in the case of a guardian, that in addition
 res enactment⁶. So, it has
 a kurta, bound his adult
 a brother as manager of a
 father and himself binds the
 interest of all the members of the family, though they have not been joined as parties to the suit or execution proceedings.⁸ But the manager of an estate is not a guardian to bind a minor by a bond in Bengal,⁹ or in Bombay.¹⁰ Even in Bengal, the manager of a commercial concern can bind the members of his family interested in it.¹¹ But in Madras, they should be made parties to any suit for a trade debt, even if they are sons and the debt has been contracted by their father.¹² But where a decree directed mesne profits to be paid by a person who was manager—the decree did not show he was sued as manager—and two members of the family joined with him were exonerated, the decree did not bind the family.¹³ Where the managing members of a joint Hindu family borrowed money for a family purpose, the creditor is entitled to a decree against the family estate, but not against the survivor of the managing members personally.¹⁴ There is no presumption that a loan contracted by a manager of a joint Hindu

¹ *Bhawani Prasad v Kalla*, (1893) 17 All., 537.

² See *Ramasayyan v Virasami*, (1893) 21 Mad., 222; *Palani Govindan v Rangdyya Goundan*, (1899) 22 Mad., 207.

³ *Kunjai Chetti v Sudda Pillai*, (1899) 22 Mad., 461.

⁴ *Chidambaram v Koothaperumal*, (1864) 27 Mad., 326.

⁵ *Hunooman Persaud v Babooee Munraj Koonwerc*, (1849) 6 Moo I A., 393, *Hutanam v. Govinda*, (1878) 2 Mad., 339; *Hari v. Jairam*, (1890) 14 Bom., 597, *Hari v. Bhubaneswari*, (1889) 16 Cal., 40; L. R., 15 I A., 195.

⁶ *Dabee Dutt v. Subodra*, (1876) 23 W. R., 449, *Chinnaman Singh v. Subram*, (1879) 2 All., 902.

⁷ *Narayan Gop Habbu v. Pandurang*, (1881) 5 Bom., 685; *Salkharam v. Devji*, (1899) 23 Bom., 372.

⁸ *Bhau v. Chundhu*, (1897) 21 Bom., 616.

⁹ *Doorga Persad v. Kesho*, (1881) L. R., 9 I. A., 27.

¹⁰ *Daji v. Dhurajram*, (1888) 12 Bom., 18; compare *Kamaraju v. Secretary of State*, (1888) 11 Mad., 309; *Subramanyayyan v. Subramanyayyan*, (1882) 5 Mad., 125.

¹¹ *Bemola Doss v. Mohun Doss*, (1880) 5 Cal., 792; see also *Johurra Bibee*, (1880) 5 Cal., 792; (1881) 5 Cal., 792; (1882) 5 Cal., 792; (1883) 5 Cal., 792; (1884) 5 Cal., 792; (1885) 5 Cal., 792; (1886) 5 Cal., 792; (1887) 5 Cal., 792; (1888) 5 Cal., 792; (1889) 5 Cal., 792; (1890) 5 Cal., 792; (1891) 5 Cal., 792; (1892) 5 Cal., 792; (1893) 5 Cal., 792; (1894) 5 Cal., 792; (1895) 5 Cal., 792; (1896) 5 Cal., 792; (1897) 5 Cal., 792; (1898) 5 Cal., 792; (1899) 5 Cal., 792; (1900) 5 Cal., 792; (1901) 5 Cal., 792; (1902) 5 Cal., 792; (1903) 5 Cal., 792; (1904) 5 Cal., 792; (1905) 5 Cal., 792; (1906) 5 Cal., 792; (1907) 5 Cal., 792; (1908) 5 Cal., 792; (1909) 5 Cal., 792; (1910) 5 Cal., 792; (1911) 5 Cal., 792; (1912) 5 Cal., 792; (1913) 5 Cal., 792; (1914) 5 Cal., 792; (1915) 5 Cal., 792; (1916) 5 Cal., 792; (1917) 5 Cal., 792; (1918) 5 Cal., 792; (1919) 5 Cal., 792; (1920) 5 Cal., 792; (1921) 5 Cal., 792; (1922) 5 Cal., 792; (1923) 5 Cal., 792; (1924) 5 Cal., 792; (1925) 5 Cal., 792; (1926) 5 Cal., 792; (1927) 5 Cal., 792; (1928) 5 Cal., 792; (1929) 5 Cal., 792; (1930) 5 Cal., 792; (1931) 5 Cal., 792; (1932) 5 Cal., 792; (1933) 5 Cal., 792; (1934) 5 Cal., 792; (1935) 5 Cal., 792; (1936) 5 Cal., 792; (1937) 5 Cal., 792; (1938) 5 Cal., 792; (1939) 5 Cal., 792; (1940) 5 Cal., 792; (1941) 5 Cal., 792; (1942) 5 Cal., 792; (1943) 5 Cal., 792; (1944) 5 Cal., 792; (1945) 5 Cal., 792; (1946) 5 Cal., 792; (1947) 5 Cal., 792; (1948) 5 Cal., 792; (1949) 5 Cal., 792; (1950) 5 Cal., 792; (1951) 5 Cal., 792; (1952) 5 Cal., 792; (1953) 5 Cal., 792; (1954) 5 Cal., 792; (1955) 5 Cal., 792; (1956) 5 Cal., 792; (1957) 5 Cal., 792; (1958) 5 Cal., 792; (1959) 5 Cal., 792; (1960) 5 Cal., 792; (1961) 5 Cal., 792; (1962) 5 Cal., 792; (1963) 5 Cal., 792; (1964) 5 Cal., 792; (1965) 5 Cal., 792; (1966) 5 Cal., 792; (1967) 5 Cal., 792; (1968) 5 Cal., 792; (1969) 5 Cal., 792; (1970) 5 Cal., 792; (1971) 5 Cal., 792; (1972) 5 Cal., 792; (1973) 5 Cal., 792; (1974) 5 Cal., 792; (1975) 5 Cal., 792; (1976) 5 Cal., 792; (1977) 5 Cal., 792; (1978) 5 Cal., 792; (1979) 5 Cal., 792; (1980) 5 Cal., 792; (1981) 5 Cal., 792; (1982) 5 Cal., 792; (1983) 5 Cal., 792; (1984) 5 Cal., 792; (1985) 5 Cal., 792; (1986) 5 Cal., 792; (1987) 5 Cal., 792; (1988) 5 Cal., 792; (1989) 5 Cal., 792; (1990) 5 Cal., 792; (1991) 5 Cal., 792; (1992) 5 Cal., 792; (1993) 5 Cal., 792; (1994) 5 Cal., 792; (1995) 5 Cal., 792; (1996) 5 Cal., 792; (1997) 5 Cal., 792; (1998) 5 Cal., 792; (1999) 5 Cal., 792; (2000) 5 Cal., 792; (2001) 5 Cal., 792; (2002) 5 Cal., 792; (2003) 5 Cal., 792; (2004) 5 Cal., 792; (2005) 5 Cal., 792; (2006) 5 Cal., 792; (2007) 5 Cal., 792; (2008) 5 Cal., 792; (2009) 5 Cal., 792; (2010) 5 Cal., 792; (2011) 5 Cal., 792; (2012) 5 Cal., 792; (2013) 5 Cal., 792; (2014) 5 Cal., 792; (2015) 5 Cal., 792; (2016) 5 Cal., 792; (2017) 5 Cal., 792; (2018) 5 Cal., 792; (2019) 5 Cal., 792; (2020) 5 Cal., 792; (2021) 5 Cal., 792; (2022) 5 Cal., 792; (2023) 5 Cal., 792; (2024) 5 Cal., 792; (2025) 5 Cal., 792; (2026) 5 Cal., 792; (2027) 5 Cal., 792; (2028) 5 Cal., 792; (2029) 5 Cal., 792; (2030) 5 Cal., 792; (2031) 5 Cal., 792; (2032) 5 Cal., 792; (2033) 5 Cal., 792; (2034) 5 Cal., 792; (2035) 5 Cal., 792; (2036) 5 Cal., 792; (2037) 5 Cal., 792; (2038) 5 Cal., 792; (2039) 5 Cal., 792; (2040) 5 Cal., 792; (2041) 5 Cal., 792; (2042) 5 Cal., 792; (2043) 5 Cal., 792; (2044) 5 Cal., 792; (2045) 5 Cal., 792; (2046) 5 Cal., 792; (2047) 5 Cal., 792; (2048) 5 Cal., 792; (2049) 5 Cal., 792; (2050) 5 Cal., 792; (2051) 5 Cal., 792; (2052) 5 Cal., 792; (2053) 5 Cal., 792; (2054) 5 Cal., 792; (2055) 5 Cal., 792; (2056) 5 Cal., 792; (2057) 5 Cal., 792; (2058) 5 Cal., 792; (2059) 5 Cal., 792; (2060) 5 Cal., 792; (2061) 5 Cal., 792; (2062) 5 Cal., 792; (2063) 5 Cal., 792; (2064) 5 Cal., 792; (2065) 5 Cal., 792; (2066) 5 Cal., 792; (2067) 5 Cal., 792; (2068) 5 Cal., 792; (2069) 5 Cal., 792; (2070) 5 Cal., 792; (2071) 5 Cal., 792; (2072) 5 Cal., 792; (2073) 5 Cal., 792; (2074) 5 Cal., 792; (2075) 5 Cal., 792; (2076) 5 Cal., 792; (2077) 5 Cal., 792; (2078) 5 Cal., 792; (2079) 5 Cal., 792; (2080) 5 Cal., 792; (2081) 5 Cal., 792; (2082) 5 Cal., 792; (2083) 5 Cal., 792; (2084) 5 Cal., 792; (2085) 5 Cal., 792; (2086) 5 Cal., 792; (2087) 5 Cal., 792; (2088) 5 Cal., 792; (2089) 5 Cal., 792; (2090) 5 Cal., 792; (2091) 5 Cal., 792; (2092) 5 Cal., 792; (2093) 5 Cal., 792; (2094) 5 Cal., 792; (2095) 5 Cal., 792; (2096) 5 Cal., 792; (2097) 5 Cal., 792; (2098) 5 Cal., 792; (2099) 5 Cal., 792; (2100) 5 Cal., 792; (2101) 5 Cal., 792; (2102) 5 Cal., 792; (2103) 5 Cal., 792; (2104) 5 Cal., 792; (2105) 5 Cal., 792; (2106) 5 Cal., 792; (2107) 5 Cal., 792; (2108) 5 Cal., 792; (2109) 5 Cal., 792; (2110) 5 Cal., 792; (2111) 5 Cal., 792; (2112) 5 Cal., 792; (2113) 5 Cal., 792; (2114) 5 Cal., 792; (2115) 5 Cal., 792; (2116) 5 Cal., 792; (2117) 5 Cal., 792; (2118) 5 Cal., 792; (2119) 5 Cal., 792; (2120) 5 Cal., 792; (2121) 5 Cal., 792; (2122) 5 Cal., 792; (2123) 5 Cal., 792; (2124) 5 Cal., 792; (2125) 5 Cal., 792; (2126) 5 Cal., 792; (2127) 5 Cal., 792; (2128) 5 Cal., 792; (2129) 5 Cal., 792; (2130) 5 Cal., 792; (2131) 5 Cal., 792; (2132) 5 Cal., 792; (2133) 5 Cal., 792; (2134) 5 Cal., 792; (2135) 5 Cal., 792; (2136) 5 Cal., 792; (2137) 5 Cal., 792; (2138) 5 Cal., 792; (2139) 5 Cal., 792; (2140) 5 Cal., 792; (2141) 5 Cal., 792; (2142) 5 Cal., 792; (2143) 5 Cal., 792; (2144) 5 Cal., 792; (2145) 5 Cal., 792; (2146) 5 Cal., 792; (2147) 5 Cal., 792; (2148) 5 Cal., 792; (2149) 5 Cal., 792; (2150) 5 Cal., 792; (2151) 5 Cal., 792; (2152) 5 Cal., 792; (2153) 5 Cal., 792; (2154) 5 Cal., 792; (2155) 5 Cal., 792; (2156) 5 Cal., 792; (2157) 5 Cal., 792; (2158) 5 Cal., 792; (2159) 5 Cal., 792; (2160) 5 Cal., 792; (2161) 5 Cal., 792; (2162) 5 Cal., 792; (2163) 5 Cal., 792; (2164) 5 Cal., 792; (2165) 5 Cal., 792; (2166) 5 Cal., 792; (2167) 5 Cal., 792; (2168) 5 Cal., 792; (2169) 5 Cal., 792; (2170) 5 Cal., 792; (2171) 5 Cal., 792; (2172) 5 Cal., 792; (2173) 5 Cal., 792; (2174) 5 Cal., 792; (2175) 5 Cal., 792; (2176) 5 Cal., 792; (2177) 5 Cal., 792; (2178) 5 Cal., 792; (2179) 5 Cal., 792; (2180) 5 Cal., 792; (2181) 5 Cal., 792; (2182) 5 Cal., 792; (2183) 5 Cal., 792; (2184) 5 Cal., 792; (2185) 5 Cal., 792; (2186) 5 Cal., 792; (2187) 5 Cal., 792; (2188) 5 Cal., 792; (2189) 5 Cal., 792; (2190) 5 Cal., 792; (2191) 5 Cal., 792; (2192) 5 Cal., 792; (2193) 5 Cal., 792; (2194) 5 Cal., 792; (2195) 5 Cal., 792; (2196) 5 Cal., 792; (2197) 5 Cal., 792; (2198) 5 Cal., 792; (2199) 5 Cal., 792; (2200) 5 Cal., 792; (2201) 5 Cal., 792; (2202) 5 Cal., 792; (2203) 5 Cal., 792; (2204) 5 Cal., 792; (2205) 5 Cal., 792; (2206) 5 Cal., 792; (2207) 5 Cal., 792; (2208) 5 Cal., 792; (2209) 5 Cal., 792; (2210) 5 Cal., 792; (2211) 5 Cal., 792; (2212) 5 Cal., 792; (2213) 5 Cal., 792; (2214) 5 Cal., 792; (2215) 5 Cal., 792; (2216) 5 Cal., 792; (2217) 5 Cal., 792; (2218) 5 Cal., 792; (2219) 5 Cal., 792; (2220) 5 Cal., 792; (2221) 5 Cal., 792; (2222) 5 Cal., 792; (2223) 5 Cal., 792; (2224) 5 Cal., 792; (2225) 5 Cal., 792; (2226) 5 Cal., 792; (2227) 5 Cal., 792; (2228) 5 Cal., 792; (2229) 5 Cal., 792; (2230) 5 Cal., 792; (2231) 5 Cal., 792; (2232) 5 Cal., 792; (2233) 5 Cal., 792; (2234) 5 Cal., 792; (2235) 5 Cal., 792; (2236) 5 Cal., 792; (2237) 5 Cal., 792; (2238) 5 Cal., 792; (2239) 5 Cal., 792; (2240) 5 Cal., 792; (2241) 5 Cal., 792; (2242) 5 Cal., 792; (2243) 5 Cal., 792; (2244) 5 Cal., 792; (2245) 5 Cal., 792; (2246) 5 Cal., 792; (2247) 5 Cal., 792; (2248) 5 Cal., 792; (2249) 5 Cal., 792; (2250) 5 Cal., 792; (2251) 5 Cal., 792; (2252) 5 Cal., 792; (2253) 5 Cal., 792; (2254) 5 Cal., 792; (2255) 5 Cal., 792; (2256) 5 Cal., 792; (2257) 5 Cal., 792; (2258) 5 Cal., 792; (2259) 5 Cal., 792; (2260) 5 Cal., 792; (2261) 5 Cal., 792; (2262) 5 Cal., 792; (2263) 5 Cal., 792; (2264) 5 Cal., 792; (2265) 5 Cal., 792; (2266) 5 Cal., 792; (2267) 5 Cal., 792; (2268) 5 Cal., 792; (2269) 5 Cal., 792; (2270) 5 Cal., 792; (2271) 5 Cal., 792; (2272) 5 Cal., 792; (2273) 5 Cal., 792; (2274) 5 Cal., 792; (2275) 5 Cal., 792; (2276) 5 Cal., 792; (2277) 5 Cal., 792; 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family has been contracted for a family purpose¹ The manager of a Hindu family has no power to revive by acknowledgment a debt barred by limitation, except as against himself²

Manager of infant's estate — A *de facto* manager of an infant's estate has in case of necessity or for the benefit of the minor power to sell his property.³ In Bombay it has been held that a minor is not bound by a decree in a suit brought by the manager of his estate, unless by judicial sale rights have been created in innocent third parties and no prejudice is shown to the minor⁴

Karnavan — A *karnavan* represents the *tarwad*, unless he has been guilty of fraud or breach of duty,⁵ but this does not prevent a suit for an injunction to restrain the decree-holder from executing the decree against him⁶ A personal decree obtained against a *karnavan* does not bind *illom* property, even if the debt for which the decree was obtained was contracted for the purposes of the *illom*⁷ But a decree in a suit in which the *karnavan* of a *nambudri illom* or a *marumakkattayam tarwad* is in his representative capacity joined as a defendant and which he honestly defends is binding on the other members of the family not actually made parties⁸

Urakars — A decree against *urakars* is binding on all future representatives of the *devasam*, unless set aside on the ground of fraud⁹

Widow — A Hindu widow will, as defendant, represent and protect her husband's estate as well in respect of her own as of the reversionary interest in any suit, the object of which is to recover or to charge an estate, and a decree against her will bar the reversioners.¹⁰ Thus, when a widow is sued for the debt

Court, and the proceedings show a clear intention on the part of the Court to bind the entire estate, no technical objection will be allowed,¹¹ but if the existence of the minor son is completely ignored, and there is nothing on the face of the proceedings to show she was sued as representing him, he is not bound by the decree.¹² A decree against "Mussanutt Choocharoo Koer, mother and guardian

¹ *Sornu Padmanath v. Narayanrao*, (1894) 18 Bom., 520.

² *Dinkar v. Appaji*, (1896) 20 Bom., 155.

³ *Mohammad Moudul v. Nafis Moudul*, (1899) 25 Cal., 820, 3 Cal. W. N., 770.

⁴ *Kashinath v. Chinmaji*, (1905) 30 Bom., 477.

⁵ *Thienju v. Chinmaji*, (1894) 7 Mad., 413; *Moidin v. Krishnan*, (1887) 10 Mad., 322; *Subramanyam v. Kah*, (1887) 10 Mad., 355; *Subramanyam v. Gopala*, (1887) 10 Mad., 223.

⁶ *Appu v. Raman*, (1891) 14 Mad., 425.

⁷ *Govinda v. Krishnan*, (1892) 15 Mad., 333.

⁸ *Vasudevan v. Sankaran*, (1897) 20 Mal., 129. See also *Manikat Velamma v. Ibrahim Lebbe*, (1904) 27 Mal., 375; and *Amruttam v. Krishna*, (1893) 16 Mad., 405.

⁹ *Keln v. Pandel*, (1886) 9 Mad., 473.

¹⁰ *Nagender Chunder v. Sreemutty Dossee*, (1867) 8 W. R., (P. C.), 17; *Natha Hari v. Janni*, 8 Bom. II C., 37; *Partab Narain v. Trilokinath*, (1883) L. R., 11 I. A., 197.

¹¹ *Ishan Chunder Mitter v. Baksht Ali Soulagur*, *Mirsh*, 614; *Sotish Chunder v. Nil Comm*, (1885) 11 Cal., 45; *Jugal Kishore v. Jotindra Mohan*, (1893) L. R., 11 I. A., 66.

¹² *Hari Saran v. Bhubaneswari*, (1889) 16 Cal., 49; L. R., 15 I. A., 195; compare *Sibbinut v. Venkatakrishnan*, (1889) 11 Mad., 405.

¹³ *Hari Saran v. Bhubaneswari*, (1889) 16 Cal., 49; L. R., 15 I. A., 195; *Hari v. Narayan*, (1888) 12 Bom., 427; *Kunhammal v. Kutti*, (1889) 12 Mad., 94.

¹⁴ *Akoba v. Sikkirim*, (1885) 9 Pom., 429; and see *Durga Persad v. Kesho Pershad*, (1881) L. R., 9 I. A., 27.

Charging estate—And, on the same principle, if a widow raises more money than she should, the estate cannot be destroyed under the decree¹ and the reversioners must get possession on paying the amount she could have raised with interest² though in such a case the alienation or charge was a good charge³ and as to the form of decree where the charge is only good in part, see *Rajaram Tewari v. Lachman Prasad*⁴. The case of *Collector Mushipatam v. Cavalry Venkata Narainpiah*,⁵ deserves particular mention. In it, a decree was obtained against a widow for debts binding the estate; the decree charged the estate, and directed a sale. Subsequently, for the purpose of preventing the sale for the time, she mortgaged the property until the principal and interest should be paid to the mortgagee, the compromise was recorded and execution suspended, but owing to an order of Court the mortgagee never got possession. It was held apparently on the ground that the compromise effected a novation, that the creditor had only a lien on the estate for the amount of the mortgage. A widow like a manager must be allowed a reasonable latitude in the exercise of her powers.⁶ She is entitled to mortgage her husband's estate for the payment of his debts. She is not bound to discharge them out of income.⁷

Court of Wards—*Quere*, if sale under a decree for a debt incurred by a widow ward, with sanction of the Court, binds the reversioner.⁸

Muhammadan—See note under s 52 p. 219. Where a suit was brought against "Khatu, deceased, represented by her minor son, represented by his guardian," and decree obtained for the debt of Khatu, it was held that a sale of her property in execution passed a good title to the whole to the purchaser, although there was another heir, and the latter could not impeach the sale unless on the ground that the debt was not due.⁹

Consent decree—A decree by consent against one heir of a deceased Muhammadan debtor cannot bind the other heirs.¹⁰

Money-decree—It is not unusual for a mortgagee or pledgee to waive his right to follow the property and sue for a simple money-decree;¹¹ unless he has deprived himself of the power by the original contract.¹² The effect of such appear that the lien is lost; it only decree be executed as a mortgage- be enforced in a separate action.¹⁴ the Code is not quite clear. See

note O II, r. 2, and the Transfer of Property Act, 1882, s 99.

¹ *Rajah Jha v. Parbatty Ojhain*, W. R. 1864, p. 140.

² *Phool Chun v. Rughoobans* (1868) 9 W. R., 103; *Sadashiv v. Dhakubai*, 5 Bom., 450.

³ *Muteeram Kavar v. Gopal Sahoo*, (1873) 20 W. R., 187.

⁴ *Rajaram Tewari v. Lachman Prasad*, (1869) 4 B. L. R., (A.C.), 118.

⁵ *Collector of Musnipatam v. Cavalry Venkata Narainpiah*, (1863) 8 Moo. I. A., 529.

⁶ *Venkaj, Shrothar v. Frohar Babji*, (1892) 19 Bom., 524.

⁷ *Ramasami v. Mangakarasu*, (1895) 18 Mad., 113.

⁸ *Debendro Narain v. Coomar Chundernath*, (1873) 20 W. R., 30; but see *Sarabjit v. Chapman*, (1885) L. R., 13 I. A., 44, p. 47; *Balkrishna t. Masuma*, (1883) 5 All., 142.

⁹ *Khurshetbibi v. Keso*, (1888) 12 Bom., 101. See also *Jafri Begam v. Amir Muhammad*, (1885) 7 All., 822; *Bursunterram v. Kamaluddin*, (1885) 11 Calc., 421; *Lutchmut v. Land Mortgage Bank*, (1837) 14 Calc., 464.

¹⁰ *Assamathem Nessa v. Lutchmeeput Singh*, (1879) 4 Calc., 142.

¹¹ *Fukeer Buksh v. Chutturdharee*, (1870) 14 W. R., 209.

¹² *Webb v. Rinehuden*, (1870) 14 W. R., 214.

¹³ *Gouree Singh v. Fazl Hossein*, (1871) 15 W. R., 313; *Radha Coomar v. Luchmee Chund*, (1863) 3 W. R., 118, 16.

¹⁴ *Gopinath Sing v. Sheo Sabay*, (1863) B. L. R., (F. B.), 72; *Bir Chunder v.*

As to the difference between a money-decree and a decree declaring a lien, see *Harsukh v Meghraj*,¹ A declaration that plaintiff is entitled to obtain possession on payment of a certain sum is a money-decree in regard to that sum.²

Registration.—S 17 of the Registration Act does not apply to judicial proceedings, whether pleadings of parties or orders of Court.³

Decree as evidence.—A decree, though not decisive of the matter in dispute, is admissible in evidence between the same parties;⁴ and even when not between the same parties, to show the nature of the title of the person who is in possession of the disputed property.⁵

7. The decree shall bear date the day on which the judgment was pronounced, and, when the Judge has satisfied himself that the decree has been drawn up in accordance with the judgment, he shall sign the decree.

Date of decree

Act XIV of 1882, s. 205

This rule applies to Prov S. C. C., but not to the Chartered High Courts in the exercise of their Original Civil Jurisdiction—O XLIX, r 3

See notes to s 2. "DECREE" and "DECREES" pp 7, 9

Date of decree.—The decree must bear the date on which judgment is delivered and not the date on which it is drawn up.⁶ The date of the decree does not mean the date on which the decree is reduced to writing and signed by the Court, but the date on which the Court delivers its judgment and expresses what the decree is.⁷

Redemption.—Where a decree for redemption declared that the improvements of the mortgagee should, when determined in execution be deducted, the date of the decree was held to be the date on which this was done.⁸

Limitation.—Limitation runs from the date the decree bears *ie*, the date of the judgment.⁹ A suitor is entitled, in computing the period within which he can appeal to deduct the time between the delivery of the judgment and the actual signing of the decree.¹⁰ Not so in Allahabad and Bombay.¹¹

Mahomed Afsarooddeen, (1884) 10 Cile 299; Soobuns Singh v. Ishur Dutt, (1874) 21 W. R., 150; Malitab Chand v. Hurdco Narain, (1871) 16 W. R., 119; Jonmejy Mullick v. Dossmoney Dossce, (1881) 7 Cal., 714, for sale or foreclosure only.

¹ *Harsukh v Meghraj*, (1879) 2 All., 315; *Debi Churn v. Pirbhu Din Ram*, 3 (1880) All., 348; and *Janki Prasad v. Baldeo*, (1880) 3 All., 216

² *Ramanagta Sing v. Ramyad*, (1879) 5 C. L. R., 176.

³ *Bundeeri Naik v. Ganga Saran Salu*, (1893) 20 All., 171; L. R., 25 I. A., 9

⁴ *Ran Bahadur v. Luchu Koer*, (1891) L. R., 19 I. A., 23; 11 Cal., 301.

⁵ *Rameshwar Pershad v. Koonj Behari*, (1878) L. R., 6 I. A., 33; 4 Cal., 633; *Hira Lal v. Hilds*, (1882) 11 C. L. R., 523.

⁶ *Ramey v. Broughton*, (1894) 10 Cal., 652; *Bani Madhub v. Matungum*, (1886) 13 Cal., 101

⁷ *Brenhild v. British India Steam Navigation Co.*, (1891) 7 Cal., 547, p. 551.

⁸ *Krishnan v. Nihilandin*, (1885) 8 Mad., 137. See "DATE OF JUDGMENT" O. XX, r. 3

⁹ *Golam Gaffar v. Golam*, (1893) 25 Cal., 109; *Afzul Hossain v. Umda*, (1896) 1 Cal. W. N., 93

¹⁰ *Bani Madhub v. Matungum*, (1886) 13 Cal., 101

¹¹ *Berhi v. Ahtamillah*, (1890) 12 All., 461; *Yamaji v. Antaji*, (1890) 23 Bom., 442

8 Where a Judge has vacated office after pronouncing judgment but without signing the decree, a decree drawn up in accordance with such judgment may be signed by his successor or, if the Court has ceased to exist, by the Judge of any Court to which such Court was subordinate.

Procedure where Judge has vacated office before signing decree
This is a new rule and applies to Prov. S. C. C. but not to the Chartered High Courts on their original side—O XLIX. It settles a point of procedure which was occasionally disputed under the former Code.

9. Where the subject-matter of the suit is immoveable property, the decree shall contain a description of such property sufficient to identify the same, and where such property can be identified by boundaries or by numbers in a record of settlement or survey, the decree shall specify such boundaries or numbers.

Decree for recovery of immoveable property
Act XIV of 1882, s. 207

This rule applies to H. C.

The decree should on the face of it, shew distinctly and accurately the property affected by it; ¹ it should specify boundaries.² So, a decree for 7 khadas, 14 pakees, 12 kanees of land, out of a larger plot, or for 6 kanees without boundaries, cannot be executed.³

Effect of decrees for immoveable property.—A party having obtained a decree for possession cannot bring a second action against the defendant for the same property, unless upon a cause of action that has arisen after execution; he must execute his decree.⁴ See "EFFECT OF DECREE," O. XX r 6 *ante*. But a second suit will lie for possession against the defendant, if the plaintiff has obtained formal possession under the first decree.⁵

A decree for possession of land carries with it possession of the village account books and other papers relating to the management of the land,⁶ and the buildings erected on it,⁷ unless they have been erected by the person in possession, and he is not a mere trespasser, but is in possession under any *bona fide* title or claim of title, when he is entitled either to remove the materials, restoring the land into the state it was in before the improvement was made, or to obtain compensation for the value of the building, fit to sell, and to remove the same.⁸

¹ *Sristeedhur Bhuttacharjee v. Kallee Doss*, (1875) 24 W. R., 479.

² *Mahomed Ismail v. Lalls Dhandur*, (1876) 25 W. R., 39.

³ *Darbaree Sany v. Palu Dhalee*, (1875) 23 W. R., 285; *Dwarkanath Roy v. Jannobee Chowdhram*, (1873) 19 W. R., 81.

⁴ *Nursingli Doss v. KumroodJeen*, (1873) 20 W. R., 412.

⁵ *Shama Charan v. Madhub Chandra*, (1885) 11 Cal., 93; *Joggobundhu v. Purnanund*, (1889) 16 Cal., 530.

⁶ *Shri Bhavani v. Devrao*, (1887) 11 Bom., 485.

⁷ *Ramdhone v. Ishanee*, (1885) 2 W. R., 123.

⁸ *Thakoor Chunder Paramanek, in re*, (1867) B. L. R., F. B., 595.

⁹ *Juggut Mohinee v. Dwarka Nath*, (1882) 8 Cal., 582.

and caution Where the reversioners of a Hindu widow sued a person claiming under her by purchase, it was held that defendant could not claim the bindings, as it was the first duty of a purchaser from a Hindow widow, or a purchaser from

10. Where the suit is for moveable property, and the decree is for the delivery of such property, the decree shall also state the amount of money to be paid as an alternative if delivery cannot be had.

Decree for delivery of moveable property

Act XIV of 1882 s. 208.

This rule applies to H. C. and Prov S C C.

In a suit for partition of moveables, defendant objected to the accuracy of the list of moveables filed by the plaintiff, and the Judge, without determining whether the list was correct or not, decreed the claim, and declared the objections regarding any articles would be heard in execution of decree. It was held that he should have framed an issue and decided the question before he gave a decree.¹

The payment of money is only an alternative form of relief, and should not be enforced unless delivery cannot be had under the decree.⁴ An alternative prayer for value of goods as compensation does not alter the character of the suit.⁶ The amount to be paid is generally the value of the property, *plus* damages, for the time the plaintiff has been kept out of it.⁶

11. (1) Where and in so far as a decree is for the payment of money, the Court may for any sufficient reason at the time of passing the decree order that payment of the amount decreed shall be postponed or shall be made by instalments, with or without interest, notwithstanding anything contained in the contract under which the money is payable.

(2) After the passing of any such decree the Court may, on the application of the judgment-debtor and with the consent of the decree-holder, order that payment of the amount decreed shall be postponed or shall be made by instalments on such terms as to the payment of interest, the attachment of the property of the judgment-debtor, or the taking of security from him, or otherwise, as it thinks fit.

Order, after decree, for payment by instalments.

Act XIV of 1882, s. 210.

This rule applies to H. C. and Prov S. C. C.

¹ Ramdhone v. Ishanee, (1865) 2 W. R., 123.

² Ram Lochun v. Munsoor Ali, (1868) 10 W. R., 96; and see Radha Kristo v. Bama Soondurco, (1870) 13 W. R., 9.

³ Bheo Golind v. Sham Narain, (1875) 7 All. H. C., 75.

⁴ Kashco Nath Koor v. Deb Kristo Ramanooj, (1871) 16 W. R., 240.

⁵ Murugesu v. Jotharam, (1879) 22 Mad., 478.

⁶ Bombay Trading Corpn. v. Mirzah Mahomed, (1873) 19 W. R., 123; Kashco Nath v. Deb Kristo Ramanooj, (1871) 16 W. R., 240.

Decrees for the payment of money—This section applies to cases referred to in s 38, Act VIII of 1839¹. It does not refer to a suit for the recovery of a bond debt by sale of the immoveable property pledged,² or to a suit to enforce a lien on an annuity called *nizakat*.³ This rule confers no authority on the Courts to relieve a contracting party from an express stipulation, in a bond payable by instalments, as to the consequence of default in punctual payment of the instalments.⁴

The Court—That is to say, the Court which passed the decree.⁵ An order under s 15 B of the Dekhan Agriculturists' Relief Act, that the amount payable by a mortgagor shall be payable by instalments can only be made in "the course of proceedings under the decree," i.e., by the Court which carries out the decree.⁶

Instalments—A Court cannot order that the amount of a decree shall not be paid until the expiration of a fixed time from its date provision.⁷

Sufficient reason—When a Court on the ground that the defendant was hard pressed, directed the amount of a decree to be paid by instalments extending over ten years, and allowed only one half of the usual rate of interest, held that there was no "sufficient reason" within the meaning of this provision.⁸

After decree—After decree, no declaration to pay in instalments can be made unless by consent, and where a judgment-debtor on security obtained an *ex parte* order modifying a decree and enabling him to pay in instalments without the decree-holder's consent, it was held that the order did not fall under this section.⁹

Consent—When an agreement for payment by instalments has been entered into and acted upon it is binding although no formal order is passed.¹⁰

A *kistbundi* or arrangement to pay by instalments the amount of a decree obtained upon a bond, does not effect an extinction of the original debt or the mortgagee's lien upon property mortgaged to him by the bond.¹¹

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has not been altered the parties have entered into a private *kistbundi*, and payments have been made under it. The rule in such cases seems to be that such payments are payments under the decree unless it is clear that it was the intention of the parties that the decree should be satisfied by the *kistbundi*.¹²

¹ Gureebullah Sirkar v. Mohun Lall, (1881) 7 Calc., 127; 8 C. L. R., 409.

² Hardeo Dass v. Hukam Singh, (1879) 2 All., 320; Shankarappa v. Danapa, 5 Bom., 604; Mahadaji v. Har, (1883) 7 Bom., 332.

³ Bachchu v. Madad Ali, (1899) 2 All., 649.

⁴ Ragho Govind v. Dipchand, (1880) 4 Bom., 96.

⁵ Gandharap v. Sheodarslan, (1890) 12 All., 571.

⁶ Bhagirathbhai v. Hari Ravji Chiplunkar, (1895) 19 Bom., 318.

⁷ Bachchu v. Madad Ali, (1879) 2 All., 649. See however, Tata Charlu v. Konadala, (1884) 7 Mad., 152. As to the interpretation of "instalment," see the cases of Chunder Komul Das v. Bisassuree, (1883) 13 C. L. R., 243:

⁸ Bindu Prasad v. Madho Prasad, (1879) 2 All., 129.

⁹ Chandan v. Tirkha, (1880) 3 All., 809.

¹⁰ Keder Nath v. Kulmar, (1907) 5 Calc. L. J., 25.

¹¹ Ram Churn v. Koondun, (1874) 14 B. L. R., 423, note; 11 W. R., 481.

¹² Surju Prasad v. Bhawani Sahai, (1879) 2 All., 431.

¹³ Bishto Chander v. Woomanath Roy, (1871) 15 W. R., 459; Bhoobunessures Debta v. Dinonath, (1869) 11 W. R., 232.

Substantial compliance with section—The debtor petitioned that he had come to an arrangement to pay by instalments and had got two months' time to pay. The order was set off, held, an order for time to pay in the order was made for fifteen days to pay. The order was considered to be an order to pay in fifteen days.¹

Waiver.—As to waiver of right to realise the whole amount of decree, on default in payment of an instalment, see *Bir Narain v Darpa Narain*,⁴ Receipt by a plaintiff of overdue instalments is no waiver of a right to execute a decree.⁵ The waiver contemplated must be either an agreement between the parties or such conduct as will afford clear evidence of a legal waiver.⁶ A judgment-debtor under an instalment decree remitted the amount payable on account of one instalment by money-order. The decree-holder payee did not accept the money, but two previous instalments had similarly been paid without objection. Held, that as the decree-holder by not refusing the money order at once had prevented the judgment-debtor from paying the instalment in time, he could not be allowed to execute the whole decree.⁷

Limitation—See art 175, Schedule II, Act XV of 1877. Where a decree awards payment by instalments, to be made at particular specified dates, the date when each instalment becomes due is to be deemed the date of the decree in respect of that instalment for the purpose of calculating the time within which execution may be issued to enforce payment of it,⁸ and this seems to be also the rule in case of a decree creating a periodically recurring right.⁹ A decree directing payment by instalments can be executed to the extent of the instalments not barred by limitation. Since the command of the Judge prescribes a term for the performance of the different parts of the order, it is to be construed as becoming a judgment for the purposes of limitation as to each instalment only on the date when the payment is made,¹⁰ but where a decree makes a sum payable by instalments on certain dates and provides that on default of payment of one of the instalments the whole money shall become due and payable and recoverable in execution, limitation runs from the first default;¹¹ but if the right to enforce the whole sum is waived, the parties are remitted to the same position as if no default had occurred.¹² When a decree for money

¹ *Jhota v. Bhubun*, (1883) 11 Cal., 143, but see *Abdul Rahaman v. Dullaram*, (1887) 14 Cal., 348.

² *Tata Charla v. Konadala*, (1884) 7 Mad., 153.

³ *Jogobundhoo v. Hari Rawoot*, (1899) 16 Cal., 16.

⁴ *Bir Narain v. Darpa Narain*, 20 Cal., 74; *Nulamadhab v. Ransoday*, (1883) 9 Cal., 837.

⁵ *Balaji Ganesh v. Sakharan Paresram*, (1893) 17 Bom., 555.

⁶ *Kankuchand v. Bustomji*, (1896) 20 Bom., 100.

⁷ *Kishan Prasad v. Beni Ram*, (1902) 24 All., 85.

⁸ *Utamiar v. Girdhari Lal*, (1869) 6 Bom. H. C., A. C., 45; *Ram Sudo v. Rajmalnath*, (1871) 15 W. R., 547; *Timcourse v. Umbika Churn*, (1875) 23 W. R., 41; *Panachand v. Bhivraj*, (1869) 6 Bom. A. C., 39.

⁹ *Lakshmi Bai v. Madhavray Bapuji*, (1848) 12 Bom., 63; *Kuppuammal v. Saminatha*, (1895) 18 Mad., 482; but see *contra*, *Yusuf Khan v. Sirdar Khan*, (1881) 7 Mad., 83; *Sabha Natha v. Subba Lakshmi*, (1884) 7 Mad., 80.

¹⁰ *Sikharam v. Ganesh*, (1879) 3 Bom., 107; *Kanchan Singh v. Sheo Prasad*, (1879) 2 All., 291; *Lakshminath v. Madhavray*, (1848) 12 Bom., 65.

¹¹ *Hurri Pershad v. Nasib Singh*, (1891) 24 Cal., 512; *Sitalchand v. Hyder Mulla*, (1897) 24 Cal., 231; 1 Cal. W. N., 229; *Shib Dutt v. Kalka Prasad*, (1879) 2 All., 443; *Judhistur v. Naban Chandra*, (1896) 13 Cal., 73.

¹² *Mon Mohan v. Durga Churn*, (1898) 15 Cal., 507; *Bardhaman Lal v. Bekkhab*, (1880) 11 All., 482; *Karakavala v. Karanam*, (1878) 3 Mad., 256; *contra*, *Dulock v. Chugon*, (1879) 2 Bom., 356.

is made payable by instalments with a proviso to the effect that on default being made in payment of the instalments, the decree-holder is entitled to execute the decree for the whole amount due, such a decree is to be construed as much as possible in favour of the decree-holder and unless the decree clearly leaves the decree-holder no option on the happening of the default, but to execute the decree once and for all for the whole amount due under it, the decree-holder may execute on the happening of the first, second or any default, and limitation will run against him in respect of each instalment separately from the time when such instalment may become due.¹ The right to bring a suit on a promissory note payable by instalments, accrues on the date of first default and limitation runs from that date.²

Can limitation be modified by consent?—In the case of *Kristo Kamul Singh v. Huree Sirdar*,³ Peacock, C. J., delivering the opinion of the majority of the Judges, said "It appears to me that a Court of execution has no power to alter a decree of the Court which decreed, and that parties cannot alter the law."

opinion, not necessary for the decision of the case, that a decree could not be varied by consent of parties; and it is now clear that parties cannot by agreement avoid the effect of the Statute of Limitation;⁴ but an action for damages will lie for breach of an agreement not to take advantage of the Statute.⁵

Limitation for application to pay in instalments by consent.—Six months from date of decree.⁶

Interest—Instalments should, as a rule, carry interest, but if such be the intention, it should be expressly declared, otherwise it cannot be allowed in

he was estopped from objecting that the Court in a subsequent execution could not go beyond the decree and award interest at the higher rate.⁷

In decreeing instalments, the Court is not bound to direct that they shall carry the stipulated rate of interest.⁸

Usual interest—If the amount of interest is not specified, the usual Court rate at the date of decree is allowed.¹⁰

¹ *Shankar Prasad v. Jalpa Prasad*, (1891) 16 All., 371. See also *Ram Culpoo v. Ram Chunder*, (1887) 14 Cal., 332.

² *Gumna v. Bhiku*, (1876) 1 Bom., 125.

³ *Kristo Komul Singh v. Huree Sirdar*, (1870) 13 W. R., F. B., 41; 4 B. L. R., F. B., 101.

⁴ *Stowell v. Billings*, (1876) 1 All., 350; see also *Meheroonissa v. Rowshan*, (1872) 17 W. R., 396; *Kristo Komul v. Huree Sirdar*, (1870) 13 W. R., (F. B.), 41; *Heera Lall v. Dhanput Singh*, (1875) 24 W. R., 283.

⁵ *East India Company v. Odit Churn Paul*, (1849) 5 Moo. I. A., 43.

⁶ *Abdul Rahaman v. Dullaram*, (1887) 14 Cal., 318.

⁷ *Surno Moyee v. Kishen Coomaree*, (1870) 14 W. R., 321.

⁸ *Sheo Golam Lall v. Bani Prasad*, (1879) 4 C. L. R., 29; but see *Guthrie v. Lister*, (1866) 11 Moo. I. A., 129; 6 W. R., P. C., 59.

⁹ *Carvalho v. Nurbibi*, (1879) 3 Bom., 202.

¹⁰ *Madhub Lall v. Noyan*, (1880) 6 C. L. R., 231.

is made payable by the proceedings had been taken for his own benefit and with-
made in payment of the plaintiff's

decree for the plaintiff's
possible in fact. — Mesne profits may be allowed on partition when one member
decree has been entirely excluded from the enjoyment of the property, or
decree has been held by a member who claimed to treat it as impartible and
made over exclusively his own.²

when such a decree is made — S. 11 of the Court fees Act contemplates a claim for mesne
profits which an amount can be and has been claimed in the plaint and in
mesne profits which some fee has been actually paid. Where plaintiff claimed
to the property with mesne profits from date of suit to obtaining posses-
decree directed that they should be determined in execution, it was

held that a Court-fee was necessary on the amount awarded.³ When upon the
Court-fee on the decree-holder, the Court executing the decree has assessed the
of mesne profits, but the necessary Court fees have not been deposited

within the time fixed by the Court, the suit, that is, the claim in respect of those
mesne profits, must be dismissed after such dismissal no application for the
execution of the decree for mesne profits can be entertained, as no such decree
is in existence.⁴ A suit upon one and the same cause of action for possession
of immoveable property and for mesne profits or damages for the wrongful
retention of such property is not a suit embracing two or more distinct subjects
within the meaning of s. 17 of the Court Fees Act.⁵

Form of decree — See *Kali Krishna v. Secretary of State*⁶

Interpretation of decree — Where a decree is silent as regards mesne
profits subsequent to the filing of the suit, they cannot be given in execution,⁷
when the decree merely declares the plaintiff's right to mesne profits,⁸ but a
parate suit will lie, even if they were asked for in the plaint.⁹ Thus, if the
decree only gives mesne profits up to the institution of the suit, the plaintiff
cannot get them for any subsequent period in execution;¹⁰ but in another case

¹ Abdul Wahid v. Shaluka, (1894) 21 Calc., 496; L. R., 21 I. A., 26.

² Bhurav v. Sitaram, (1893) 19 Bom., 532. See also Appa Rao v. Court of
Wards, (1882) 5 Mad., 236, L. R., 9 I. A., 125.

³ Ram Krishna v. Dhimabhai, (1891) 15 Bom., 416. As to the fees in a case for
possession and mesne profits — see Mohini Mohan v. Satis Chandra, (1899) 17
Calc., 704.

⁴ Kewal Kishan v. Sookhari, (1897) 24 Calc., 173; 1 Calc. W. N., 243.

⁵ Reference under Court Fees Act, (1893) 16 All., 401.

⁶ Kali Krishna v. Secretary of State, (1889) 16 Calc., 173, p. 183; L. R., 15
I. A., 186.

⁷ Sadasiva Pillai v. Ramalinga, (1875) 24 W. R., 193; L. R., 2 I. A., 219;
Fakharuddin Mahomed v. Official Trustee, (1890) L. R., 8 I. A., 197; 8 Calc.,
178; Wise v. Rajendur Coomar, (1869) 11 W. R., 200; Eckowri v. Bijoy
Nath, (1870) 12 W. R., 111; Raesoonissa v. Sharoda
id v. Zameer Ahmed, (1872) 13
19 W. R., 154; Bhoobunes-
Rai, (1885)
Coomar v.
Ram, (1894)
n, (1901) 6

Calc. W. N., 612.

⁸ Vinayak v. Abaji, (1888) 12 Bom., 416; but see Kalee Nath Doss v. Rajah
Meah, (1874) 22 W. R., 406.

in which the decree did not specify the amount or the period, it was held that everything was left to be settled in execution, and plaintiff was entitled to mesne profits within the period of limitation.¹ But where the Privy Council made an order in favour of a plaintiff, decreeing possession of certain property with mesne profits, it was held that the decree authorised the Courts to consider and deal with the question of mesne profits as fully as a Court could, which was charged with the duty of originally determining the merits of such a question between the parties to the suit.² The terms of the decree as to the period during which mesne profits are to be allowed must be strictly adhered to.³

Up to possession.—A decree for possession and wasilat from the date of suit, without specifying the period for which the calculation should be made, means up to possession being delivered.⁴

Determination of mesne profits: continuation of suit.—The determination of mesne profits under this rule is an essential part of the decree, and as such must be made by the Court trying the case; it cannot be left to another Court, *e.g.*, the Court that will execute the decree;⁵ nor can the duty be deputed to an Ameen.⁶ It is in short a continuation of the suit between the parties and no final decree exists to appeal from, until it is closed.⁷ Where a decree awards mesne profits to be subsequently assessed an application for the assessment of such mesne profits is not an application for execution of the decree, which does not become an "operative decree" until such assessment is completed, but is an application in the suit in which the decree is made.⁸ A Munsif can ascertain and award mesne profits, even though they are in excess of the pecuniary jurisdiction of the Court.⁹

Interest.—In the ascertainment of mesne profits, a decree-holder is entitled to receive interest year by year on the amount found to be due and not only on the amount actually ascertained and embodied in the decree.¹⁰

Effect of the declaration.—A decree declaring the liability for mesne profits but not determining the amount, if worked out after the death of a defendant, does not bind the heirs not parties.¹¹

Limitation.—The enquiry is not affected by any period of limitation,¹² but if either party, upon being duly summoned to appear and prosecute the proceedings fails to do so, the Court should either dismiss them for default and not resume them again,¹³ or decree them *ex parte*.¹⁴ The period of three years

¹ Hareebur Mookerjee v. Abdoolbar, (1872) 17 W. R., 209.

² Budlan v. Farloor Rahman, (1875) 23 W. R., 449.

³ Ram Lochan v. Munsoor Ali, (1869) 11 W. R., 336; Ram Manickya v. Juggunnath, (1890) 5 Cal., 563.

⁴ Fakharuddin Mahomed v. Official Trustee, (1880) L. R., 8 I. A., 197; 8 Cal., 178; Bunsce Singh v. Nuzul Ali, (1874) 22 W. R., 328; Bajar Bahadur v. Bhup Indar, (1897) 19 All., 296; Dhurm Narain v. Bundhoo, (1869) 12 W. R., 75.

⁵ Mher Jan v. Gierda, (1876) 25 W. R., 270.

⁶ Indurjeet Singh v. Radhey, (1874) 21 W. R., 269.

⁷ Dikdar v. Mujeedunnissa, (1879) 4 Cal., 629; Krishnan v. Nilakandan, (1885) 8 Mad., 137; Anando v. Anando, (1887) 14 Cal., 50; Radha Prasad v. Lal Bahad, (1891) 13 All., 53, p. 65; L. R., 17 I. A., 150.

⁸ Muhammad Umar Jan v. Zinat, (1903) 25 All., 385.

⁹ Ramswar Mahton v. Dilu Mahton, (1894) 21 Cal., 559.

¹⁰ Radha Raman v. Burnamoy Deb, (1902) 7 Cal. W. N., 437.

¹¹ Radha Prasad v. Shah, (1891) 13 All., 53, p. 65; L. R., 17 I. A., 150.

¹² Purn Chand v. Radha Kishan, (1892) 19 Cal., 132; Prayag Singh v. Raja Singh, (1894) 25 Cal., 207; Wahya Bibi v. Nazar Hassan, (1904) 26 All., 623.

¹³ Fuzelun v. Keramat Hossain, (1874) 21 W. R., 212.

¹⁴ Panchann Bosa v. Oomannath Row, 1870, 11 W. R., 200.

fixed under art. 109 of sch II of the Limitation Act has no reference to the period when rents fall due.¹

Practice—The defendant should not be called upon to answer until the plaintiff has started his case by giving *prima facie* evidence of the damage he has sustained by loss of mesne profits; he must fix the liability of the defendant and the amount he is liable for.² Once the liability of a party is fixed in the appellate Court, the lower Court must confine its enquiry to assessing the amount of damages.³

New suit barred—The plaintiff is bound to put forward his whole claim for mesne profits before suit. Thus, where plaintiff who had sued for possession and mesne profits from the date of institution till he should get possession, and, obtaining a decree, subsequently sued for mesne profits before institution, the suit was dismissed.⁴ A sued for possession of property and obtained a decree. He made no claim for mesne profits; *held*, a subsequent suit for mesne profits prior to the first suit would not lie.⁵ When a claim for mesne profits prior to the institution of the suit has been made, but the decree is silent, a separate suit for the same is barred,⁶ but when the plaintiff's claim has accrued since the decree in the former suit, it is not *res judicata* and is not barred.⁷ Plaintiff claimed possession of land with mesne profits from date of dis-possession to the date of recovery of possession and obtained a decree for possession with mesne profits up to date of suit; *held*, a second suit would lie for the subsequent mesne profits.⁸ When a decree for partition is silent about mesne profits subsequent to the institution of the suit, a party is at liberty to assert his right to mesne profits by a separate suit.⁹ The mere omission of the Court to adjudicate upon the claim for mesne profits accruing due after the institution of the suit does not operate as a bar to a subsequent suit for such mesne profits.¹⁰

Enquiry into the amount.—For form of decree under this rule, see *Jagatjit v. Sarabjit*.¹¹ The direction as to the enquiry into the amount of mesne profits need not necessarily be contained in the decree.¹²

Ear-marking.—It is very doubtful if a Court of equity would ear-mark the profits of a trespasser invested in real property and follow them.¹³

Amount allowed.—A decree for a larger amount of wasilat than has been estimated for, or covered by the plaint, may be given in some cases: the amount demanded is merely an approximation;¹⁴ but the decree cannot be

¹ *Abbas v. Fasihuddin*, (1897) 24 Cal., 413.

² *Indurjeet Singh v. Radhey Singh*, (1874) 21 W. R., 269.

³ *Dwarka Lal v. Nirunder Narain*, (1874) 23 W. R., 461.

⁴ *Ram Ruttun v. Ram Chander*, (1876) 23 W. R., 113.

⁵ *Venkoba v. Subhana*, (1899) 11 Mad., 151; but see *Lesser v. Janki*, (1892) 19 Cal., 615.

⁶ *Jiban Das v. Durga Pershad*, (1891) 21 Cal., 232.

⁷ *Ramabhadra v. Jagannatha*, (1891) 14 Mad., 323.

⁸ *Mon Mohun v. Secretary of State*, (1890) 17 Cal., 968.

⁹ *Bhivray v. Sitaram*, (1895) 19 Bom., 532.

¹⁰ *Ram Dayal v. Madan Mohan*, (1899) 21 All., 426. See also the order in *Marianne*, 1 P. D., (1891), 180; *Jagatjit v. Sarabjit*, (1892) 19 Cal., 159; L. R., 18 I. A., 165.

¹¹ *Jagatjit v. Sarabjit* (1892) 19 Cal., 159, p. 173; L. R., 18 I. A., 165.

¹² *Fatima v. Abdul Majid*, (1892) 14 All., 531; *Abdul Majid v. Abdul Aziz*, (1897) 19 All., 155.

¹³ *Ran Bijai v. Jagatpal*, (1891) 18 Cal., 111, p. 119.

¹⁴ *" "*, 217; *Pearce Soonduree v. Eshan* 17 Dacca v. Hafez Mahomed, (1892) 18 Cal., 197; 8 I. A., 197; 41; 9 Cal., 112.

in which the decree did not specify the amount or the period, it was held that everything was left to be settled in execution, and plaintiff was entitled to mesne profits within the period of limitation.¹ But where the Privy Council made an order in favour of a plaintiff, decreeing possession of certain property with mesne profits, it was held that the decree authorised the Courts to consider and deal with the question of mesne profits as fully as a Court could, which was charged with the duty of originally determining the merits of such a question between the parties to the suit.² The terms of the decree as to the period during which mesne profits are to be allowed must be strictly adhered to.³

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¹ Hareeshur Mookerjee v. Abinobhar, (1872) 17 W. R., 200.

² Budlun v. Farloar Rahman, (1875) 23 W. R., 449.

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⁵ Mcher Jan v. Gerda, (1876) 25 W. R., 270.

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⁷ Dildar v. Majeedunnissa, (1879) 4 Cal., 629; Krishnan v. Nilakandan, (1885) 8 Mad., 137; Anando v. Anando, (1887) 14 Cal., 50; Radha Prasad v. Lal Sahab, (1891) 13 All., 53, p. 65; L. R., 17 I. A., 150.

⁸ Muhammad Umar Jan v. Zinat, (1903) 25 All., 385.

⁹ Ramnagar Mahton v. Dita Mahton, (1894) 21 Cal., 559.

¹⁰ Radha Raman v. Sursumoyi Debi, (1902) 7 Cal. W. N., 437.

¹¹ Radha Prasad v. Sahab, (1891) 13 All., 53, p. 65; L. R., 17 I. A., 150.

¹² Parat Chand v. Radha Kshen, (1892) 19 Cal., 132; Prayag Singh v. Raju Singh, (1894) 25 Cal., 203; Wahya Bibi v. Nazar Hassan, (1904) 26 All., 623.

¹³ Fuzzeelun v. Keramat Hossein, (1874) 21 W. R., 212.

¹⁴ Panchanan Bose v. Gowanath Roy, (1870) 14 W. R., 160.

fixed under art. 109 of sch II of the Limitation Act has no reference to the period when rents fall due.¹

Practice—The defendant should not be called upon to answer until the plaintiff has started his case by giving *prima facie* evidence of the damage he has sustained by loss of mesne profits, he must fix the liability of the defendant and the amount he is liable for.² Once the liability of a party is fixed in the appellate Court, the lower Court must confine its enquiry to assessing the amount of damages.³

New suit barred—The plaintiff is bound to put forward his whole claim for mesne profits before suit. Thus, where plaintiff who had sued for possession and mesne profits from the date of institution till he should get possession, and, obtaining a decree, subsequently sued for mesne profits before institution, the suit was dismissed.⁴ A suit for possession of property and obtained a decree. He made no claim for mesne profits: *held*, a subsequent suit for mesne profits prior to the first suit would not lie.⁵ When a claim for mesne profits prior to the institution of the suit has been made, but the decree is silent, a separate suit for the same is barred,⁶ but when the plaintiff's claim has accrued since the decree in the former suit, it is not *res judicata* and is not barred.⁷ Plaintiff claimed possession of land with mesne profits from date of dis-possession to the date of recovery of possession and obtained a decree for possession with mesne profits up to date of suit; *held*, a second suit would lie for the subsequent mesne profits.⁸ When a decree for partition is silent about mesne profits subsequent to the institution of the suit, a party is at liberty to assert his right to mesne profits by a separate suit.⁹ The mere omission of the Court to adjudicate upon the claim for mesne profits accruing due after the institution of the suit does not operate as a bar to a subsequent suit for such mesne profits.¹⁰

Enquiry into the amount.—For form of decree under this rule, see *Jagatjit v. Sarabjit*.¹¹ The direction as to the enquiry into the amount of mesne profits need not necessarily be contained in the decree.¹²

Ear-marking—It is very doubtful if a Court of equity would ear-mark the profits of a trespasser invested in real property and follow them.¹³

Amount allowed—A decree for a larger amount of wasilat than has been estimated for, or covered by the plaint, may be given in some cases: the amount demanded is merely an approximation;¹⁴ but the decree cannot be

¹ *Abbas v. Fasih-uddin*, (1897) 24 Cal., 413.

² *Indurjeet Singh v. Radhey Singh*, (1874) 21 W. R., 269.

³ *Dwarka Lall v. Niruader Naram*, (1874) 22 W. R., 461.

⁴ *Ram Rutton v. Ram Chunder*, (1876) 23 W. R., 113.

⁵ *Venkoba v. Subbana*, (1888) 11 Mad., 151; but see *Lalassar v. Janki*, (1892) 19 Cal., 615.

⁶ *Jiban Das v. Durga Pershad*, (1894) 21 Cal., 252.

⁷ *Ramabhadra v. Jagannatha*, (1891) 14 Mad., 328.

⁸ *Moti Mohun v. Secretary of State*, (1890) 17 Cal., 963.

⁹ *Bhivray v. Sitaram*, (1895) 19 Bom., 532.

¹⁰ *Ram Dayal v. Madan Mohan*, (1899) 21 All., 426. See also the order in *Marianne*, 1 P. D., (1891), 189; *Jagatjit v. Sarabjit*, (1892) 19 Cal., 159; L. R., 18 L. A., 165.

¹¹ *Jagatjit v. Sarabjit* (1892) 19 Cal., 159, p. 173; L. R., 18 L. A., 165.

¹² *Fatima v. Abdul Majid*, (1892) 14 All., 531; *Abdul Majid v. Abdul Aziz*, (1897) 19 All., 135.

¹³ *Ran Bijai v. Jagatpal*, (1891) 18 Cal., 111, p. 119.

¹⁴ *Boonduree v. Eshan z Mahomed*, (1882) R., 8 L. A., 197;

executed until stamp-duty has been paid on the excess—s. 11 Act VII of 1870;¹ but in the case of *Gooroo Dass Roy v Bungshet Dhu Sein*,² it was decided that s. 11 of Act VII only provides for those cases where a plaintiff has no means of knowing how long a suit would last, or what would be realized by the plaintiff while the suit was pending, and does not interfere with the ordinary rules that a plaintiff is not entitled to greater damages than he has claimed in his plaint.

Sums actually received—A person who has not received the mesne profits, but come into the estate afterwards, on its release from management by Government, is only liable for sums actually received,³ even when such collections are in excess of what the decree-holder himself might have ordinarily collected.⁴

Mesne Profits—How calculated; interest thereon Appeal etc., see notes to sect. 2 (12) *ante*.

13. (1) Where a suit is for an account of any property and for its due administration under the decree in administration suit decree of the Court, the Court shall, before passing the final decree, pass a preliminary decree ordering such accounts and inquiries to be taken and made, and giving such other directions as it thinks fit.

(2) In the administration by the Court of the property of any deceased person, if such property proves to be insufficient for the payment in full of his debts and liabilities, the same rules shall be observed as to the respective rights of secured and unsecured creditors and as to debts and liabilities proveable, and as to the valuation of annuities and future and contingent liabilities respectively, as may be in force for the time being within the local limits of the Court in which the administration-suit is pending with respect to the estates of persons adjudged or declared insolvent; and all persons, who in any such case would be entitled to be paid out of such property, may come in under the preliminary decree, and make such claims against the same as they may respectively be entitled to by virtue of this Code.

38 and 39 Vic., c. 77 (Supreme Court of Judicature Amendment Act, 1875) s. 10. Act XIV of 1882, s. 213. This rule applies to H. C.

The second paragraph of this rule was passed in England to assimilate the practice in Chancery to that in Bankruptcy. In Chancery, a secured creditor could, in an administration-suit, prove for the full amount of his debt; in Bankruptcy, he must realize his security and prove for the balance. This is now the law.⁵ A judgment-creditor who has obtained a garnishee order is a secured creditor within the meaning of the Bankruptcy Act;⁶ but a plaintiff who has

¹ *Luckhee Kant v. Deen Dyal*, (1870) 14 W. R., 82.

² *Gooroo Dass Roy v. Bungshet Dhu Sein*, (1871) 15 W. R., 81; *Rahoojan v. Bejnath*, (1881) 5 Cal., 473; *Soorish Row v. Cotagherey*, (1866) 5 W. R., P. C., 127; 2 Moo. I. A., 113; *Karoo Lal v. Forbes*, (1867) 7 W. R., 140.

³ *Kishnanand v. Partab Narain*, (1881) 10 Cal., 785; L. R., 11 I. A., 89.

⁴ *Chunder Coomar v. Kasheemath*, (1866) 5 W. R., M. A., 37.

⁵ *Coal Consumers' Association, in re*, 4 C. D., 625; *Kellock's case*, L. R., 3 Ch. App. Cas., 769.

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Dividend—In the administration by the Court of the estate of a deceased, the dividend in respect of a debt against the estate is to be estimated on the amount of the debt at the date of the order for payment and not at the date of proof.⁵

Barred debt—The rule followed by the Courts of Equity in England whereby notwithstanding the provisions of the Statutes of Limitation, the share of one of the next-of-kin in the estate of an intestate while in the hands of the administrator is liable for a debt due by the next-of-kin to the deceased, though barred at the date of the death of the latter, is to be applied in the Courts of British India.⁶

Debts and liabilities proveable—See s. 40 of the Insolvent Debtors' Act, 11 and 13 Vict., c. XXI.

Insolvent—See *Soobul Chunder v. Russick*.⁷

Receiver—Before completion of the administration decree, no order can be made for the discharge of receiver directing him to make over the estate to the plaintiff.⁸

Purchaser—A decree in an administration-suit brought by the parties whose interest had been sold against the executor of their father's will, by whom the sale had been made, was held to be no bar to the maintenance of a suit against the purchaser to have the sale set aside.⁹

Mortgage decree—The pendency of an administration-suit is no ground for staying the execution of a mortgage decree.¹⁰

Stamp—For the stamp on such an application, see *Ladubhai Premchand v. Revichand Venichand*.¹¹

Appeal—An order under the corresponding section of Act XIV of 1882 was a decree and appealable, see s. 2, *ante*.

¹ *Nelson, ex parte*, 14 Ch. D., 41.

² *Worraker v. Pryer*, 2 C. D., 109. As to the principle on the point, see *Dhunraj v. Broughton*, (1875) 15 B. L. R., 296.

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⁴ *Dowdeswell v. Dowdeswell*, 9 C. D., 291; as to costs, *Jones, sa re*, 10 C. D., 40; executor's expenses—*Sharp v. Lush*, 10 C. D., 463; as to subsequent action after administration judgment—*Laming v. Gee*, 10 C. D., 715; as to right of relatives—*Richmond v. White*, 10 C. D., 727.

⁵ *Agra and Masterman's Bank v. Robinson*, (1870) 6 B. L. R., App., 140.

⁶ *Dhanjibhai v. Navabhai*, (1878) 2 Bom., 75. See also *Lokenath v. Odoychurn*, (1881) 7 Cal., 614.

⁷ *Soobul Chunder v. Russick*, (1883) 15 Cal. 202, p. 203.

⁸ *Bhugwan v. Heera Lall*, (1900) 5 Cal. W. N., 417.

⁹ *Dhonendra Chunder v. Muttu Lall*, (1874) 14 B. L. R., 276; 23 W. R., 6; L. R., 2 I. A., 18.

¹⁰ *Kristomohun v. Bama Churn*, (1881) 7 Cal., 733.

¹¹ *Ladubhai Premchand v. Venichand*, (1882) 6 Bom., 143; *Bhogilal v. Popatbhai*, (1883) 7 Bom., 121; *Erakshub v. Adarni*, (1883) 7 Bom., 535; *Abul Ali v. Jamiruddin*, (1882) 13 C. L. R., 169, and see s. 7, cl. (iv) (f), of the Court Fees Act.

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³ *Kishnanand v. Partab Narain*, (1891) 10 Cal., 785; 1 L. R., 11 I. A., 88.

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14. (1) Where the Court decrees a claim to pre-emption in respect of a particular sale of property and the purchase-money has not been paid into Court, the decree shall—

- (a) specify a day on or before which the purchase-money shall be so paid, and
- (b) direct that on payment into Court of such purchase-money, together with the costs (if any) decreed against the plaintiff, on or before the day referred to in clause (a), the defendant shall deliver possession of the property to the plaintiff, whose title thereto shall be deemed to have accrued from the date of such payment, but that, if the purchase-money and the costs (if any) are not so paid, the suit shall be dismissed with costs.

(2) Where the Court has adjudicated upon rival claims to pre-emption, the decree shall direct,—

- (a) if and in so far as the claims decreed are equal in degree, that the claim of each pre-emptor complying with the provisions of sub-rule (1) shall take effect in respect of a proportionate share of the property including any proportionate share in respect of which the claim of any pre-emptor failing to comply with the said provisions would, but for such default, have taken effect; and,
- (b) if and in so far as the claims decreed are different in degree, that the claim of the inferior pre-emptor shall not take effect unless and until the superior pre-emptor has failed to comply with the said provisions.

Act XIV of 1882, Sect. 214.

This rule applies to H. C.

The right of pre-emption must be exercised and the claims necessary to give effect to it must be made with the utmost promptitude; any unreasonable and unnecessary delay is construed as an election not to pre-empt.¹ See notes under ss. 9 and 35.

Application of rule.—This rule is inapplicable to a case in which the parties setting up the right of pre-emption are already in possession.² No right of pre-emption arises where land is assigned without consideration as *shankul*,³ or when a lease, even though it be *mawarishi*, is granted by a co proprietor.⁴ In

¹ *Bagynath Goenka v. Bamihary*, (1903) 7 Cal. L. J., 318. (P.C.)

² *Krishna Menon v. Kottan*, (1907) 20 Mad. 305.

³ *Har Naran v. Ram Prasad*, (1892) 15 All. 373.

⁴ *Devaikutuffah v. Karem Mulla*, (1898) 13 Cal. 181.

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² *Krishna Menon v. Kesava*, (1907) 20 Mad. 303

³ *Har Narain v. Ram Prasad*, (1892) 14 All. 373.

⁴ *Dewanatullah v. Karam Molla*, (1888) 15 Cal. 161

overcome by amending the plaint by striking out the name of the stranger; but a co-sharer of an estate, who has a right of pre-emption, does not merely by joining with himself members of his family who are not co-sharers in such estate in a suit to enforce such right, defeat such right.² In cases of pre-emption based upon a *wajib-ul-ars*, the right of pre-emption does not survive, if the land, which is the subject of pre-emption having been sold to a stranger, is subsequently re-sold by the stranger before suit to a co-sharer having equal rights with those seeking pre-emption.³ The *wajib-ul-ars* of a village forming an

by a *husadar* of his share or *hissa* to a which no new *wajib-ul-ars* was framed and of land in one of the new mahals, a person who, prior to the partition, was a co-sharer of the vendor in the undivided mahal, but who since the partition owned a share only in another of the new mahals, is not entitled to pre-emption.⁴ A successful plaintiff in a pre-emption suit does not forfeit his right by mortgaging the property to a stranger.⁵

.. The daughter of a Hindu widow to whom the widow e, of which share she was in possession for a pre-emption in respect of a sale which had taken relinquishment made to her by her mother.⁶

... of separate plots of *muafi* land in- no connection with one another, lopted by or existing among the uld be applicable to the owners of dan law applicable to the Sunni not obtained his decree for pre- does not survive to his heirs.⁷

... mption, if he refuses to bid at a ... execution of a decree against

An *Uthman* ... Court sale of the land comprised in the the *sharnavan* and senior *anandravan* vested. In the absence of express war trued as having a right of pre-emptor sale to *husadar* of an inferior class.¹⁰

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* Bhupal Singh v. ... (1893) 5 All. 107; ... v. Lalman, (1893) 5 All. 180.

(1892) 4 All. 259.

* Bhurey Mal v. Nawal Singh, ... 20 All. 100.

* Serh Mal v. Hukam Singh, (1893) ... 22 All. 1.

... H. 143.

... p; and see Abdul Hai v. Nain

* Narain Dax v. Ram Saran, (1893) 20 All. ... 20 All. 83; Majibullah v.

Singh, (1893) 20 All. 92.

* Muhammad Hussin v. Niamatunnissa, (1893) ... case in, ... 21 All. 119

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* Ammott v. Kanlayan, (1892) 15 Mad. 490.

* Sheobalak Singh v. Lachmidhar, (1901) 23 All. 427.

* Abul Shakur v. Mendat, (1911) 23 All. 200; and see Bahal Sit,

(1904) 30 All. 77.

* Qurban Hussin v. Chote, (1900) 22 All. 162.

* Chatar Singh v. ...

in the village is *prima facie* a good covenant.¹ No right of pre-emption arises upon a sale which according to Muhammadan law is invalid, but if such a rule becomes complete then the ownership of the purchaser becomes complete, and a right of pre-emption arises.² The plaintiff was owner of a chak of 33 acres in a village which for revenue purposes constituted a mahal, and by the settlement under which he held, he paid Rs 40 a year of the revenue, that amount being paid through the lambardar but he did not reside in the village. *Held*, that he was a co-sharer of the whole mahal, and as such had a right of pre-emption.³

After an alleged cause of action for pre-emption had arisen but before suit brought, the defendants vendees acquired by the dismissal of another suit for pre-emption brought against them by two of the plaintiffs on a different cause of action, a title as co-sharers in the village in which the property sought to be pre-empted lay. *Held*, that the title so acquired was a good answer to the subsequent suit for pre-emption.⁴

In Bengal, one coparcener has no right of pre-emption against another.⁵

Minor.—The guardian of a minor is competent to exercise or refuse to exercise on behalf of the minor a right of pre-emption.⁶

Formalities of pre-emption—Where a plaint in a suit for pre-emption does not state the plaintiff's readiness and willingness to pay any amount which the Court might find to be the actual price, it is discretionary with the Court to grant a decree.⁷

Practice—It is the practice of the Courts to allow claims to pre-emption to be asserted on the grounds both of contract and custom in one and the same suit,⁸ but the claim must be, if possible, for the whole of the property included in the sale,⁹ and if a claimant is disqualified to sue as to part, he cannot claim the remainder.¹⁰ Where a pre-emptor by reason of the claim of other persons is entitled only to a certain portion of the property, he is not bound to frame his suit as a suit for the whole of the property sold.¹¹

Where a party, through an execution-proceeding, obtains possession of land which is bound by right of pre-emption, he ought to have the benefit of the purchase-money which the pre-emptor is to pay,¹² and if the right is based on

¹ Bimal Jatt v. Biranja Kurr, (1900) 22 All., 238.

² Najm-un-Missa v. Ajib Ali Khan, (1900) 22 All., 317.

³ Munoo Lal v. Muhammad Tahir, (1901) 23 All., 514. Another case in which Bharthi, 514; and

⁴ Ram Hit Singh v. Narain, (1901) 26 All., 389.

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⁵ Umrao Singh v. Dalip Singh, (1901) 23 All., 129.

18 All., 298.

⁶ Nehchul v. Thian Singh, (1870) 2 All. H. C., 222.

⁷ Durga Prasad v. Munsif, (1881) 6 All., 423.

⁸ Muhammad Wiliyat Ali v. Abdul Rab, (1889) 11 All., 103.

⁹ Abdullah v. Amanatullah, (1899) 21 All., 292.

¹⁰ Buksha v. Tofer Ali, (1873) 20 W. R., 216.

¹¹ See also Muhammad v. Muhammad, (1896)

contract, it does not arise where the sale is not by the contracting party, but by a third person under a decree.¹ In a suit for pre-emption the vendor is not a necessary party.²

Purchase money.—As to the amount of it, see the case of Ajaibnath Mathura Prasad.³ The plaintiff may deduct his costs.⁴ When both the vendor and the vendee refuse to disclose the real price, the Court should ascertain from the plaintiff the market value of the property at the time of the sale.⁵

Payment. The appellate Court can extend the time allowed to deposit the price.⁶ If on the day on which the time for payment expires, the Court is closed, the pre-emptive price may be paid on the next day the Court is opened.⁷

¹ enforced.¹¹ The pre-emptor having deposited the price fixed by the lower Court within the space allowed to him
The pre-emptor

Final decree.—As to when a decree becomes final in a pre-emption suit, see the undernoted cases.¹²

certain fixed period, can after the expiration of such period, appeal against such

¹ Ferasat Ali v. Ashootosh Roy, (1871) 15 W. R., 455.

² Ramsarup v. Sital Prasad, (1904) 26 All., 519.

³ Ajaib Nath v. Mathura Prasad, (1899) 11 All., 161; and the cases cited.

⁴ Ishri v. Gopal, (1884) 6 All., 351.

⁵ Agar Singh v. Baghura, (1887) 9 All., 471; as to the right to the accruing profits, see Deokinandan v. Sri Ram, (1890) 12 All., 231; Sri Kishen Lal v. Atma Ram, (1897) 19 All., 261.

⁶ Parshadi Lal v. Ram Dial, (1870) 2 All., 741; Kotal Singh v. Jaisri Singh, (1891) 13 All., 376.

⁷ Muchul Koer v. Laljee, (1867) 2 N. W. P., 112; Dabi Din v. Muhammad Ali, (1850) 3 All., 850.

⁸ Muhammad Ali v. Debi Din, (1882) 4 All., 420.

⁹ Ram Sahai v. Gaya, (1883) 7 All., 107.

¹⁰ Rupchand v. Shamsh ul-Jehan, (1889) 11 All., 316.

¹¹ Jai Kishen v. Bhola Nath, (1892) 14 All., 529. And see Jaggarnath v. Jokhi (1896) 18 All., 223.

¹² Balmukund v. Pancham, (1888) 10 All., 400.

¹³ Hingan Khan v. Ganga Parshad, (1876) 1 All., 291; Narain Das v. Lachmar (1880) 3 All., 135; Ramshai v. Gaya, (1883) 7 All., 107; Ewaz v. Mokuna, (1876) 1 All., 132.

¹⁴ Kotal Singh v. Jaisri Singh, (1891) 13 All., 376.

decree on the ground that a condition of the contract out of which this right to pre-empt arises has not been embodied in the decree.¹

Form of decree—The second clause of this rule deals with a difficulty which occasionally arose under the former code and speaks for itself.

A recorded co-sharer has a preferential right to a person who claims to be a co-sharer by virtue of a *benami* purchase.²

Execution—The right is personal, and where a pre-emptor has transferred the property in any manner inconsistent with the object of the suit, his claim should be dismissed³ and the transferee of a pre-emption decree cannot execute it,⁴ but the pre-emptor can execute the decree for the benefit of a vendee of the property after decree.⁵

Limitation—In a suit to declare a right of pre-emption against the heir of a mortgagee of an undivided share of an estate who had foreclosed, *Held*, that the suit was barred after six years from the expiry of the year of grace allowed in the foreclosure decree.⁶

15 Where a suit is for the dissolution of a partnership, or the taking of partnership accounts, the Court, before passing a final decree, may pass a preliminary decree declaring the proportionate shares of the parties, fixing the day on which the partnership shall stand dissolved or be deemed to have been dissolved, and directing such accounts to be taken, and other acts to be done, as it thinks fit.

Decree in suit for dissolution of partnership

Act XIV of 1882, sect. 215.

This rule applies to H. C.

Decree—The usual forms of decree in such a suit are given in Nos 21 and 22 schedule I App. D. In a suit for an account of a dissolved partnership, a decree should be passed under this rule in accordance with form No 21 and it should

partnership.⁸ So also a partner is not in a position to sue for profits, but the suit must be for an account.⁹

Jurisdiction—See the undernoted cases.¹⁰

¹ Wazir Khan v. Kale Khan, (1894) 16 All., 126.

² Benishankar v. Mahpal Bahadur, (1887) 9 All., 480.

³ Rajjo v. Lalman, (1883) 5 All., 180. But see Ujagar Lal v. Jia Lal, (1896) 18 All., 332.

⁴ Sarju Prasad v. Jamna Prasad, (1887) 7 All., 109.

⁵ Ram Sahai v. Gaya, (1885) 7 All., 107.

⁶ Batul Begum v. Mansur Ali, (1900) L. R., 28 I. A., 219.

⁷ Thirukumaresan v. Sabbaraya (1897) 20 Mad., 313. See also Ram Chunder v. Manick Chunder, (1891) 7 Cal., 423.

⁸ Karim Bhai v. Conservator of Forests, (1890) 4 Bom., 222.

⁹ Doyaram v. Sookhanum, (1871) 16 W. R., 141.

¹⁰ See Adarji Dorabji v. Erakshah, (1884) 8 Bom., 272; Kisaandas Hajarimal v. Oulab Chand, (1884) 8 Bom., 491.

the decree shall declare the rights of the several parties interested in the property, but shall direct such partition or separation to be made by the Collector, or any gazetted subordinate of the Collector deputed by him in this behalf, in accordance with such declaration and with the provisions of section 54 ;

(2) if and in so far as such decree relates to any other immoveable property or to moveable property, the Court may, if the partition or separation cannot be conveniently made without further inquiry, pass a preliminary decree declaring the rights of the several parties interested in the property and giving such further directions as may be required.

This is a new rule, and is subordinate to section 54 in the body of the Code. See the notes to that section.

19. (1) Where the defendant has been allowed a set-off against the claim of the plaintiff, the decree shall state what amount is due to the plaintiff and what amount is due to the defendant, and be for the recovery of any sum which appears to be due to either party.

(2) Any decree passed in a suit in which a set-off is claimed shall be subject to the provisions in respect of appeal to which it would have been subject if no set-off had been claimed.

(3) The provisions of this rule shall apply when a set-off is admissible under rule 6 of Order III, or otherwise.

Act XIV of 1882, s. 216.

20. Certified copies of the judgment and decree shall be furnished to the parties on application to the Court at their expense.

Act XIV of 1882, s. 217.

This rule applies to H. C. and Prov. S. C. C.

The parties are entitled to receive copies of the judgments and translations of them.¹

The practice of furnishing copies free of cost, on supplying a stamp, has been set aside.²

¹ Varjivan v. Aji Daji, (1862) 1 Bom. H. C., 165.

² See the case of Nil Moneo Singh v. Chimbas, (1873) 20 W. R., 200.

A stranger to the suit may also obtain copies of judgments, decrees or orders but not of exhibits put in evidence, except with the consent of the person by whom they were produced. A fee of four annas is charged in Bengal for searching for all documents of which copies are required and which have been deposited in the Record Room. But no such fee should be charged to pleaders for looking at the records of *pending* cases, or for copies wanted by public officers for public purposes. For detailed rules relating to copies, see Calc. High Court Circulars (civil), pp. 99 to 106.

ORDER XXI

EXECUTION OF DECREES AND ORDERS

Payment under Decree

Money of paying
money under decree

I (1) All money payable under a decree shall be paid as follows, namely:—

- (a) into the Court whose duty it is to execute the decree; or
- (b) out of Court to the decree-holder; or
- (c) otherwise as the Court which made the decree directs.

(2) Where any payment is made under clause (a) of sub-rule (1) notice of such payment shall be given to the decree-holder.

Act XIV of 1882, s. 257

This rule applies to H. C. and Prov. S. C. C.

When an order has been made for the payment of money in a suit on a certain date and the Court was closed on that date, a payment made on the following date would be a good payment for the purposes of the order.¹

Costs—Costs ordered to be paid under s. 35 are not paid under a decree and should be paid under that section.²

Notice—Clause (2) of this rule is new, it does not state by whom the notice is to be given but presumably the person making the payment will be held responsible for the issue of the notice.

(1) Where any money payable under a decree of any kind is paid out of Court, or the decree is otherwise adjusted in whole or in part to the satisfaction of the decree-holder, the decree-holder shall certify such payment or adjustment to the Court whose duty it is to execute the decree, and the Court shall record the same accordingly.

(2) The judgment-debtor also may inform the Court of such payment or adjustment, and apply to the Court to issue a notice to the decree-holder to show cause, on a day to be fixed by the Court, why such payment or adjustment

¹ Aravamudan v. Sanjayappa, (1898) 21 Mad., 385. See also Dabee Rawoot v. Heeramun Mahton, (1867) 8 W. R., 223; Shoo-hee Bhushan v. Gobind Chunder, (1891) 18 Cal., 231.

² Shanks v. Secretary of State, (1889) 12 Mad., 120.

ment should not be recorded as certified; and if, after service of such notice, the decree-holder fails to show cause why the payment or adjustment should not be recorded as certified, the Court shall record the same accordingly.

(3) A payment or adjustment, which has not been certified or recorded as aforesaid, shall not be recognized by any Court executing the decree.

Act XIV of 1882, sect 258.

This rule applies to H. C. and Prov S. C. C

Section 257A of Act XIV of 1882 has been wholly omitted from this Code; it provided that agreements to give time to the judgment-debtor for satisfaction of the judgment-debt by the payment of a sum larger than the amount due under the decree must be sanctioned by the Court. In practice this provision was found of little service to judgment-debtors,¹ and in a Bombay case it was held that an agreement between a judgment-creditor and a person other than the judgment-debtor, whereby such person in consideration of the postponement of execution undertook to pay to the judgment-creditor a certain sum of money was enforceable although made without the sanction of the Court.² Thus interpreted the section was of little service to judgment-debtors, who can still avail themselves of section 16 of the Indian Contract Act

Under a decree.—The rule now states that if a decree-holder gives up the decree after the Court has given up the decree after the decree has been given up to the Court.³

Bona fide purchaser.—When a person, a stranger to the proceedings, purchases property *bona fide* at an auction sale held in execution of a decree, the sale cannot be set aside on the ground that the decree had already been satisfied out of Court at the time the sale was held.⁴

Surety.—This rule does not apply to the case of a surety, who having paid the amount due under a decree afterwards sues the principal.⁵

When rent is payable for a *mirasi* tenure and not under a decree, the provisions of this rule do not apply.⁶

Of any kind.—These words are new and would seem to extend the rule so as to cover every kind of decree, thus settling at rest the doubts created by decisions under the former Code, as to whether this provision applied to money decrees only.⁷ The view taken by the Calcutta High Court was that it covered the adjustment of any decree.⁸

Mortgage Decrees.—There is a conflict of opinion between the High Courts with regard to the application of this provision which does not seem to have been dealt with in the new rule.

¹ See Statement of Objects and Reasons.

² *Kesu v. Genu*, (1897) 23 Bom., 502; and see *Horkishen v. Nibaran Chunde* (1901) 6 Calc. W. N., 27.

³ *Hari Sasthish v. Dipu*, (1867) 5 Bom. H. C., A. C. J., 78.

⁴ *Vallappa v. Ram Chandra*, (1897) 21 Bom., 463.

⁵ *Halaji v. Dada*, (1888) 12 Bom., 235.

⁶ *Kelari v. Gajai*, (1894) 18 Bom., 690.

⁷ *Sankaran v. Kanara*, (1899) 22 Mad., 182; *Kishavlal v. Bai Parvati*, (1900) 1 Bom., 371.

⁸ *Bala Mahomed v. Webb*, (1881) 6 Calc., 750.

The Calcutta High Court has held that, in an application under s 89 of the Transfer of Property Act for an order absolute for sale of the mortgaged property, this provision is no bar to an enquiry into the plea of payment of the mortgage debt.¹

The Bombay, Madras and Allahabad High Courts have decided that applications under ss 87, 89 of the Transfer of Property Act are applications in execution of decrees, and, therefore, the provisions of this rule are applicable to them.² The mortgagee of certain property sued and obtained decree for sale. The mortgagor sold to a third person and the mortgagee agreed to accept from the purchaser a sum in full satisfaction of his decree. The purchaser tendered the sum and the mortgagee refused to accept it. *Held* that s 258, former Code was not applicable and that the purchaser on payment of the money into Court was entitled to a declaration that the mortgagee's decree was satisfied.³

This provision has been further held to apply to amounts realized by a fructuary mortgagee in possession under a decree for sale.⁴

Satisfaction by one decree-holder—Where there are several decree-holders, the Court should not recognise any payment out of Court, unless it is intended to be for the benefit of all the decree-holders.⁵ The question whether of several decree-holders can enter satisfaction on behalf of all is one of procedure. It is not the act of the joint decree-holders, but the act of the court executing the decree that it is intended to operate as a valid discharge.⁶ If one of two holders of a joint decree applied for execution of the decree to the full amount. It appeared that the other decree-holder had received a certain sum from the judgment-debtor on account of the decree out of Court, but this payment had not been certified; *held*, that the payment was valid only to the extent of the share to which the payee was entitled, and that this share having been ascertained and credit given for it, the decree should be executed in favour of the present applicant for the balance.⁷ As to the effect of payment or release of one joint-creditor, see r. 20, *infra*.

Decree-holder shall certify—Application may be made for a certificate of part satisfaction.⁸ When after a decree had been sent to the Collector under s 320, former Code, (sections 68, 70 and 71 of this Code) the decree-holder and judgment-debtor joined in an application to the Collector in which they stated that the decree-holder had received Rs 2,900 in part payment of the decretal amount and that there was a certain balance due from the judgment-debtor; *held*, that the application was properly made to the Collector, and that the Court whose duty it was to execute the decree.⁹

The decree-holder is not subject to any limitation, and may certify after any lapse of time.¹⁰ The ordinary way of certifying a payment or adjustment is by

¹ *Pramatha Chandra v. Khetra Mohan*, (1902) 29 Cal., 651; *Hatem Ali v. Abdul Gaffar*, (1903) 8 Cal. W. N., 102; *Akikunnessa v. Ruplal Das*, (1897) 25 Cal., 33.

² *Bhagawan v. Ganu*, (1899) 23 Bom., 644; *Malikarjunadas v. Lingamurti*, (1902) 25 Mad., 244; *Ali Ahmad v. Naziran*, (1902) 24 All., 542.

³ *Malikarjuna v. Narasimha Rao*, (1901) 24 Mad., 412.

⁴ *Ramasami v. Ramasami*, (1907) 39 Mad., 235.

⁵ *Tarruck Chunder v. Divendra Nath*, (1887) 9 Cal., 831; *Budhun v. Hafeezah*, (1879) 4 C. L. R., 70; *Tamman Singh v. Luchman Kannan*, (1904) 26 All., 318; *Moti Ram v. Hanan Prasad*, (1904) 26 All., 334.

⁶ *Seshan v. Raja Gopala*, (1890) 13 Mad., 236, see p. 240.

⁷ *Sultan Moudan v. Savalayammal*, (1892) 15 Mad., 343.

⁸ *Rajendro Nath v. Chinnammal*, (1880) 5 Cal., 413.

⁹ *Muhammad Said v. Payag Sahu*, (1891) 16 All., 228.

¹⁰ *Fakir Chand v. Madan Mohan*, (1869) 4 B. L. R., 130; 13 W. R., (F. B.) 40; *Juggut Mohan v. Mithun Chunder*, (1871) 15 W. R., 66; *Bhubaneswar Debi v. Dinanath*, (1868) 2 B. L. R., 320; 14 W. R., 232; *Tukaram v. Babaji*, (1897) 21 Bom., 122.

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¹ *Pramatha Chandra v. Khetra Mohan*, (1902) 29 Cal., 631; *Hatem Ali v. Abdul Gaffur*, (1903) 8 Cal. W. N., 102; *Alikumissa v. Ruplal Das*, (1897) 23 Cal., 37.

² *Bhagawan v. Gannu*, (1899) 23 Bom., 614; *Malikarjunadu v. Lingamarti*, (1902) 25 Mad., 214; *Ali Ahmad v. Naziran*, (1902) 24 All., 542.

³ *Malikarjunu v. Narasimha Rao*, (1901) 24 Mad., 412.

⁴ *Ramasami v. Ramasami* (1907) 30 Mad., 255.

⁵ *Taruck Chunder v. Divendra Nath*, (1883) 9 Cal., 831; *Budhun v. Hafizah* (1879) 4 C. L. R., 70; *Tamman Singh v. Luchman Kanwar*, (1904) 26 All., 318; *Moti Ram v. Hannu Prasad*, (1901) 26 All., 331.

⁶ *Seshan v. Raja Gopila*, (1890) 13 Mad., 236, see p. 240.

⁷ *Sultan Moideen v. Savalayammal*, (1892) 15 Mad., 341.

⁸ *Rajendro Nath v. Chunnomsul*, (1880) 5 Cal., 448.

⁹ *Muhammad Said v. Payag Sahu*, (1894) 16 All., 228.

¹⁰ *Fakir Chaml v. Madan Mohan*, (1869) 4 B. L. R., 130; 13 W. R., (F. B.) 40; *Juggut Mohini v. Madhuk Chunder*, (1871) 15 W. R., 69; *Dhuaneswari v. Dinanath*, (1868) 2 B. L. R., 320; 11 W. R., 232; *Tukaram v. ...* (1897) 21 Bom., 122.

petition made by the decree-holder to the Court;¹ but it can also be certified on an application to execute the decree. See r. 11, *infra*.

If a decree holder receives payment and does not certify, he may be liable in damages to the judgment-debtor.²

Not be recognised.—The prohibition only extends to Courts executing decrees and not to Courts having to try the allegation of the parties on the merits.³

The wording of clause (3) has been so altered as to make it clear that the Court cannot recognize an uncertified payment or adjustment for any purpose whatsoever,⁴ and evidence can no longer be given of uncertified payments in order to defeat the plea of limitation.⁵

Remedies of the debtor.—*Certify*—If the decree-holder does not certify the debtor may apply within ninety days from the date of the adjustment—Art. 173A, Act XV of 1877,—to compel him to do so, and the Court, after hearing the parties and those persons who are acquainted with the facts of the case, may pass such orders as may seem proper,⁶ the application can be made to the Court executing the decree,⁷ and where the uncertified purchase of a decree by the legal representative of the judgment-debtor was not recognised as an adjustment of the decree, it was held that a Judge in Chambers could take notice of the contract and compel the seller to execute a power-of-attorney in favour of the purchaser so as to enable the latter to appear and claim under s. 73;⁸ but an adjustment of a decree not certified by either party within the time limited by law (see Limitation Act, Sch. 11, art. 161) cannot be recognized as a bar to execution.⁹ If the decree-holder dishonestly refuse to certify when called upon to do so, he can be made liable to refund it in an action.¹⁰

Separate suit.—If the debtor fails, he can bring a separate suit to recover compensation for the money or other property given to the judgment-creditor,¹¹ but not to set aside the sale.¹² If an agreement not to sue has been entered

¹ Saadoollah v. Kaleo Churn, (1869) 12 W. R., 338.

² Medai Kallani *in re*, (1907) 39 Mad., 515. See note 10, *infra*.

³ Kalyan Singh v. Kamta Prasad, (1891) 13 All., 339; Swamirao v. Kashinath (1891) 15 Bom., 419; Ghinasham Lakshmandas v. Kashiram Naroba, (1891) 16 Bom., 589 and "separate suit" *infra*.

⁴ Statement of Objects and Reasons.

⁵ Zahur Khan v. Bakhtawar, (1895) 7 All., 327; Sham Lal v. Kanahia Lal (1892) 4 All., 669; Hurri (1900) 12 All., 669; Balaji, (1895) 17 All., 42; Koushan Singh v. Bataam, (1891) 10 All., 30; Rajeswami v. Hari, (1891) 19 Mad., 162.

⁶ Parcechut v. Ragho, (1870) 2 All. H. C., 48; Chango v. Kaluram, (1867) 4 Bom. H. C., A. C. J., 120.

⁷ Rajendronath v. Chunnoolul, (1890) 5 Cal., 148.

⁸ Munmohan Das v. Vazlas, (1889) 13 Bom., 171.

⁹ Chedumbara v. Ratna Ammal, (1878) 3 Mad., 113.

¹⁰ Mahomed Kazem v. Khetoo Beebe, (1873) 20 W. R., 150. See note 2 *supra*.

¹¹ Shadi v. Ganga, (1890) 3 All., 538; Guni Khan v. Koomjoo Bhatry, (1878) 1 L. R., 414; Mallanma v. Venkappa, (1883) 8 Mad., 277; Gironama Khapoo, (1884) 10 Cal., 351; Periatamla v. Vellaya, (1898) 21 Mad., 469.

¹² Ishay Chunder v. Indro Narain, (1882) 12 C. L. B., 390; 9 Cal., 788; Rajar v. Ramayyar, (1894) 21 M. L. J., 736; 19 Cal., 376; not followed.—Motilal Vellappa v. Ram Chandra, (1894) 20 All., 254, in which it was held that a sale held in execution of a decree on the ground that the decree had been adjusted out of Court, when in fact no such adjustment had been certified in the manner provided by this provision, it was pointed out that the ca-

decree The defendant then sued for the land or for damages : *held*, that his claim to this was not maintainable, but that he was entitled to damages.¹

Criminal proceedings.—If the creditor fraudulently executes a satisfied decree, and does not enter the satisfaction in his application to execute, he is liable under s. 193 and 210 of the Indian Penal Code.² But if the decree is not caused to be executed, no offence is committed under s. 210, Indian Penal Code.³

Show cause.—This means to allege and prove sufficient cause, and the Court is bound to hear the evidence adduced.⁴

Appeal—An order under this provision is appealable under s. 47, see s. 2 “decree”⁵

Courts executing Decrees.

3. Where immoveable property forms one estate or tenure situate within the local limits of the jurisdiction of two or more Courts, any one of such Courts may attach and sell the entire estate or tenure.

This is a new rule, settling a point on which the decisions of the different High Courts were not harmonious.⁶

4. Where a decree has been passed in a suit of which the value as set forth in the plaint did not exceed two thousand rupees and which, as regards its subject-matter, is not excepted by the law from the time being in force from the cognizance of either a Presidency or a Provincial Court of Small Causes, and the Court which passed it wishes it to be executed in Calcutta, Madras, Bombay or Rangoon, such Court may send to the Court of Small Causes in Calcutta, Madras, Bombay or Rangoon, as the case may be, the copies and certificates mentioned in rule 6 ; and such Court of Small Causes shall thereupon execute the decree as if it had been passed by itself.

Act XIV of 1882, Sect. 223, para 5.

• This rule applies to H. C. and Prov. S. C. C.

¹ Krishnasami v. Ranga, (1897) 20 Mad. 360.

² Queen-Empress v. Bapuji, (1886) 10 Bom. 283 ; Mathub Chunder v. Norodet (1889) 16 Cal., 120 ; Q. E. v. Pillala, (1886) 9 Mad., 101.

³ Shama Churn v. Kasi Naik, (1896) 23 Cal., 971.

⁴ Bung Lal v. Hem Narain, (1885) 11 Cal., 166.

⁵ Rangji v. Bhaji, (1887) 11 Bom., 57 ; Lingayya v. Narasimha, (1891) 14 Ma. 99 ; Gurusayya v. Vudayappa, (1897) 18 Mad., 26 ; Ghazulin v. Fakir Bakh, (1885) 7 All., 73 ; Jamuna Prasad v. Mathura Prasad, (1891) 16 All., 129.

⁶ See Okenealy v. P. J., pp. 380, 381 ; Tincourie Delya v. Shub Chandra Pal, (1882) 21 Cal., 632.

The Court which passed a decree — If the subject-matter of the suit is within the Court's jurisdiction, the jurisdiction continues in all matters of execution.¹

Where the Court which has passed the decree, has ceased to have jurisdiction, application for execution may be made either to that Court or to the Court which (if the suit wherein the decree has been passed, were instituted at the time of making the application to execute it) would have jurisdiction to try the case.² A obtained a decree against B in the Court of the 1st Munsif of Howrah. After the decree, the local area within which the cause of action arose was transferred to the 2nd Munsif. A then applied to the 2nd Munsif for execution of his decree; *held*, that the 2nd Munsif had no jurisdiction, and that the 1st Munsif only had jurisdiction to execute the decree.³ See s. 37 which has greatly extended the meaning of "Court" in this Chapter.

See notes to sects 38-41, *ante*.

5. Where the Court to which a decree is to be sent

for execution is situate within the same district as the Court which passed such

decrees, such Court shall send the same directly to the former Court. But, where the Court to which the decree is to be sent for execution is situate in a different district, the Court which passed it shall send it to the District Court of the district in which the decree is to be executed.

Act XIV of 1882, sect. 223.

This rule applies to H. C. and Prov. S. C. C. See notes to sect 41, *ante*

Procedure where Court desires that its own decree shall be executed by another Court.

6 The Court sending a decree for execution shall send—

- (a) a copy of the decree ;
- (b) a certificate setting forth that satisfaction of the decree has or has not been obtained by execution within the jurisdiction of the Court by which it was passed, where the decree has been executed in whole or in part, and that satisfaction has or has not been obtained with reference to the decree remaining unsatisfied ;
- (c) a copy of the decree, and a certificate of the Court by which the decree was passed.

Act XIV of 1882, s.

This rule applies to H. C. and Prov. S. C. C. by s. 37.

Shamray

Latchumai

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decree. The defendant then sued for the land or for damages: *held*, that his claim to this was not maintainable, but that he was entitled to damages.¹

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Show cause.—This means to allege and prove sufficient cause, and the Court is bound to hear the evidence adduced.⁴

Appeal.—An order under this provision is appealable under s. 47, see s. “decree.”⁵

Courts executing Decrees.

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4. Where a decree has been passed in a suit of which the value as set forth in the plaint did not exceed two thousand rupees and which, as regards its subject-matter, is not excepted by the law for the time being in force from the cognizance of either a Presidency or a Provincial Court of Small Causes, and the Court which passed it wishes it to be executed in Calcutta, Madras, Bombay or Rangoon, such Court may send to the Court of Small Causes in Calcutta, Madras, Bombay or Rangoon, as the case may be, the copies and certificates mentioned in rule 6; and such Court of Small Causes shall thereupon execute the decree as if it had been passed by itself.

Act XIV of 1882, Sect. 223, para 5.

This rule applies to H. C. and Prov. S. C. C.

¹ Krishnasami v. Rangas, (1897) 20 Mad., 369.

² Queen-Empress v. Bipuji, (1886) 10 Bom., 288; Mathur Chunder v. Norode (1889) 10 Cal., 120; Q. E. v. Pillai, (1886) 9 Mad., 101.

³ Shama Churn v. Kasi Nalk, (1896) 23 Cal., 871.

⁴ Bung Lall v. Hem Narain, (1885) 11 Cal., 166.

⁵ Rangji v. Phool, (1887) 13 Cal., 191.

⁶ See O.L. 1882, p. 341; Tincourie Datta v. Shub Chandra Pal, (1882) 21 Cal., 173.

case direct to the Judge of that district, who, in turn, referred it to his Subordinate Judge *held*, that the proceedings were regular.¹ A Munsif to whom a decree is sent direct has no jurisdiction to execute it without an order of the District Judge under this rule.²

A Court of Small Causes within a district is subordinate to the District Judge. See s. 2, "DISTRICT COURT." An order under this rule need not be signed by the District Judge. If the order is issued under his authority, the absence of his signature does not vitiate the proceeding.³

9. Where the Court to which the decree is sent for execution is a High Court, the decree shall be executed by such Court in the same manner as if it had been passed by such Court in the exercise of its ordinary original civil jurisdiction.

Execution by High Court of decree transferred by other Court

Act XIV of 1882, sect. 227

This rule applies to H. C. and Prov. S. C. C.

Ordinarily, a decree would be sent for execution to a High Court, only when it has been passed in a case not cognizable by a Small Cause Court, for in such a case, it would be sent to the local Court of Small Causes. See r. 4, *supra*.

As to the execution of a judgment entered up under s. 85 of the Indian Insolvent Act, see the cases of *Candas Narrondas*.⁴

Where a judgment is removed from an inferior to a superior Court under 1 and 2 Vict., cap. 110, s. 22, for execution, the superior Court has no jurisdiction to inquire into the merits or into the regularity of the proceedings in the Court below;⁵ otherwise, if the decree has been passed without jurisdiction.⁶

Application for Execution.

10. Where the holder of a decree desires to execute it, he shall apply to the Court which passed the decree or to the officer (if any) appointed in this behalf, or if the decree has been sent under the provisions hereinbefore contained to another Court then to such Court or to the proper officer thereof.

Application for execution.

Act XIV of 1882, sect. 230.

The rule applies to H. C. and Prov. S. C. C.

All decree-holders, if desirous of enforcing their decrees, are required to apply for execution under this rule.⁷

The Court which passed the decree, &c.—Enforcement of a decree by a Court other than that which passed it can be obtained only after it has been regularly sent to that Court in the manner directed by rr. 5 and 6.

¹ Polukdhari Roy v. Radha Pershad, (1880) L. R., 8 I. A., 165.

² Debi Dul Sahu v. Moharaj Singh, (1893) 22 Cal., 764.

³ Jogendra Chandra v. Mahesh Chandra, (1896) 23 Cal., 430.

⁴ Candas Narrondas, (1886) 11 Bom., 138; Bhagwanadas, *in re*, (1884) 8 Bom., 511; Candas, *in re*, (1889) 13 Bom., p. 521.

⁵ Williams v. Bolland, 1 C. P. D., 227.

⁶ Bridge v. Branch, 1 C. P. D., 633; Oram v. Brearey, L. R., 2 Ex. D., 346, and see r. 7, *ante*.

⁷ Pallonji Shapurji v. Jordan, (1883) 12 Bom., 400.

An award of compensation under the Land Acquisition Act (X of 1870) cannot be enforced against the Collector by execution proceedings—*Quart*, whether an award made under the provisions of Act I of 1894 can be so enforced?¹

Portion of decree.—Execution may be taken out for a portion of a decree in certain cases. For instance, a decree-holder may obtain a decree for possession of lands and for mesne profits to be assessed in execution. The decree cannot, therefore, be executed as regards *mesne profits* until the amount has been ascertained. That ought not to prevent the execution-creditor from executing the decree as to that portion which is perfect and capable of execution and so seizing the lands which have been decreed to him. But where the decree might be executed in its entirety, as, for instance, in the case just put, after the *mesne profits* have been assessed and fixed, the decree-holder cannot take out one execution for the *mesne profits*, another for the costs, and another for the interest on the costs.²

Who can apply.—A mukhtar cannot make an application;³ but if the application is not returned at the time, it cannot afterwards be objected to, on this ground.⁴ A *benamidar* cannot apply.⁵

Deceased creditor.—See sec. 4 of Act VII of 1889 (Succession Certificate Act) and *Kanchan Modi v. Raynath*.⁶ A certificate necessary under this section may be supplied during pendency of proceedings.⁷ An application for execution by the heirs of a deceased decree-holder without having obtained a certificate under s. 4, Act VII of 1889, is still one made in accordance with law and saves limitation.⁸ A decree in favour of a deceased mohunt for costs incurred by him in proceedings carried on by him on behalf of the *muth* may be executed by his successor and representative without probate, certificate or letters of administration.⁹ A decree was made for the sale of certain mortgaged property. *held*, that this was not a decree against a debtor for payment of his debt within the meaning of s. 4, and it is doubtful if the Act will apply to the case of a plaintiff who has been substituted for a plaintiff who has taken out a certificate.¹⁰ If rent sued for becomes due after the death of deceased, it formed no part of his estate, and no certificate under the Succession Act is necessary.¹¹ The heir of a deceased decree-holder requires no certificate of heirship, if the right to execute the decree has devolved upon him by survivorship—otherwise, if the debt was part of the separate property of the deceased.¹² S. 4, of Act VII of 1889, is not a bar to execution proceedings instituted on a mortgage decree upon the application of the original mortgagee by reason of the original mortgagee having died

¹ *Nilkantli v. Collector of Thant*, (1893) 22 Bom., 802.

² *Haro Sunkur v. Tarnek Chunder*, (1869) 11 W. R., 488; 3 B. L. R., 114. See also *Enlehand v. Bai Ichha*, (1888) 12 Bom., 98; *Sailho Saran v. Hawal Pande*, (1897) 19 All., 93; see "*whole decree*" r. 15, *infra*, and "*several debtors*," r. 11, *infra*.

³ *Jahur Kant Bhadooree, in re*, (1875) 21 W. R., 233.

⁴ *Autoo Mirce v. Bidhoo Mookhee*, (1879) 1 Cal., 603.

⁵ *Demonath v. Lalit Kumar*, (1882) 12 C. L. J., 116; 9 Cal., 633; *Gour Sundar v. Hem Chunder*, (1889) 16 Cal., 355; see, however, *Ram Sahai v. Gaja*, (1883) 7 All., 107; and *Mamklam v. Tatayya*, (1898) 21 Mad., 388. As to a minor, see *Hari v. Sambhoji*, (1883) 12 Bom., 427.

⁶ *Kanchan Modi v. Brij Nath*, (1892) 19 Cal., 330.

⁷ *Brojo Nath v. Isswar Chandra*, (1892) 19 Cal., 482; *Kahan Singh v. Ram Charan*, (1898) 18 All., 31.

⁸ *Hafizuddin Chowdhury v. Abdul Aziz*, (1893) 20 Cal., 755; *Mangal Khan v. Sahumallah*, (1891) 16 All., 26; *Balkishan v. Wagarsing*, (1895) 20 Bom., 70.

⁹ *Jogender Nath Bharrati v. Rama Chunder Bharrati*, (1893) 20 Cal., 103.

¹⁰ *Baid Nath Das v. Shamaund Das*, (1897) 22 Cal., 117.

¹¹ *Ranchordas v. Bhagubhai*, (1894) 14 Bom., 391.

¹² *Rajbhavendra v. Ehlma*, (1892) 16 Bom., 319; *Pallamraju v. Bapanna*, (1899) 22 Mad., 309.

during the pendency of the proceeding, and his legal representatives who were substituted in his place not having produced any succession certificate ¹

Who can object—A person not a party to a suit cannot object to the issue of an order for the execution of a decree ²

Application registered—When an application for execution of a decree has been admitted and registered and attachment ordered thereon, the judgment-debtor cannot question the validity of the proceedings on the ground that execution is barred ³

Form of application—An application to enforce a decree should contain the particulars set forth in rr 11-14, and must be in writing, except in the case provided for in r 11 (1), that is, "where the decree is for a sum of money, and the amount decreed does not exceed the sum of one thousand rupees" A Court may, in such a case, "*when passing the decree, on the oral application of a decree holder, order immediate execution,*" but only within the limits of its local jurisdiction, against the person or moveable property of the debtor.

Irregular application—An imperfect application is one within the rule; ⁴ provided it does not ask for what the creditor cannot get under the decree. ⁵ When an application for execution was allowed to be amended after the expiry of the period of limitation, *held*, that the amendment would relate back to the preceding application and that execution of the decree was not time barred ⁶

Decree must be executed—It is not open to a Court to refuse to execute a decree against which no appeal has been preferred and the time for appealing against which has expired ⁷ A decree for maintenance must be executed No objection that the decree-holder has by her conduct forfeited her right to maintenance can be entertained, if the decree did not contain such a condition ⁸

Annuity—Future maintenance can be obtained under this rule and rule 43. ⁹

Dismissal for default—A Court cannot under O. IX, r. 9 restore to the file an application for execution, which has been dismissed for default ¹⁰
 *ute, to dismiss an applica-
his own laches to put the*

11. (1) Where a decree is for the payment of money
the Court may, on the oral application of
the decree-holder at the time of the pass-
ing of the decree, order immediate execution thereof by the
arrest of the judgment-debtor, prior to the preparation of a
warrant if he is within the precincts of the Court.

¹ Mahomed Yusuf v. Abdur Rahim, (1899) 26 Cal., 839.

² Nathubhai v. Nana, (1895) 19 Bom., 544.

³ Norendra Nath v. Bhupendra Narain, (1896) 23 Cal., 374. See also Mungul Pershad v. Grija Kant, (1882) 8 Cal., 51; L. R., 8 I. A., 123.

⁴ Asgar Ali v. Troilokya, (1890) 17 Cal., 631.

⁵ Pandirunath v. Lalchand, (1889) 13 Bom., 237. See also Hari v. Narayan, (1888) 12 Bom., 427.

⁶ Jivat Dube v. Kal Charan, (1898) 20 All., 478.

⁷ Ishan Chunder v. Ashanullah, (1884) 10 Cal., 817.

⁸ Ramul Sangi v. Kundin Kuwar, (1902) 26 Bom., 707.

⁹ Ashutosh v. Lakhimom, (1892) 19 Cal., 139; Lakshmbai v. Madhavray, (1888) 12 Bom., 65.

¹⁰ Akramnissa v. Valulnissa, (1894) 18 Bom., 429.

¹¹ Dhonkal Singh v. Phakkar Singh, (1893) 15 All., 84; Tirthasami v. Annapayya, (1892) 18 Mad., 131.

to execute a decree in
in effect execution of

An application for execution was made by a mukhtar and admitted by the Judge who ordered a notice to issue on the judgment-debtor: *held*, that such an application could not, after the notice was issued, and on the occasion of a subsequent application, be set aside as having been irregularly filed,² and even where an application was irregular and returned for amendment and nothing further was done, it was held to give a new starting point for limitation,³ provided perhaps the application does not ask what the decree cannot give.⁴ A decree was passed in favour of a firm in the name of an agent of the firm. The second and subsequent applications for execution were made by an agent other than the agent named in the decree. *Held*, such proceedings, however irregular, were not invalid.⁵

Double execution—The fact that the petition of one of several decree-holders in applying for execution requires amendment, because of the list of property being incomplete, is no ground for declining such application to be superseded by a later application made before the completion of the necessary amendment, by another co-decree-holder for execution; both executions can proceed.⁶

Representative—The representative of a deceased decree-holder cannot execute a decree without obtaining a certificate. See "DECEASED CREDITOR," p. 682. "CERTIFICATE" and "SUCCESSION CERTIFICATE ACT."

Amendment.—See r 17, *infra*.

Parties—When a minor is bound by a decree, execution may be rightfully sought against him through his guardian, and it is no answer that his name is not on the record.⁷ On the other hand, the Court is bound to allow execution to issue at the request of the decree-holder on the record, unless it be shown under r 16 *infra* that some other person has taken his place.⁸

Limitation—The applications described in art 179, Sch. II of the Limitation Act, are applications under this rule;⁹ and an imperfect application is within the rule.¹⁰ An imperfect application is not one made "in accordance with law" within the terms of art 179 (4), Sch. II of the Limitation Act;¹¹ so also an improper application,¹² or an informal application.¹³ But only material defects vitiate an application.¹⁴ An insufficiently stamped application for execution may suffice to keep the decree alive.¹⁵ The dismissal of a duly made

¹ *Jugesh Chandra Choudhary v. Goluck Mohee*, (1874) 22 W. R., 334. See, however, the case of *Collector of Shahjhanpur v. Surjan*, (1882) 4 All., 72; and compare *Kuthath v. Barotti*, (1878) 3 Mad., 79.

² *Shampat Singh v. Lalani*, (1888) 2 B. L. R., App. 18; *Autoo Mierce v. Bidhoomookhee*, (1879) 4 Cal., 645.

³ *Ramanandan v. Peristambi*, (1881) 6 Mad., 250; *Farooq Rahman v. Altaf Hosen*, (1884) 10 Cal., 541; *Rudra v. Rudra*, (1894) 18 Cal., 515; *Rama v. Varada*, (1893) 16 Mad., 142.

⁴ *Panlathnath v. Lalachand*, (1889) 13 Bom., 257.

⁵ *Lachman v. Patni Ram*, (1876) 1 All., 510.

⁶ *Ahmed Chowdhry v. Shahzad Khatoon*, (1880) 7 C. L. R., 537.

⁷ *Hari Haran v. Bhulabharwar*, (1882) 16 Cal., 40.

⁸ *Jasota v. Kirtilash*, (1894) 18 Cal., 632. See r. 16, *infra*.

⁹ *Parash Ram v. Kali Pallo*, (1890) 17 Cal., 51.

¹⁰ *Agar Ali v. Trollikya Nath*, (1890) 17 Cal., 631.

¹¹ *Gopal Sah v. Janki Koor*, (1894) 23 Cal., 247.

¹² *Muhammad Umar v. Kamla Pith*, (1882) 4 All., 31.

¹³ *Jibba Muljibai v. Parbhu Das*, (1876) 1 Bom., 52.

¹⁴ *pol Choudhary Manna v. Gossain Das Koley*, (1898) 23 Cal., 594; *Kalka Datta v. B. Choudhary Patak*, (1901) 27 All., 162.

¹⁵ *Premnar v. Nalagyanpur*, (1883) 6 Mad., 161.

application furnishes a point of time for the beginning of a new term of limitation,¹ but the dismissal of an execution case for omission to pay process-fee does not²

Res judicata—It has been held that a refusal to execute does not bar a subsequent application,³ the decision of a Court admitting part execution is final, if unreversed.⁴

Extension of time—See *Shooshee Bhusan v. Gobind*.⁵

Mortgage—In the case of a mortgage-decree on the Original Side of the High Court, six months' time is usually allowed for repayment of the principal and interest, but the Court may allow the decree to be satisfied at once.⁶

Whether any appeal has been preferred from the decree—Whether the decree is that of a High Court, or of an inferior Court, affirmed by the High Court and appealable to the Privy Council, if such an appeal has been presented, or if proceedings are being taken for that purpose, the decree-holder should state the fact, and though he is bound only to state that an appeal has been preferred, it would add to his good faith if he also states when any preliminary proceedings for that purpose have been or are being taken.⁷

Limitation—In case of an appeal decided under OXLI, r. 4, see *Babaji v. Collector of Salt Revenue*.⁸

Whether any and what adjustment, &c—Every adjustment of a decree should be certified to the Court whose duty it is to execute the decree, and if the party seeking execution intentionally makes a false statement, as to an adjustment, whether certified or not, of the amount still due, he is guilty of an offence under ss 193 and 210 of the Indian Penal Code.⁹ Notifying an adjustment in an application under this rule to the Court will be held to satisfy the requirements of O. XXI, r. 2.¹⁰ If a decree-holder fails to certify satisfaction made out of Court, the debtor may recover the amount by an action for damages,¹¹ but money paid in excess of what was due can only, it is said, be recovered in execution.¹² It is for the party applying for execution to state any adjustment between the parties after decree.¹³

An adjustment, such as is contemplated by cl (e), may also be the result of an application under r. 11, by which payment of the money-decree may be ordered to be by instalments.

¹ *Shankur Bisto v. Narasinh Rao*, (1887) 11 Bom., 467.

² *Dhukiram v. Jogendra*, (1900) 5 Cal. W. N., 347.

³ *Huroosondary Dasse v. Jagobundhoo*, (1881) 6 Cal., 203; but see *Mungal Pershad Dicht v. Gria Kanta Jahn*, (1880) L. R. 8 L. A., 123; 8 Cal., 51; and the remarks of Melville, J., at 6 Bom., p. 59; *Basudeo v. Seology*, (1887) 14 Cal., 640.

⁴ *Dalichand v. Shivkor*, (1891) 15 Bom., 242.

⁵ *Shooshee Bhusan v. Gobind*, (1891) 18 Cal., 231; *Peary Mohun v. Anunda*, (1891) id., 631.

⁶ *Chotooolal v. Miller*, (1880) 7 C. L. R., 267; see *Administrator-General v. Mirza Ahmed*, (1883) 9 Cal., 33.

⁷ *Toondun Singh, in re*, (1870) 14 W. R., 203. And see *Kassa Mal v. Gopi*, (1898) 10 All., 389.

⁸ *Babaji v. Collector of Salt Revenue*, (1887) 11 Bom., 596.

⁹ *Queen Empress v. Bapaji*, (1886) 10 Bom., 238.

¹⁰ *Malitab Chand v. Moorleedhur*, (1876) 15 W. R., 67.

¹¹ *Gunamani Das v. Prankishori*, (1870) 5 B. L. R., 233; see also *Bhugoban v. Gobind Chunder*, (1869) 3 W. R., 210; *Vinayaghaba v. Subbakkia*, (1882) 5 Mad., 397; *Davilata v. Ganesh*, (1880) 4 Bom., 295; *Musatti v. Shekhamn*, (1883) 6 Mad., 41; *Ishan Chunder v. Indro Narain*, (1883) 9 Cal., 788.

¹² *Kashee Kishore Roy v. Kishen Chunder*, (1871) 15 W. R., 160.

¹³ *Paupayya v. Narasannah*, (1878) 2 Mad., 216. See notes under O. XXI, r. 2, *Supra*.

The name of the person against whom enforcement is sought.—The name of the original debtor (if he be dead) and of his legal representative against whom enforcement is sought, should be shown here. Execution can be taken out only against those whose names are mentioned in the application, without reference to the decree itself.¹ In connection with this matter, it is important to note the provisions of Limitation Act (XV of 1877), Sch. II, art. 179, *Explanation 1*:—"Where the decree or order has been passed severally against more persons than one, distinguishing portions of the subject-matter as payable or deliverable by each, the application shall take effect against only such of the said persons or their representatives as it may be made against. But where the decree or order has been passed jointly against more persons than one, the application, if made against any one or more of them, or against his or their representatives, shall take effect against them all."

Clause (2), art. 179, Sch. II of the same Act applies only to those cases in which the parties to the execution-proceedings were parties to the appeal or the class of cases to which O. XXI, r. 4 applies, and it has been held that where a decree is passed against several defendants not jointly but severally, and an appeal is preferred by some only, limitation to execute against the others runs from the date of the decree, and the cases cited; but the better opinion seems to be that it runs from the date of the decree in appeal.²

The mode in which the assistance of the Court is required.—Rule 21 makes it discretionary with a Court to permit execution to be taken out simultaneously against the person and property of the judgment-debtor. A mere request that the amount of the decree may be recovered without any specification of the mode in which the Court was desired to aid in the recovery, is not a proper application.³

In a suit by certain members of a joint Hindu family to recover from the
 execution
 posses-
 debt for
 which the original decree had been made, with interest at 6 per cent. up to date of realization, *held*, that the condition in favour of the defendant was not a decree which was capable of being put in execution at his instance.⁴

Several debtors.—Where there is a joint, or a joint and several, decree passed against two or more persons, the decree-holder may execute his decree against any of the persons he may select,⁵ and execution will not be stopped, though
 proportionate part,⁶ or
 ors.⁷ But where in execution C was a mere tenant,
 property did not satisfy

Otherwise as the nature of the relief granted may require.—These words mean that the mode of execution is to be adapted in each case to

¹ *Abdool Kader v. Jaimi Ali*, (1872) 14 W. R., 56; but *see* as to this case—*Nuzeeun v. Amersoojee*, (1875) 21 W. R., 3.

² *Mashut un nissa v. Rani*, (1891) 13 All., 1.

³ *Nandha Lall v. Bai Jyokishon*, (1883) 16 Cal., 598; *Gopal Chunder Manna v. Gossain Das Kalay*, (1893) 25 Cal., 591; *Mahomed Mohi v. Mohine Kanta Chowdhury*, (1908) 7 Cal. J., 205.

⁴ *Franks v. Nunch Mal*, (1875) 7 All. H. C., 79.

⁵ *Shamsingara Singh v. Ramjod*, (1879) 5 C. L. R., 176.

⁶ *Wahid Ali v. Mulla & Enayat Hussain*, (1873) 12 B. L. R., 50; *Krishna Kishore v. Ram Lechen*, (1865) 12 W. R., 49.

⁷ *Salig Bhai v. Rani Senak*, (1866) 1 Agre. M., 11.

⁸ *Shree Ch. v. Ram Narain*, (1871) 16 W. R., 69; *Kishor Ali v. Karamadhi*, (1880) 6 C. L. R., 212.

⁹ *Potteloy Maje v. Kishore Maje*, (1861) 1 W. R., 115. See "Writ of Habeas Corpus," p. 15, *infra*.

the nature of the particular relief sought to be enforced under the decree,¹ and a person may make separate and successive applications for execution of a decree giving reliefs of different characters, in respect of such relief.² Decree-holders seeking khas possession of land already in the possession of a surbarakar under order of Court, should apply to the Court that appointed him.³ The manner in which a decree directing the defendant to pull down a wall should be enforced is by imprisonment of the debtor, or attachment of his property, and if the mode in which the assistance of the Court is asked is wrong, the Judge should return the application for amendment.⁴ A decree declining a party entitled to a constantly recurring right to receive certain payments in kind valued at a certain annual sum, cannot be executed.⁵

Transfer of Property Act—An application for an order absolute under s. 87 of Act IV of 1832, is a proceeding in execution and subject to the rules of such proceedings.⁶ But it is not an application for execution and need not be in the form prescribed by this rule.⁷ An order for sale under s. 88 should not be executed unless it is made absolute under s. 89.⁸

Section 90—A decree of the nature referred to in s. 90 can be made in the original suit, and a new suit is unnecessary.⁹

Foreclosure—In foreclosure suits the mortgagee can redeem until an order absolute is made.¹⁰

Succession Certificate Act—Clause (c) of sub-sec. 1 of s. 4 of Act VII of 1889, does not apply to applications or proceedings in execution of a decree made before and pending when the Act came into force.¹¹

12. Where an application is made for the attachment of any moveable property belonging to a judgment-debtor but not in his possession, the decree-holder shall annex to the application an inventory of the property to be attached, containing a reasonably accurate description of the same.

Act XIV of 1882, s. 236

This rule applies to H. C. and Prov. S. C. C.

This rule, it should be noted, refers only to an application for the enforcement of a decree by attachment of moveable property *belonging to the judgment-debtor, but not in his possession*. Rules 46 and 53 prescribe the mode of attachment

¹ *Donomath Backet v. Maty Lal Paul*, (1862) 67 J. H. 259.

² *Radha Krishen v. Radha Pershad*, (1882) 8 Cal. 515.

³ *Hurriah Kisto Dass v. Motoo Chand*, (1868) 10 W. R. 444.

⁴ *Protap Chunder v. Peary Chowdhram*, (1882) 8 Cal. 174.

⁵ *Tata Charlar v. Singara Charnar*, (1882) 4 Mad. 219.

⁶ *Oudh Behari v. Nageshar*, (1891) 13 All. 278.

⁷ *Ajudhia Pershad v. Baldeo Singh*, (1891) 21 Cal. 818; *Tiluck Singh v. Persotein Pershad*, (1893) 22 Cal. 921; *Rambur Singh v. Draggil*, (1894) 16 All. 23.

⁸ *Ram Lal v. Narain*, (1890) 12 All. 533; *Tara Prasad v. Bhubodeb*, (1895) 22 Cal. 931.

⁹ *Raj Singh v. Parmanand*, (1889) 11 All. 480.

¹⁰ *Poreshnath v. Ramjoda*, (1889) 16 Cal. 216; *contra*—*Oudh Behari v. Nageshar*, (1891) 13 All. 278; *Chaitath v. Krishna*, (1890) 13 Mal. 267; *Ajudhia Pershad v. Baldeo Singh*, (1894) 21 Cal. 821.

¹¹ *Balukhai v. Nasir*, (1891) 15 Bom. 79; and see *Chinniram v. Hanmanta*, (1891) 15 Bom. 205. See "DECREASED CREDITOR."

in such cases, the last-mentioned rule referring to property deposited in, or in the custody of, any Court or public officer.

This rule does not contemplate any inquiry before the Court whether the property belongs to the judgment-debtor or not.¹

Inventory.—This inventory, when the property is moveable, must be delivered into Court with the application for execution.²

Moveable property.—See note under s. 60

Wrong seizure.—Regarding the liability of the decree-holder, Sheriff or Nazir for damages for seizure of moveable property belonging to a third party and not to the judgment-debtor, see the undernote.³ cases⁴

Application for attachment of immoveable property to contain certain particulars.

13. Where an application is made for the attachment of any immoveable property belonging to a judgment-debtor, it

shall contain at the foot—

- (a) a description of such property sufficient to identify the same and, in case such property can be identified by boundaries or numbers in a record of settlement or survey, a specification of such boundaries or numbers; and
- (b) a specification of the judgment-debtor's share or interest in such property to the best of the belief of the applicant, and so far as he has been able to ascertain the same.

Act XIV of 1882, s. 237.

This rule applies to H. C.

Description.—The description of the property to be attached, and the location of the property, should be such as to enable the Court to identify the property. The description should be such as to enable the Court to identify the property. The description should be such as to enable the Court to identify the property. The description should be such as to enable the Court to identify the property.

And so when the property was described as the property sought to be attached in a former execution, the description, though irregular in form, was considered sufficient.⁵ A third person purchasing mortgaged property *bona fide* at a sale in execution of a money decree obtained by the mortgagee against the mortgagor obtains a good title free from the mortgage lien, unless the sale is made subject to it.⁶ A mortgagee who purchases at an auction sale of the property over which he has a mortgage lien, cannot free himself of his liability to be re-leased, if he does not notify or disclose his lien at the time of sale.⁷

¹ Subhan Bhai v. Saristhali, (1869) 3 B. L. R., A. C., 413; 12 W. R., 329

² Sreenath Gosh v. Yusuf Khan, (1881) 7 Cal., 559.

³ Kales Chandra v. Bal Dwair, (1872) 11 B. L. R., 256; Guny Mahad v. Gokuldas Khimji, (1870) 3 Bom., 71; Framji v. Hormaji, (1879) 2 Bom., 258, p. 271; 12 Cal. 121; Chander v. Shama Soodani, (1870) 4 Cal., 283.

⁴ Lock Ram v. Mohesh Dass, (1867) 12 W. R., 488

⁵ Mahadevan v. Rameshwar, (1872) 18 W. R., 411.

⁶ Herry Chander v. Shalidar, (1886) 12 Cal., 161; Wajidan v. Bishwanath, (1881) 18 Cal., 462, and compare—Margdar v. Tarnid Churn, (1887) 11 Cal., 121

⁷ Harn v. Shankargur, (1870) 23 Bom., 119

⁸ Mahadev v. D. Kaly, (1878) 22 Bom., 621.

Verification under the former Code, the inventory had to be verified and an omission to verify amounted to an irregularity within sec. 99.¹

Specification of the share—In case of a joint family, the application should state whether it is the judgment-debtor's share or the joint family property that is sought to be attached. It should also specify the family property.² The creditor is bound to specify the debtor's share or interest to the best of his belief, or so far as he has been able to ascertain the same, and cannot evade the law by describing his debtor's separate portion in a *bhag* as his "right, title, and interest in the whole *bhag*."³

Estoppsl—The decree-holder may be prevented from executing his decree. Thus, where A sold the right, title and interest of his debtor without disclosing that he had a mortgage on it, he was not able to enforce the mortgage against the purchaser.⁴ When in execution of a simple money decree obtained for some of the instalments due on his mortgage bond, a mortgagee brought to sale the

14. Where an application is made for the attachment of any land which is registered in the office of the Collector, the Court may require the applicant to produce a certified extract from the register of such office, specifying the persons registered as proprietors of, or as possessing, any transferable interest in, the land or its revenue, or as liable to pay revenue for the land, and the shares of the registered proprietors.

Power to require certified extract from Collector's register in certain cases

Act XIV of 1882, s. 238

This rule applies to H. C.

It should be noted that this rule is not restricted to land registered in the Collector's office in the name of the judgment-debtor, for it frequently happens that the actual proprietors are not so registered.

Description—The decree-holder is not bound to specify the names of all appurtenances to an estate registered in the Collector's office, such as *aslee* and *dikhlee* mouzahs, as they would necessarily be included in the estate, which is sufficiently described by its ordinary name and the amount of Government revenue

¹ *Nazir-un-nissa v. Ghapuruddin*, (1906) 23 All., 244; *foli. Basdeo v. Smidt*, (1899) 22 All., 55.

² *Muhammad v. Dip Chaml*, (1892) 14 All., 190.

³ *Ardesir Nasarvanji v. Mune Natha Amji*, (1876) 1 Bom., 601.

⁴ *Dulla's Sirkar v. Krishna Kumar*, (1869) 3 N. L. R., 407; *Tionappa v. Murugappa*, (1881) 7 Mad., 107; *Kasturi v. Venkataschalapathi*, (1892) 15 Mad., 412.

⁵ *Ram Chandra v. Jairam*, (1898) 22 Bom., 686.

⁶ *Narsing v. Roghoobur*, (1881) 10 Cal., 609; *Agarchand v. Rakhma*, (1888) 12 Bom., 678.

⁷ *Dhondo v. Raoji*, (1896) 20 Bom., 290.

⁸ *Tinnappa v. Nurugappa*, (1881) 7 Mad., 107. See note to s. 65, *Cf. r. 66, infra*.

in such cases, the last-mentioned rule referring to property deposited in, or in the custody of, any Court or public officer.

This rule does not contemplate any inquiry before the Court whether the property belongs to the judgment-debtor or not.¹

Inventory—This inventory, when the property is moveable, must be delivered into Court with the application for execution.²

Moveable property.—See note under s. 60.

Wrong seizure—Regarding the liability of the decree-holder, Sheriff or Nazir for damages for seizure of moveable property belonging to a third party and not to the judgment-debtor, see the undernoted cases.³

Application for attachment of immoveable property to contain certain particulars

13. Where an application is made for the attachment of any immoveable property belonging to a judgment-debtor, it shall contain at the foot—

- (a) a description of such property sufficient to identify the same and, in case such property can be identified by boundaries or numbers in a record of settlement or survey, a specification of such boundaries or numbers; and
- (b) a specification of the judgment-debtor's share or interest in such property to the best of the belief of the applicant, and so far as he has been able to ascertain the same.

Act XIV of 1882, s. 237

This rule applies to H. C.

Description—The intention of this rule being that the description of the property should be such as may be sufficient to identify it, where the property is an estate paying revenue to Government, a specification of the revenue is necessary. . . . described as a *lakheraj* tank with four banks, the boundary was held to be fully made out.⁴ . . . the property sought to be attached in a former execution, . . . was irregular in form, was considered sufficient.⁵ A third person purchasing mortgaged property *bona fide* at a sale in execution of a money decree obtained by the mortgagee against the mortgagor obtains a good title free from the mortgage lien, unless the sale is made subject to it.⁷ A mortgagee who purchases at an auction sale of the property over which he has a mortgage lien, cannot free himself of his liability to be redeemed, if he does not notify or disclose his lien at the time of sale.⁶

¹ *Subjan Bibi v. Saristalla*, (1869) 3 B. L. R., A. C., 413; 12 W. R., 329.

² *Sreenath Gooka v. Yusof Khan*, (1891) 7 Cal., 559.

³ *Kaleo Coomra v. Siddheshwar*, (1872) 11 B. L. R., 256; *Goma Mahad v. Gokaldas Klump*, (1879) 3 Bom., 74; *Tramji v. Hormaji*, (1878) 2 Bom., 258, p. 271; *Raj Chunder v. Shanti Soondari*, (1879) 4 Cal., 542.

⁴ *Lack Ram v. Mohesh Doss*, (1869) 12 W. R., 489.

⁵ *Mahtabchand v. Burdunath*, (1872) 14 W. R., 411.

⁶ *Harce Charin v. Sankardar*, (1886) 12 Cal., 161; *Wajahan v. Bishwanath*, (1891) 18 Cal., 462, and compare—*Macgregor v. Tarini Churn*, (1897) 14 Cal., 124.

⁷ *Husein v. Shankargere*, (1899) 23 Bom., 119.

⁸ *Martand v. Dhondo*, (1899) 22 Bom., 624.

The application must be for the whole decree and not for any fractional share that the applicant may consider himself entitled to.¹

Where two out of several co-decree-holders applied to the Judge's Court to execute their share of a decree, it was held that the application was not one upon which the Court could proceed in execution, and that in appeal it could not be changed into an application to execute the whole decree;² moreover, it is not sufficient to bar limitation and cannot be cured by petition after the period of limitation has expired,³ and where by inadvertence, execution issued for the separate shares, costs were refused.⁴ A defendant cannot object to the share claimed for himself by a decree holder, and on that account refuse to pay into Court the entire amount, if the Court allows execution of the whole decree.⁵ A decree provides that the plaintiff should pay Rs. 304 for the costs of 13 out of 18 defendants. Two of the defendants sought to execute the decree in respect of their proportionate share of the sum so awarded. Besides the plaintiff, two only of the other defendants were joined as parties to those proceedings. *held*, that the application was not maintainable and was dismissed.⁶

Part execution allowed—Where of two decree-holders one sold his share to the debtor, and delivered to him the certified copy of the Privy Council decree required for execution, and the other applied for execution, it was held that execution should issue, leaving the Court in execution to decide under s. 47 the share of the remaining decree holder.⁷

Regular suit.—As to when a regular suit will lie for a portion of the decretal money realised by the debtors who have purchased benamies and whose benamidar has not succeeded in getting his name registered under r. 16. See *Haragobind v. Issuri*.⁸

Satisfaction—But as one joint decree-holder is not bound by the acts of another, who has compromised or received payment out of Court,⁹ the debtor would be wise in not paying unless jointly or to the extent of their admitted

¹ *Thakoor Dass Singh v. Lachmoepat*, (1867) 7 W. R., 10; *Jagjeebun v. Goluk Monee*, (1874) 22 W. R., 351; *Harro Sanker v. Tarak Chandra*, (1869) 3 B. L. R., 114; *Banarsi v. Kuar*, (1893) 5 All., 27; *contra*—*Hurrieh Chunder v. Kail Sunderi*, (1883) 9 Cal., 497; L. R., 10 I. A., 4, in which the Privy Council has decided that a complainant is competent to obtain execution according to the extent of his interest in the decree.

² *Purna Chandra v. Saroda Churn*, (1869) 3 B. L. R., App., 21; *contra*—*Roy Goodur v. Dhunneswar*, (1880) 7 C. L. R., 117.

³ *Collector of Shahjahanpur v. Surjan*, (1882) 4 All., 72; *contra*—*Kuthail v. Ravotti*, (1878) 3 Mad., 79; *Dulchand v. Bai Shivakor*, (1891) 15 Bom., 242.

⁴ *Prannath Mitter v. Mothooranath*, (1863) 6 W. R., Mis., 64.

⁵ *Sutesh Chunder v. Saroda Pershad*, (1866) 5 W. R., Mis., 59.

⁶ *Muthusami v. Natesa*, (1895) 18 Mad., 464.

⁷ *Kally Soonlary, in the matter of*, (1881) 6 Cal., 594; (1883) 9 Cal., 482; L. R., 10 I. A., 4; and see *Kudhai v. Sheo Dyal*, (1888) 10 All., 570.

⁸ *Haragobind v. Issuri*, (1888) 15 Cal., 187.

⁹ *Balgobind v. Bhawanee Dorn*, (1866) 1 Agra, Mis., 16.

¹⁰ *Mahima Chandra v. Pyari Mohan*, (1868) 2 B. L. R., App., 43.

¹¹ *Budhun v. Hafezah*, (1879) 4 C. L. R., 70; *Tamman Singh v. Lachmin Kunwari*, (1904) 26 All., 318; *Moti Ram v. Hannu Prasad*, (1904) 26 All., 334.

¹² *Lachman Dasi v. Chitarrhooj Das*, (1906) A. W. N., 16, 28 All., 252; and see *Banarsi v. Kuar*, (1883) 5 All., 27.

¹³ *Anando v. Anando*, (1897) 14 Cal., 831; approved in *Tarruck Chunder v. Niro Nath*, (1893) 9 Cal., 831; *approved* in *Savalayamma v. Niro Nath*, (1893) 9 Cal., 831; *approved* in *Savalayamma v. Niro Nath*, (1893) 9 Cal., 831.

Application—application must be for the whole decree and not for any fractional share at the applicant may consider himself entitled to¹

Where two out of several co-decree-holders applied to the Judge's Court to execute their share of a decree, it was held that the application was not one upon which the Court could proceed in execution, and that in appeal it could not be changed into an application to execute the whole decree,² moreover, it is not sufficient to bar limitation and cannot be cured by petition after the period of limitation has expired,³ and where by inadvertence, execution issued for the separate shares, costs were refused.⁴ A defendant cannot object to the share claimed for himself by a decree-holder, and on that account refuse to pay into Court the entire amount, if the Court allows execution of the whole decree.⁵ A decree provided that the plaintiff should pay Rs. 304 for the costs of 13 out of 18 defendants. Two of the defendants sought to execute the decree in respect of their proportionate share of the sum so awarded. Besides the plaintiff, two only of the other defendants were joined as parties to those proceedings. *Held*, that the application was not maintainable and was dismissed.⁶

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Regular suit—As to when a regular suit will lie for a portion of the decretal money is disallowed by the debtors who have purchased benamie and whose benamidar has not succeeded in getting his name registered under r. 16. See *Haragobind v. Issuri*.⁸

Satisfaction—But as one joint decree-holder is not bound by the acts of another, who has compromised or received payment out of Court,⁹ the debtor would be wise in not paying unless jointly or to the extent of their admitted shares.¹⁰ For, ordinarily, a joint decree-holder has no power to give a discharge out of Court to a judgment-debtor for more than his own share of the decree,¹¹ not even if they are co-executors,¹² and certainly not if the decree be not based on contract, but is for possession of land against the defendants as wrong-doers.¹³ A

¹ *Thakoor Dass Singh v. Lachmeput*, (1867) 7 W. R., 10; *Jagjeebun v. Goluk Monce*, (1874) 22 W. R., 354; *Haro Sanker v. Tarak Chandra*, (1869) 3 B. L. R., 114; *Banarsi v. Kuar*, (1883) 5 All., 27; *contra*—*Hurish Chander v. Kali Sanderi*, (1883) 9 Cal., 497; L. R., 10 I. A., 4, in which the Privy Council has decided that a co-plaintiff is competent to obtain execution according to the extent of his interest in the decree.

² *Purna Chandra v. Saroda Churn*, (1869) 3 B. L. R., App., 21; *contra*—*Roy Goodar v. Dhunnesur*, (1880) 7 C. L. R., 117.

³ *Collector of Shikhabanpur v. Surjan*, (1882) 4 All., 72; *contra*—*Kuthali v. Bivotti*, (1878) 3 Mad., 79; *Dalchand v. Bai Shivakor*, (1891) 15 Bom., 212.

⁴ *Prannath Miter v. Mothooranath*, (1869) 6 W. R., Mis., 64.

⁵ *Sutesh Chunder v. Saroda Pershad*, (1866) 5 W. R., Mis., 58.

⁶ *Mathuram v. Natesa*, (1895) 18 Mad., 464.

⁷ *Kally Soonlary, in the matter of*, (1891) 6 Cal., 594; (1893) 9 Cal., 482; L. R., 10 I. A., 4; and see *Kudhai v. Sheo Dayal*, (1898) 10 All., 570.

⁸ *Haragobind v. Issuri*, (1898) 15 Cal., 187.

⁹ *Balgobind v. Bhawanee Deen*, (1866) 1 Agra, Mis., 16.

¹⁰ *Mahima Chandra v. Pyari Mohan*, (1863) 2 B. L. R., App., 43.

¹¹ *Budhun v. Hafezah*, (1879) 4 C. L. R., 70; *Tamman Singh v. Lachmin Kunwari*, (1904) 26 All., 318; *Moti Ram v. Haran Prasad*, (1904) 26 All., 334.

¹² *Lachman Das v. Chaturbhaj Das*, (1906) A. W. N., 16; 23 All., 252; and see *Banarsi v. Kuar*, (1883) 5 All., 27.

¹³ *Anando v. Anando*, (1887) 14 Cal., 50; *Tarruck Chunder v. Diomedro Nath*, (1883) 9 Cal., 831; approved in *Sultan v. Savaleymall*, (1892) 15 Mad., 343.

payable.¹ It is unnecessary to specify in the notification of sale the in, or in the mouzals included in the property sought to be sold. All that is necessary is to specify the estates, or shares of estates, and the number they bear in the Collector's office.²

15. (1) Where a decree has been passed jointly in favour of more persons than one, any one or more of such persons may, unless the decree imposes any condition to the contrary, apply for the execution of the whole decree for the benefit of them all, or, where any of them has died, for the benefit of the survivors and the legal representatives of the deceased.

(2) Where the Court sees sufficient cause for allowing the decree to be executed on an application made under this rule it shall make such order as it deems necessary for protecting the interests of the persons who have not joined in the application.

Act XIV of 1882, s. 231.

This rule applies to H. C. and Prov. S. C. C.

Passed jointly.—When once a joint decree has been given, that decree ever after remains a joint decree, any act or conduct of the decree-holder's notwithstanding.³ A obtained a decree for partition of certain property. Subsequently, B got a decree against A declaring he was entitled to a one-fifth share of what A would recover, and then applied to execute A's decree; *held*, they were not joint decree-holders,⁴ but B as assignee of a share could execute the whole decree.⁵

Representatives.—The old section read "such persons or their representatives may apply" and this was held to cover the assignee of the decree-holder.⁶ This case is covered by the next rule.

Unless the decree imposes any condition to the contrary.—This proviso is new, and gives effect to the decision in *Farzand v. Abdullab*.⁷

Whole decree.—Ordinarily all the decree-holders in a joint decree must join in an application to execute a decree for possession of property,⁸ or for money,⁹ but where there are several joint decree-holders the Court can issue execution on the application of some of them (or their representatives).¹⁰

¹ *Zerkalee Koor v. Doorga Pershal*, (1871) 16 W. R., 149.

² *Amruncasa v. Secretary of State*, (1834) 10 Cal., 63.

³ *Juzurnath v. Abimoolah*, (1867) 8 W. R., 132; *Aodh Beharee Lall v. Brojo Mohun*, (1870) 13 W. R., 125; see also *Nunkoo Lall v. Dhunesh Koor*, (1872) 17 W. R., 497.

⁴ *Ramram v. Anda Pillai*, (1899) 13 Mad., 347.

⁵ *Id.*, (1891) 14 Mad., 252. See "LIMITATION," *infra*.

⁶ *Dwar Bux v. Fatik Jali*, (1898) 3 Cal. W. N., 222.

⁷ *Farzand v. Abdullab*, (1834) 6 All., 62.

⁸ *Roy Goolur v. Dhuneshwar*, (1890) 7 C. L. R., 117.

⁹ *Collector of Shahjehanpur v. Surjan*, (1832) 1 All., 72; *Dishband v. Bai Slaker*, (1891) 15 Bom., 212; *Banaru v. Kuar*, (1833) 5 All., 27.

¹⁰ *Teja Singh v. Raj Narain*, (1849) 1 B. L. R., 62; *Amruncasa v. Shashi Khushu*, (1868) 2 B. L. R., App., 47.

Practice—One of several decree-holders has no right to claim execution, unless he satisfies the Court that he has sufficient cause for asking for execution alone, and as this ordinarily cannot be properly done without hearing the other decree-holders, notice must be given to them and the application disposed of in their presence¹. But it has been recently held that no notice to the judgment-debtor is necessary². If the application is allowed, the Judge is bound to pass such order as is necessary to protect the interests of the non-applicants. The usual order is an order reserving, in express terms, their rights to share in the proceeds of the execution³.

Appeal—No appeal lay from an order under the old Code refusing to allow one of several joint-holders to execute,⁴ and none is given under O XLIII. But an appeal lay from an order under s. 231, former Code, (this provision) such an order being one relating to the execution of a decree within the meaning of s. 47⁵.

16. Where a decree or, if a decree has been passed jointly in favour of two or more persons, the interest of any decree-holder in the decree is transferred by assignment in writing or by operation of law, the transferee may apply for execution of the decree to the Court which passed it: and the decree may be executed in the same manner and subject to the same conditions as if the application were made by such decree-holder:

Provided that, where the decree, or such interest as aforesaid, has been transferred by assignment, notice of such application shall be given to the transferor and the judgment-debtor, and the decree shall not be executed until the Court has heard their objections (if any) to its execution:

Provided also that, where a decree for the payment of money against two or more persons has been transferred to one of them, it shall not be executed against the others.

Act XIV of 1882, s. 232.

This rule applies to H. C. and Prov. S. C. C.

Rent-suits—It does not apply to the transfer of a rent-decree in Bengal.⁶

¹ *Umrit Nauth Chowdhry v. Chunder Kishore*, (1874) 21 W. R., 31; see *Ahmed Chowdhry v. Shahzada Khatoon*, (1890) 7 C. L. R., 537; *Hurish Chunder v. Kali Sundari*, (1881) 6 Cal., 594; (1893) 9 Cal., 482; L. R., 10 I. A., 4.

² *Durga Das v. Deoraj*, (1906) 33 Cal., 306, and see *Mukerjee J.*, (1906) 10 Cal. W. N., 297, cf. r. 16, *infra*.

³ *Tara-mundari Burmoh v. Beharilal Ray*, (1868) 1 B. L. R., A. C., 28.

⁴ *Odhyo Pershad v. Mohadco Bhandaree*, (1872) 17 W. R., 415; *Guoroo Doss v. Ram Rungmee*, (1872) 17 W. R., 136; *Batanlal v. Gulab*, (1899) 23 Bom., 623.

⁵ *Lakshmi Amurth v. Ponnassa Menon* (1894) 17 Mal., 304.

⁶ Act VIII, 1885, s. 148, cl. (h). See *Kodish Chunder v. Jodu Nath*, (1887) 14 Karanv. Mov. v. Jodini, (1896) 1 Cal. W. N., 694; transferee can

not of the whole decree.⁸ There is no prohibition in judgment-debtors are sued as well as decree-holders assigning his interest under the decree, and the assignee of the creditors is allowed to execute, unless the judgment-debtor can show that such assignment is prejudicial to his interests.⁹ The purchase of the benefit of the joint debtors, although it has the legal effect of satisfying the debt, does not affect the decree itself. The decree is not void, but only

In writing—An oral transfer is not recognised.¹⁰ In this country, an assignment can always be impeached by third parties who can show that it is not a real transaction.¹¹

By operation of law—The holder of a certificate under Reg. VIII of 1827, in regard to a deceased judgment-creditor is a transferee.¹² A Hindu widow obtained probate of an alleged will of her husband, and got a decree for rent due by one of his tenants. The heir got the will set aside; *held*, he was a transferee of the rent-decree by operation of law.¹³ The mere fact of one of the judgment-debtors being one of the representatives of the deceased decree-holder does not debar the other representatives from executing the decree according to their rights,¹⁴ and the second proviso is no bar where the decree is against the representatives of the others.¹⁵

Transferee—The transfer must have been from 'the decree-holder to any other person.' A instituted a suit, and dying before judgment, his wife C carried on the suit as his representative and got a decree. It was held that D, who claimed as heir of A, could not execute the decree so long as C was alive and did not transfer her rights to him.¹⁶ A transferee of a decree may apply to have it transferred to another Court to have it executed against the surety as well as against the judgment-debtor.¹⁷ A transfer of a future decree is not within this rule.¹⁸

An order setting aside an adjudication as insolvent on assignment of the insolvent's estate to a surety does not annul a decree, but passes the

¹ *Vishnu v. Krishnarao*, (1887) 11 Bom., 153. See also *Kalyan Bhai v. Ghanshyam*, (1881) 5 Bom., 29.

² *Abeloomissa v. Amereomissa*, (1877) L. R., 4 I. A., 66, p. 73; 2 Cal., 327.

³ *Ram Sahai v. Gaya*, (1885) 7 All., 107. See *Hansraj v. Mukhraji*, (1903) 30 All., 28.

⁴ *Id.*

⁵ *Sectaput Roy v. Syud Ali*, (1875) 21 W. R., 11; *contra*—*Kishore Chand v. Gibbons & Co.*, (1890) 17 Cal., 341; *Gyanmonee v. Radha Romon*, (1890) 5 Cal., 592.

⁶ *Muthunarayana v. Balakrishna*, (1896) 19 Mad., 306.

⁷ *Abul Munsoor v. Abdool Hamid*, (1877) 2 Cal., 93. See "WHOLE DECREE," p. 692.

⁸ *Jayermal v. Umaji*, (1885) 9 Bom., 179; *Parvata v. Digambar*, (1891) 15 Bom., 107. See also the distinction between a purchaser at a sale in execution of decree, and a private assignee—*Gour Sundar v. Hem Chunder*, (1889) 10 Cal., 351.

⁹ *Mulji v. Nathubhai*, (1891) 15 Bom., 1.

¹⁰ *Rhanderv v. Ganesh*, (1887) 11 Bom., 369.

¹¹ *Umaseondary v. Broj Nath*, (1888) 16 Cal., 347. See also *Sethurayar v. Shanmugam Pillai*, (1893) 21 Mad., 353.

¹² *Wise v. Abdool Ali*, (1867) 17 W. R., 136.

¹³ *Panchanand v. Sundarai*, (1907) 31 Bom., 303.

¹⁴ *Abeloomissa v. Amereomissa*, (1877) L. R., 4 I. A., 73; 2 Cal., 327.

¹⁵ *Chathott v. Saidindrade*, (1902) 28 Mad., 238.

¹⁶ *Bhandari v. Rama Chandra*, 17 M. L. J., 392.

Practice—One of the surety, who becomes by operation of law an unless he satisfies the Court¹ alone; and as this is not essential under Act VIII of 1859 that the decree-holder, in every case have obtained a certificate under Act XXVII in their presence². It is to be allowed to execute³. An applicant having purchased judgment-debtor is not entitled to execution of a decree a debt due to a deceased person is to pass such order as may be under s 4 (a) of the Succession Certificate Act, VII of The usual order is as follows in the proceeds of the

Judgment-debtor—If the judgment-debtor is dead before the application—No need get notice, the transfer may still be allowed,⁴ but not one of the representatives are brought on the record and served with notice⁵

Notice—Notice shall be given to the transferor.—The notice must be issued by the Court which passed the decree⁶. If a transfer is made after notice to transferor and debtor, and the decree partly executed, the representative of the judgment-debtor cannot subsequently object⁷.

A decree is not a debt within the meaning of s 131 of the Transfer of Property Act, 1882, so as to make the transfer void without express notice. Notice under this rule is sufficient⁸.

The mere issue of a notice under this rule does not operate as a revivor within the meaning of art 180 of the Limitation Act⁹.

Abatement—There is no express provision in the Code for abatement of proceedings in execution. When it is brought to the notice of the Judge that the judgment-creditor is dead, he should strike off the proceedings by default, leaving the legal representative to apply within the period of limitation,¹⁰ and a sale of property attached in the debtor's life-time properly published is not bad, if it takes place after the death of the debtor¹¹.

Benamidar—A *benamidar* has no *locus standi* under this rule, the person having the beneficial interest is the transferee,¹² and an application by him does not save limitation.¹³ But a Court may allow execution to proceed at the instance of a transferee who is a *benamidar*, if it thinks fit and such proceedings, if in proper time, keep the decree alive.¹⁴

Transfer recorded—The actual substitution of the name of the assignee for that of the decree-holder is not necessary for the validity of the proceeding

¹ *Miller v Abinash Chander*, (1899) 4 Cal. W. N., 785.

² *Gopal Singh Deb v. Gopal Chunder Chuckerhutti*, (1867) 7 W. R., 394; *Roghunath Shaha v. Poresh Nath Pundari*, (1899) 15 Cal., 54. But see s. 4, Act VII of 1859.

³ *Mancharam Pranjivan v. Bai Mahal*, (1894) 18 Bom., 315.

⁴ *Khushrobbhai v. Hormazsha*, (1887) 11 Bom., 727.

⁵ *Mahalinga v. Kuppanachariar*, (1907) 30 Mad., 541.

⁶ *Nando Lal v. Chatterput Sing*, (1902) 29 Cal., 235; *Gulzari Lal v. Daya Ram*, (1887) 9 All., 46.

⁷ *Mulchand v. Chhagan*, (1886) 10 Bom., 74.

⁸ *Dagdu v. Vanji*, (1900) 24 Bom., 502.

⁹ *Monohar Das v. Futtch Chand*, (1903) 7 Cal. W. N., 793; 30 Cal., 979.

¹⁰ *Dulari v. Mohan Singh*, (1881) 3 All., 759.

¹¹ *Shree Prasad v. Hira Lal*, (1899) 12 All., 440. See notes under O XXII, r. 5, and O XXIII, r. 4.

¹² *Abdul Kureem v. Chukhum*, (1879) 5 C. L. R., 253.

¹³ *Deno Nath v. Lalit Coomarr*, (1883) 9 Cal., 633; 12 C. L. R., 146. *Gour Sundar v. Hem Chunder*, (1899) 18 Cal., 355. See also *Manikkam v. Tatayya*, (1893) 21 Mad., 389.

¹⁴ *Balkishen v. Bedmati Koer*, (1893) 20 Cal., 388; see also *Purnu Chandra v. Abhaya Chandra*, (1869) 4 B. L. R., App., 40.

If decree be transferred —The transferee gains

stranger ⁴ It is doubtful if this rule would apply to the whole of the decree ⁵ There is no prohibition in law, does, not as decree-holders assigning his interest under the decree, and, or, and the ad to execute, unless the judgment-debtor can show that such whole prejudicial to his interests ⁶ The purchase of the benefit of the joint debtors, although it has the legal effect of satisfying debt, does not affect the decree itself The decree is not void, but only

In writing —An oral transfer is not recognised ⁷ In this country, an assignment can always be impeached by third parties who can show that it is not a real transaction.⁸

By operation of law —The holder of a certificate under Reg. VIII of 1827, in regard to a deceased judgment-creditor is a transferee.¹⁰ A Hindu widow obtained probate of an alleged will of her husband, and got a decree for rent due by one of his tenants The heir got the will set aside, *held*, he was a transferee of the rent-decree by operation of law ¹¹ The mere fact of one of the judgment-debtors being one of the representatives of the deceased decree-holder does not debar the other representatives from executing the decree according to their rights,¹² and the second proviso is no bar where the decree is against the representatives of the others ¹³

Transferee —The transfer must have been from 'the decree-holder to any other person' A instituted a suit, and dying before judgment, his wife C carried on the suit as transferee and not as decree It was held that D, who claimed long as C was alive and did not a decree may apply to have it transferred against the surety as well as against the judgment-debtor ¹⁴ A transfer of a future decree is not within this rule ¹⁵

An order setting aside an adjudication as insolvent on assignment of the insolvent's estate to a surety does not annul a decree, but passes the

¹ *Vishnu v. Krishnarao*, (1837) 11 Bom., 153. See also *Kalyan Bhai v. Ghana Shamlal*, (1881) 5 Bom., 29.

² *Abdoolnissa v. Ameeroonissa*, (1877) L. R., 4 I. A., 66, p. 73; 2 Cal., 327.

³ *Ram Sahai v. Gaya*, (1885) 7 All., 107. See *Hansraj v. Mukhrji*, (1908) 30 All., 28.

⁴ *Id*

⁵ *Sectaput Roy v. Synd Ali*, (1875) 21 W. R., 11; *contra*—*Kishore Chand v. Gibbons & Co.*, (1890) 17 Cal., 341; *Gyamonee v. Radha Romon*, (1890) 5 Cal., 502.

⁶ *Muthunarayana v. Balakrishna*, (1896) 19 Mad., 306.

⁷ *Abul Munsoor v. Abdool Hamid*, (1877) 2 Cal., 98. See "WHOLE DECREE," p. 692.

⁸ *Jayermal v. Umaji*, (1885) 9 Bom., 179. *Parvata v. Digambar*, (1891) 15 Bom., 307. See as to the distinction between a purchaser at a sale in execution of decree, and a private assignee—*Gour Sundar v. Hem Chunder*, (1890) 16 Cal., 357.

⁹ *Mulji v. Nathubhai*, (1891) 15 Bom., 1.

¹⁰ *Rhenderv v. Ganesh*, (1887) 11 Bom., 368.

¹¹ *Umaseondary v. Broj Nath*, (1889) 16 Cal., 347. See also *Sethurayar v. Shanmugam Pillai*, (1894) 21 Mad., 253.

¹² *Woo v. Abdool Ali*, (1867) 7 W. R., 136.

¹³ *Panchander v. Sundabai*, (1907) 31 Bom., 303.

¹⁴ *Abdoolnissa v. Ameeroonissa*, (1875) L. R., 4 I. A., 73; 2 Cal., 327.

¹⁵ *Chathott v. Sahindavale*, (1903) 26 Mad., 253.

¹⁶ *Bhandari v. Rama Chandra*, 17 M. L. J., 392.

If decree be transferred—The transferee gains as if it were the property of the transferor, and if the latter could execute, the transferee can also execute. This would seem to exclude the owner of any interest in the property, and not only the assignee should not be put on the record, but the decree-holder's interest in the property and not on the record. A pre-emption decree, not as a stranger.¹ It is doubtful if this rule would apply to the whole and the part of the decree.² There is no prohibition in the whole decree-holders assigning his interest under the decree, and the transferee is bound to execute, unless the judgment-debtor can show that such assignment is prejudicial to his interests.³ The purchase of the benefit of the decree, although it has the legal effect of satisfying the debt, does not affect the decree itself. The decree is not void, but only

In writing.—An oral transfer is not recognised.⁴ In this country, an assignment can always be impeached by third parties who can show that it is not a real transaction.⁵

By operation of law.—The holder of a certificate under Reg. VIII, c.

debtors being one of the representatives of the deceased decree-holder does not debar the other representatives from executing the decree according to their rights,⁶ and the second proviso is no bar where the decree is against the representatives of the others.⁷

Transferee—The transfer must have been from "the decree-holder to any other person." A instituted a suit, and dying before judgment, his wife C carried on the suit as his representative and got a decree. It was held that D, who claimed as heir of A, could not execute the decree so long as C was alive and did not transfer her rights to him.⁸ A transferee of a decree may apply to have it transferred to another Court to have it executed against the surety as well as against the judgment-debtor.⁹ A transfer of a future decree is not within this rule.¹⁰

An order setting aside an adjudication as insolvent on assignment of the insolvent's estate to a surety does not annul a decree, but passes the

¹ *Vishnu v. Krishnaram*, (1887) 11 Bom., 153. See also *Kalyan Bhai v. Ghanshamlal*, (1881) 5 Bom., 29.

² *Abdoolnissa v. Ameerunnissa*, (1877) L. R., 4 L. A., 66, p. 73; 2 Cal., 327.

³ *Ram Sahai v. Gaya*, (1885) 7 All., 107. See *Hansraj v. Mukhrji*, (1908) 30 All., 28.

⁴ *Id.*

⁵ *Sectaput Roy v. Syad Ali*, (1875) 24 W. R., 11; *contra*—*Kishore Chand v. Gobarra & Co.*, (1890) 17 Cal., 311; *Gyanonee v. Radha Ramon*, (1880) 5 Cal., 692.

⁶ *Muthunarayana v. Balakrishna*, (1896) 19 Mad., 306.

⁷ *Abul Munsoor v. Abdool Hamid*, (1877) 2 Cal., 93. See "WHOLE DECREE," p 692.

⁸ *Jayram v. Umaji*, (1885) 9 Bom., 179; *Parrata v. Digambar*, (1891) 15 Bom., 307. See as to the distinction between a purchaser at a sale in execution of a decree, and a private assignee—*Gour Sundar v. Hem Chunder*, (1889) 16 Cal., 355.

⁹ *Mulji v. Nathubhai*, (1891) 15 Bom., 1.

¹⁰ *Khandharav v. Ganesh*, (1887) 11 Bom., 369.

¹¹ *Umraoondary v. Brojonath*, (1889) 16 Cal., 317. See also *Sethurayar v. Shanmugam Pillai*, (1894) 21 Mad., 353.

¹² *Wise v. Abdool Ali*, (1867) 7 W. R., 136.

¹³ *Panchsahar v. Sundarbat*, (1907) 31 Bom., 303.

¹⁴ *Abdoolnissa v. Ameerunnissa*, (1877) L. R., 4 L. A., 73; 2 Cal., 327.

¹⁵ *Chathott v. Sautikavade*, (1903) 26 Mad., 253.

¹⁶ *Bhandari v. Rama Chandra*, 17 M. L. J., 392.

Practice—One of the sureties, who becomes by operation of law an assignee, is not essential under Act VIII of 1859 that the receiver-holder, notice in every case have obtained a certificate under Act XXVII of 1859 that the receiver-holder be allowed to execute.² An applicant having purchased the debt is not entitled to execution of a decree if a debt due to a deceased person is passed such order as is under s 4 (a) of the Succession Certificate Act, VII of 1859, the usual order is an order for the proceeds of the

Judgment-debtor—If the judgment-debtor is dead before the application, no notice, the transfer may still be allowed;⁴ but notice of the representatives are brought on the record and served with notice.⁵

Notice—Notice shall be given to the transferor.—The notice must be issued by the Court which passed the decree.⁶ If a transfer is made after notice to transferor and debtor, and the decree partly executed, the representative of the judgment-debtor cannot subsequently object.⁷

A decree is not a debt within the meaning of s 131 of the Transfer of Property Act, 1882, so as to make the transfer void without express notice. Notice under this rule is sufficient.⁸

The mere issue of a notice under this rule does not operate as a revivor within the meaning of art 180 of the Limitation Act.⁹

Abatement—There is no express provision in the Code for abatement of proceedings in execution. When it is brought to the notice of the Judge that the judgment-creditor is dead, he should strike off the proceedings by default, leaving the legal representative to apply within the period of limitation;¹⁰ and sale of property attached in the debtor's life-time properly published is not bad, it takes place after the death of the debtor.¹¹

Benamidar—A *benamidar* has no *locus standi* under this rule, the person having the beneficial interest is the transferee.¹² and an application by him does not save limitation.¹³ But a Court may allow execution to proceed at the instance of a transferee who is a *benamidar*, if it thinks fit and such proceedings, if in proper time, keep the decree alive.¹⁴

Transfer recorded—The actual substitution of the transferee for the assignee

On receiving an application for the execution of a decree as provided by rule 11, sub-rule (2), the Court shall ascertain whether such of the requirements of rules 10 to 14 as may be applicable to the case have been complied with; and, if they have not been complied with, the Court may reject the application, or may allow the defect to be remedied then and there or within a time to be fixed by it.

(2) Where an application is amended under the provisions of sub-rule (1), it shall be deemed to have been an application in accordance with law and presented on the date when it was first presented.

(3) Every amendment made under this rule shall be signed or initialled by the Judge.

(4) When the application is admitted, the Court shall enter in the proper register a note of the application and the date on which it was made, and shall, subject to the provisions hereinafter contained, order execution of the decree according to the nature of the application :

Provided that, in the case of a decree for the payment of money, the value of the property attached shall, as nearly as may be, correspond with the amount due under the decree.

Act XIV of 1882, s. 245

This rule applies to H. C. and Prov. S. C. C.

If the application is not amended, an order rejecting the application should be passed.¹ A Court is not competent by an order under this provision, returning an application for amendment, to extend the period allowed by the law of limitation.² One being entitled under a decree of 1809 to a share in the income of a zamindari, obtained a decree in a suit of 1887 against certain recent purchasers of the zamindari, declaring that he had a valid charge on the estate and awarding to him besides his costs the amount due in respect of one year. He now applied in execution of the latter decree for payment of the amount due in respect of five years as well as his costs. An application to amend the petition for execution by inserting a reference to the former decree was made after the right of the petitioner in respect of some of the years in question had become barred by limitation. This application was refused by the Court of first instance; *held*, that under the circumstances the amendment should have been allowed to be made.³

As nearly as may be—See *Sorabji v. Govind*.⁴

Appeal—An appeal lies from an order under this provision under the former Code, see s. 583 cl. (1). Order XLIII does not provide an appeal *as from* an "order" but it may be argued that it lies as from a "decree" *see sec. 2 ante*.

¹ *Kamini Mohun v. Gopal*, (1892) 8 Cal., 479.

² *Gopal Sah v. Janki Koer*, (1896) 23 Cal., 222.

³ *Sattappa v. Jogi*, (1891) 17 Mad., 67.

⁴ *Sorabji v. Govind*, (1892) 16 Bom., 91, p. 114.

F singly and applies for execution to the Court in which the joint-decree is being executed. F may treat his joint-decree as a cross-decree under this rule.

Act XIV of 1882, s. 246.

This rule applies to H. C. and Prov. S. C. C.

Cross-decrees—This rule deals with cross-decrees and not with cross-claims under one decree. That is provided for by r. 19.¹

Every transferee of a decree holds it subject to the equities (if any) which the judgment-debtor might have enforced against the original decree-holder² (s. 49). Where execution of A's decree against B was stayed pending the passing of a decree in B's cross-suit: *held*, that no subsequent purchase of B's rights and interest in his cross-suit could be set up as a bar to A's rights to attach the whole of the decree in the cross-suit in execution of his decree against B.³ A obtained a decree against K and P, and assigned it to D, and prior to the assignment, K and P had sued A and D: *held*, K and P were entitled to set off their decree against the unexecuted portion of the assigned decree.⁴ One of several decree-holders cannot execute a decree in respect of his own separate interest or otherwise than as a whole.⁵ When there were cross-decrees and one of decree-holders was by an order of the Court made with the consent of both parties, bound in executing his decree to set off the amount of the decree against him; *held*, that it would be inequitable to allow the other decree-holder to obtain execution in full without setting off the amount decreed against him.⁶ On the 3rd February, 1900, cross-decrees were passed between A and B in different suits. A's decree was for a larger amount than B's decree against A. On the 25th January, 1900, B transferred his decree to C, but A only received notice of the assignment in October, 1900. *Held*, that C was not entitled to execute the decree against A. The transfer from B to C could take effect against A in respect of his cross-decree only after A had received notice of it, that being so, the decree so transferred being for a smaller amount than A's, became incapable of execution under the equitable principle enunciated above. At the date of completion of transfer by notice, B's decree was subject to the equity, and consequently the right of C, as the transferee of it, was also subject to that equity under s. 49 of the Code.⁷

Definite Sums—This rule applies to a decree directing the recovery of a decreed sum by sale of properties.⁸

Execution
issue for the
smaller sum,
which null and
in execution
which it is int.

course of execution at the same time.¹⁰ They must be decrees of the same Court between the same parties, or between the same parties, though of different

¹ *Kalka Prasad v. Ram Din*, (1883) 5 All., 272.

² *Kaim Ali v. Luckhy Kant*, (1868) 10 W. R., (C. B.) 32, 1 B. L. R., 23; *Nandoo Coomur v. Koonjo Kishore*, (1866) 6 W. R., 73.

³ *Peelo Chowdram v. Court of Wards*, (1867) 7 W. R., 219.

⁴ *Kristo Ramani v. Keslar Nath*, (1889) 16 Cal., 619.

⁵ *Judoonath v. Ram Buksh*, (1867) 7 W. R., 535.

⁶ *Haro Sanker v. Tarak Chandra*, (1869) 3 B. L. R., 114.

⁷ *Smtu Pandaram v. Sathboji Row*, (1903) 26 Mad., 428.

⁸ *Krishnan v. Venkatapathi*, (1906) 29 Mad., 318; followed *Vaidhinasamy Ayyar v. Samisundram*, (1935) 28 Mad., 476.

⁹ *Rewa Milton v. Ram Krishen*, (1885) 1 L. R., 13 L. A., 106; 14 Cal., 18.

¹⁰ *Judoonath v. Ram Buksh*, (1867) 7 W. R., 535.

Execution in case of cross-claims under same decree

19. Where application is made to a Court for the execution of a decree under which two parties are entitled to recover sums of money from each other, then,—

- (a) if the two sums are equal, satisfaction for both shall be entered upon the decree; and,
- (b) if the two sums are unequal, execution may be taken out only by the party entitled to the larger sum and for so much only as remains after deducting the smaller sum, and satisfaction for the smaller sum shall be entered upon the decree

Act XIV of 1882, s. 247

This rule applies to H. C. and Prov. S. C. C.

By analogy to r. 18 where there is only one decree and not cross-decrees, the party entitled to the smaller sum cannot take out execution against the party entitled to the larger,¹ execution should only issue for the difference.²

The parties must hold the same character and identical rights of enforcing execution. Thus, where A was entitled to execution against specified property of B, and B was entitled as against A to realize by proceeding against his person and property, the cross claims were not allowed to be set-off.³ This provision is not limited in its application to cases in which the remedy of each party against the other is of precisely the same nature. Thus, where one party to the suit was entitled to recover certain costs by means of the sale of hypothecated property and the other party under the same decree was entitled to recover a smaller sum as costs from his opponent personally, it was held that this provision applied and that the costs recoverable personally could be set-off against the costs recoverable by sale of hypothecated property.⁴ So, the defendants may set-off the amount payable by them to plaintiff by way of costs against an amount due under a mortgage decree and the value of improvements payable by the plaintiff to them.⁵

Extension—This rule does not apply to a case of pre-emption, but only to counter claims, in suits for money. Still the spirit of it is applicable and under an order to deposit the purchase-money, costs may be deducted.⁶

Cross-decrees and cross claims in mortgage suits.

20. The provisions contained in rules 18 and 19 shall apply to decrees for sale in enforcement of a mortgage or charge.

This is a new provision which makes it clear that the provisions as to cross-decrees and cross-claims apply to mortgage decrees. It also expresses the

¹ Jugo Mohan v. Soorondronath Roy, (1870) 13 W. R., 106.

² Amjad Ali v. Fazul Hossain, (1873) 19 W. R., 187; Giribala v. Mina Kumari, (1900) 5 Cal. W. N., 497.

³ Kalka Prasad v. Ram Din, (1883) 5 All., 272.

⁴ Bhagwan Singh v. Ratan, (1894) 16 All., 393.

⁵ Sunkara Menon v. Gopal Pattar, (1900) 23 Mad., 121.

⁶ Ishri v. Gopal Saran, (1884) 6 All., 351.

intention of the Legislature that the term *decree for payment of money* does not include a decree for sale in enforcement of a mortgage or charge.¹

Simultaneous execution

21. The Court may, in its discretion, refuse execution at the same time against the person and property of the judgment-debtor.

Act XIV of 1882, sect. 230

Person and property—discretion—In exercising its discretion to refuse execution at the same time against the person and property of judgment-debtor, a Court should refuse to issue a warrant against the person of a *purdia* lady, until it is satisfied by the decree-holder that he has no other means of enforcing his decree.² Now a woman is not liable to arrest on a money-decree s. 56.³

The words "or his or her representatives" have been omitted from this rule, but this will be covered by the general clause.

Notice to show cause against execution in certain cases.

22. (1) Where an application for execution is made —

- (a) more than one year after the date of the decree, or
- (b) against the legal representative of a party to the decree,

the Court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause, on a date to be fixed, why the decree should not be executed against him :

Provided that no such notice shall be necessary in consequence of more than one year having elapsed between the date of the decree and the application for execution if the application is made within one year from the date of the last order against the party against whom execution is applied for, made on any previous application for execution, or in consequence of the application being made against the legal representative of the judgment-debtor, if upon a previous application for execution against the same person the Court has ordered execution to issue against him.

(2) Nothing in the foregoing sub-rule shall be deemed to preclude the Court from issuing any process in execution of a decree without issuing the notice thereby prescribed, if, for reasons to be recorded, it considers that the issue of such

¹ See Report of Second Select Committee.

² *Narain Coomaraswami v. Barrook Soodhuree*, (1868) 10 W. R. (T. B.), 21.

³ *Davis v. M. L. L. L.*, (1867) 8 W. R. 2-2; *Johari Mal v. Sant Lal*, (1857) 9 All. 181.

notice would cause unreasonable delay or would defeat the ends of justice.

Act XIV of 1882, s. 248

This rule applies to II C and Prov S C C

When a defendant-respondent died before judgment in appeal was pronounced, it was held that the decree was a good decree which could be executed against the heirs of the deceased defendant without placing them on the record.¹

Duty of Court—A Court is not competent to execute a decree more than a year old without satisfying itself that notice has been duly served on the parties against whom execution is applied for.²

Form—The notice must be in the form given in App. E. No 7 and served in the manner provided for the service of summons, see O. V, r. 2

Limitation—Limitation runs from the date on which the notice was issued and served,³ and not from the date when the Court passes the order for issuing the notice,⁴ whether issued on a valid or an invalid application,⁵ even though subsequent proceedings have been taken.⁶ Where an application was filed and notice issued under this provision but nothing more was done, *held*, the application was not granted within s. 48,⁷ Art. 179, Cl. (5) of the Limitation Act applies only when the notice has been actually issued. If no notice is issued, time cannot be counted from the date of the order of the Court, though it may be that where a notice has been issued the date of its issue would be the date on which the Court ordered its issue.⁸ Applications for the execution of a decree, made after the death of the judgment-debtor and without either any representative of the judgment-debtor being brought upon the record or there being any subsisting attachment of the property against which execution is sought are not good applications for the purpose of saving limitation.⁹ Where a notice was issued under this provision and further proceedings were dropped until after the expiry of the period of limitation for execution, *held*, that there being no order of the Court, such notice alone did not operate as a revivor of the decree under art. 180 Sch. II of the Limitation Act.¹⁰

Application—The judgment-creditor should ask for the execution of the decree, and not for the issue of a notice; it is the duty of the Court to issue the notice.¹¹ The application may be made either to the Court which passed the decree or to the Court to which it is transferred for execution.¹²

¹ *Ramacharya v. Anantacharya*, (1897) 21 Bom., 314.

² *Raj Bullab v. Govain Das*, (1870) 13 W. R., 400.

³ Act XV of 1877, Sch. II art. 179, cl. 5—*Koonj Beharee v. Girdharee*, (1874) 22 W. R., 484; *Sheo Sahay v. Brij Beharee*, (1875) 23 W. R., 195.

⁴ *R. v. ...* an v.
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⁵ *Dhonkal Singh v. Phakkar Singh*, (1833) 15 All., 84; *Bohari Lall v. Sahk Ram*, (1876) 1 All., 676.

⁶ *Nilmoney v. Nilcomul*, (1876) 25 W. R., 546.

⁷ *Chengaya v. Appasami*, (1883) 6 Mad., 172.

⁸ *Hari Ganesh v. Yamunabai*, (1899) 23 Bom., 35.

⁹ *Madho Prasad v. Kesho Prasad*, (1897) 19 All., 337.

¹⁰ *Monohar Das v. Futtah Chand*, (1903) 30 Cal., 979; 7 Cal. W. N., 793.

¹¹ *Gooroo Dass v. Modhoo*, (1866) 6 W. R., Mir., 98.

¹² *Sham Lal Pal v. Modhu Sudan Sircar*, (1895) 22 Cal., 558. But see, *Hirachand Das v. Kasturchand*, (1894) 18 Bom., 221, in which it was held that, though the notice might be issued by the Court to which a decree had been transferred

If notice does not issue—Neglect to issue notice if the judgment-debtor dies after decree but before attachment, vitiates all subsequent proceedings, at least when the rights of third parties have not been affected.¹ Neglect to issue notice under clause (b) vitiates sale in execution.² Similarly, neglect to issue a notice under cl (a) vitiates the sale; it makes no difference that the auction-purchaser is a third party and not the decree-holder.³ If neither party appears on the day on which the notice under this rule is made returnable, the application for execution can be dismissed.⁴ A sale having been held in execution of a money decree against a deceased person without notice to his legal representative and property having been purchased by a person who had a mortgage lien over it, it was held on his legal representatives suing within twelve years of the sale that they were entitled to redeem.⁵

If notice is not served an application may be made under O. IX, r. 13.⁶

Waiver.—A judgment-debtor who appears in proceedings taken in execution cannot object that notice was not served upon him⁷ but where a notice under this rule is issued after the expiry of the period of limitation, it cannot save limitation, even though the judgment-debtor allows it to pass unchallenged.⁸ An objection to the sufficiency of the notice of execution should be taken at the earliest opportunity.⁹ A judgment-debtor who obtains time to pay the decretal debt waives his right to the issue of fresh sale proclamation and pays part of the decretal debt, cannot subsequently object that the properties attached were joint family properties of a Mitakshara family and that they were in possession by right of survivorship and not as heirs of their deceased father.¹⁰

Proof of service of notice.—It not unfrequently happens that after issue of notice nothing further is done towards enforcement of the decree, and on a takes advantage of this fact to evade the decree. The Courts, however, have recognized the difficulty, and in the case of *Bimola Soondurce Dasse v. Kallee Krishen*,¹¹ it was held that a notice under s 216,

non est.

¹ *Rameswari Dasse v. Bhongadare*, (1880) 7 C. L. R., 85; 6 Cal., 103; *Imamun-
nissa v. Lalk*, 13 All., 13; *Prasad*, (1901) 13 All., 13; *Prasad v. H*, 13 All., 13.

² *Gopal Chunder v. Gunamoni*, (1893) 20 Cal., 370.

³ *Shanku Pandey v. Ghadrani Gyalwal*, (1891) 21 Cal., 10.

⁴ *Tukaram v. Khamlu*, (1893) 20 Bom., 511.

⁵ *Erava v. Subramappa*, (1897) 21 Bom., 421.

⁶ *Krishna v. Protap*, (1886) 3 Cal. L. J., 276.

⁷ *Gopal Chunder v. Bhimani Motee*, (1869) 11 W. R., 329. See also *Madhu Sndan v. Kallish Chunder*, (1897) 2 Cal. W. N., 251.

⁸ *Madhava Rao v. Potimale*, (1878) 2 Mad., 1; see also *Unnoda Fenzal v. Koonan Atty*, (1878) 3 Cal., 518. As to where the objection can be taken, see the case of *Sahary Mandul v. Murari*, (1886) 13 Cal., 257.

⁹ *Beaut Koonan v. Omrao Bahubhor*, (1874) 21 W. R., 143.

¹⁰ *Candry v. Tulshi Prasad*, (1889) 5 Cal. W. N., 672.

¹¹ *Imola Soondurce Dasse v. Kallee Krishen*, (1871) 22 W. R., 5. And in the case of *Messrs. D. C. & Co. v. Alaca Pater*, (1871) 13 W. R., 207, the report of the Court of the original fact was taken to be prima facie evidence of the truth of the facts stated therein. See also *Makrishnath v. Nili*, (1870) 18 W. R., 102.

Act VIII of 1859, corresponding to this rule which it was the duty of the Court to issue, stood upon quite a different footing from a summons or other notice which a party is bound to serve, and a Judge is entitled to presume that the Court had issued notice, and it would lie upon the defendants to prove to the satisfaction of the Court that the notice did not in fact issue.

Enforcement against the legal representative of a judgment-debtor.—See ss 50 and 52. The notice should be addressed to the widow of a deceased Hindu who held joint undivided property along with his brothers; for it must be as *quasi* separate property that the attaching creditor had a claim to it.¹

s. 216³

High Court—An order for execution under this rule or r. 17 and made after notice to shew cause, has, on the Original Side of the High Court, the same effect of reviving the judgment as the *scire facias* formerly had.⁴

23. (1) Where the person to whom notice is issued under the last preceding rule does not appear or does not show cause to the satisfaction of the Court why the decree should not be executed, the Court shall order the decree to be executed.

(2) Where such person offers any objection to the execution of the decree, the Court shall consider such objection and make such order as it thinks fit.

Act XIV of 1882, s. 249

This rule applies to H. C. and Prov. S. C. C.

Irregularity—The person against whom a notice under r. 22 is issued and served is bound to appear and show cause against it, if he has any valid ground for objecting to the execution against himself. In a case under s 216, Act VIII of 1859, corresponding to r 22, it was held that proceedings taken in execution after notice could not be treated as void, and the High Court refused to interfere in exercise of its extraordinary power under s 15 of the Charter Act.⁵

Verification—A petition of objection showing cause under this rule need not be verified.⁶

¹ *Shurut Chunder v Abdool Khyr*, (1875) 23 W. R., 327; see also *Eshan Chunder v. Prannath*, (1874) 14 B. L. R., F. B., 143; 22 W. R., 512; *Rohini Nundan v Bhogoban*, (1874) 14 B. L. R., 144, note; 22 W. R., 154.

² *Pearce Soonduree v Bhubo Soonduree*, (1875) 23 W. R., 31.

³ *Ashootosh Dutt v. Deorga Churn*, (1891) 6 Cal., 501; see, however, *Tincowrie v Debendro*, (1890) 17 Cal., 491; *Ganapathi v. Balasundara*, (1884) 7 Mad., 540.

⁴ *Cochrane v. Broja Soonduree*, (1875) 23 W. R., 310; 14 B. L. R., 330. See also *Sham Lal Pal v. Modhu Sudan Sirkar*, (1895) 22 Cal., 538.

⁵ *Sant Gopal Chunder v. Jugut Indur*, (1887) 8 W. R., 290.

Practice—When a petition of objection is presented under this rule, the Judge is bound, whether a day for hearing has been fixed or not, to fix a day for consideration of it; and (even if the petitioner is not present, either personally or by a pleader) to consider those objections, and to pass such orders as may be just and proper; for it might be that the ground of objection raised would be of such a nature as that the judge might *prima facie*, and without going further into the case, see reason for not proceeding with the execution.¹

Process for execution.

24 (1) When the preliminary measures (if any) required by the foregoing rules have been taken, the Court shall, unless it sees cause to the contrary, issue its process for the execution of the decree.

Process for execution

(2) Every such process shall bear date the day on which it is issued, and shall be signed by the Judge or such officer as the Court may appoint in this behalf, and shall be sealed with the seal of the Court and delivered to the proper officer to be executed.

(3) In every such process a day shall be specified on or before which it shall be executed.

Act XIV of 1882, ss 250, 251.

This rule applies to H. C. and Prov. S. C. C.

Where the previous warrant has been infructuous without any fault on the part of the judgment-creditor, the Court should not refuse to issue a warrant for the attachment of the person of the debtor.² There are no provisions in the Code which empower a Court to refuse to execute a decree against which no appeal has been preferred, and the time for appealing against which has expired.³

A District Magistrate has no power to make any order which would have the direct effect of interfering with the execution of a decree of a Civil Court.⁴

Signed by the Judge.—As to the result if the warrant is not signed by the Judge. See.⁵

Proper officer.—The execution of the warrant may be delegated to another by the officer to whom it is addressed.⁶

Arrest—An officer cannot arrest without having the warrant in his possession,⁷ but he cannot object to serve it on the ground that it has not been signed, but only installed.⁸

¹ *Raj Bullab Shaha v. Ram Sadoj*, (1870) 11 W. R., 153; 5 B. L. R., App., 65.

² *Saton v. Bifohn*, (1871) 8 B. L. R., 253; 17 W. R., 165. See also, *Kallee Chander v. Thakoor Dass*, (1869) 12 W. R., O. C., 7.

³ *Isan Chander v. Akbar-Allah*, (1881) 10 Cal., 819.

⁴ *Rahmat Ullah*, in the matter of, (1895) 17 All., 485.

⁵ See *Ram Dyal v. Mahtab Singh*, (1885) 7 All., 507.

⁶ *Abul Karam v. Eulla*, (1881) 6 All., 385; *Utharam Chander v. Queen Empress*, (1885) 22 Cal., 295; *Shree Pragnath v. Bhup Narain*, (1895) 22 Cal., 759.

⁷ *Empress v. Anwar Nath*, (1883) 5 All., 319.

⁸ *Queen Empress v. Janki*, (1886) 8 All., 293.

Proof of execution—The receipt of a chowkeedar or the report of a Nazir executing a process in execution of a decree is not evidence *per se*, but must be proved like other documentary evidence ¹

Specified day—See *Anand Lall v. Empress* ²

25 (1) The officer entrusted with the execution of the process shall endorse thereon the day on, and the manner in, which it was executed, and, if the latest day specified in the process for the return thereof has been exceeded, the reason of the delay, or, if it was not executed, the reason why it was not executed, and shall return the process with such endorsement to the Court.

(2) Where the endorsement is to the effect that such officer is unable to execute the process, the Court shall examine him touching his alleged inability, and may, if it thinks fit, summon and examine witnesses as to such inability and shall record the result.

Act XIV of 1882, sec 343

This rule applies to H C and Prov S C C.

The Nazir can delegate the execution to a subordinate officer by endorsing his name in the warrant. If the endorsement is irregular, it does not invalidate the arrest ³

Stay of execution.

26 (1) The Court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time, to enable the judgment-debtor to apply to the Court by which the decree was passed, or to any Court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay execution, or for any other order relating to the decree or execution which might have been made by such Court of first instance or appellate Court if execution had been issued thereby, or if application for execution had been made thereto.

(2) Where the property or person of the judgment-debtor has been seized under an execution, the Court which issued the execution may order the restitution of such

¹ *Okhoy Chunder v. Erskine & Co.*, (1863) 3 W. R., Mir., 11; *Shah Knondun Lall v. Noor Ali*, (1864) 10 W. R., 3; *Megh Lall v. Shri Pershad*, (1881) 7 Cal., 34

² *Anand Lall v. Empress*, (1894) 10 Cal., 18; *Abinash Chandra v. Ananda Chandra*, (1904) 31 Cal., 424

³ *Abdul Karim v. Bullen*, (1881) 6 All., 385.

property or the discharge of such person pending the result of the application.

(3) Before making an order to stay execution or for the restitution of property or the discharge of the judgment-debtor, the Court may require such security from, or impose such conditions upon, the judgment-debtor as it thinks fit.

Power to require security from, or impose conditions upon, judgment-debtor.

Act XIV of 1882, s. 339

This rule applies to H. C. and Prov. S. C. C.

Appellate jurisdiction.—The Court having appellate jurisdiction, referred to in this rule would be the Court having such jurisdiction over the Court which passed the decree. Any order made by the Court to which the decree has been sent for execution does not fall within this provision because such orders, when appealable, are appealable to the Court having ordinary appellate jurisdiction over such Court.¹

Practice.—Before issuing process, the Court is bound to see that the provisions of the Code have been strictly complied with by the Court transmitting the decree for execution. The documents required are—(1) a copy of the decree; (2) a certificate of any sum remaining due; and (3) a copy of the order of execution;² and nothing more should be sent;³ so a *roobacarie* declaring petitioner is entitled to execute without a copy of the decree and certificate, does not give the second Court jurisdiction.⁴ A certificate which contains all the information requisite though irregular in form is a good certificate.⁵

Stay execution.—This provision seems only to contemplate stay of execution on the application or objection of the judgment debtor. This provision has been enacted to prevent precipitate execution, when the decree itself or some order passed in execution is still under appeal, and also, because the Court to which a decree has been sent for execution has no jurisdiction to decide such matters as the right of the decree-holder to execute the decree or the regularity of the transmission of the decree,⁶ or there is doubt as to the jurisdiction of the Court which passed the decree,⁷ or it has been obtained by fraud⁸ or there is a doubt as to the amount for which it is sought to be executed.⁹ If execution is stayed under this rule, the order does not affect the right to execute.¹⁰ The Court to which the decree has been sent for execution can only stay execution temporarily,¹¹ yet it is often the better course for the latter Court to stay execution and refer the objector to the Court passing the decree,

¹ *McBarack Ali v. Soomsee Rungta*, (1871) 3 All. H. C., 169.

² *Venkateswar v. Sivaramappa*, (1863) 4 Mad. H. C., 331.

³ *Loddsolsh v. Kerut Chund*, (1874) 21 W. R., 320.

⁴ *Dhanraj Koor v. Olfet Hovein*, (1874) 21 W. R., 219.

⁵ *Modatskeshee D. Das v. Luchmeput Singh*, (1868) 10 W. R., 137.

⁶ *Shah Narain Singh v. Gopal Das*, (1875) 23 W. R., 151; *Berehunder v. Maymay*, (1880) 5 Cal., 731.

⁷ *Carroll v. Trustees*, (1883) 7 Bom., 181; but see note under r. 7, *supra*.

⁸ *Sobramaniam v. Periyasami*, (1882) 4 Mal., 221.

⁹ *Keshab Chandra v. Khetat Chandra*, (1869) 9 W. R., 351.

¹⁰ *Sahay Chund J. Murari*, (1886) 13 Cal., 237.

¹¹ *Ram Lal v. Ra. Roy Lal*, (1883) 7 All., 320.

instead of deciding the objections itself.¹ A Court should stay execution if the debtor signifies his intention to apply for a re-hearing of the suit, which has been decided against him *ex parte*.² Where a debtor objects that the decree is barred, and he had no notice, the Court executing the decree may stay execution that he may apply to the original Court.³ An objector obtained time to place his objections before the Court from which the decree had been sent but instead of doing so, appealed; *held*, he should pay all costs.⁴

27 No order of restitution or discharge under rule 26

Liability of judgment-debtor shall prevent the property or person of a judgment-debtor from being retaken in execution of the decree sent for execution.

Act XIV of 1882, sect. 211.

This rule applies to H. C. and Prov. S. C. C.

Ordinarily, a debtor once discharged after arrest cannot be re-arrested in execution of the same decree.⁵

28 Any order of the Court by which the decree was

passed, or of such Court of appeal as aforesaid, in relation to the execution of such decree, shall be binding upon the Court to which the decree was sent for execution.

Act XIV of 1882, s. 242.

This rule applies to H. C. and Prov. S. C. C.

But the ordinary Court of appeal would still exercise its jurisdiction in respect of any order passed by the Court to which a decree was sent for execution :
s. 42.

See the case of *Ghazidin v. Fakir*⁶ as to the relative position of the original Court to the Court executing the decree.

29. Where a suit is pending in any Court against the

holder of a decree of such Court, on the part of the person against whom the decree was passed, the Court may, on such terms as to security or otherwise, as it thinks fit, stay execution of the decree until the pending suit has been decided.

Act XIV of 1882, s. 243.

This rule applies to H. C. and Prov. S. C. C.

¹ *Jassoda Koer v. Land Mortgage Bank*, (1882) 11 C. L. R., 348; 8 Cal., 916.

² *Mirtoonjoy v. Cochrane*, (1867) 8 W. R., 202.

³ *Brahary Mundul v. Murari*, (1886) 13 Cal., 237.

⁴ *Jassoda Koer v. Land Mortgage Bank*, (1882) 11 C. L. R., 348; 8 Cal., 916.

⁵ *Secretary of State v. Jindal*, (1886) 12 Cal., 652; *Balye Chund Dutt*, in the matter of, (1893) 20 Cal., 874. See s. 58.

⁶ *Ghazidin v. Fakir*, (1885) 7 All., 73, p. 76.

property or the discharge of such person pending the result of the application.

(3) Before making an order to stay execution or for the restitution of property or the discharge of the judgment-debtor, the Court may require such security from, or impose such conditions upon, the judgment-debtor as it thinks fit

Power to require security from, or impose conditions upon, judgment debtor

Act XIV of 1883, s. 230

This rule applies to H. C. and Prov. S. C. C.

Appellate jurisdiction—The Court having appellate jurisdiction, referred to in this rule would be the Court having such jurisdiction over the Court which passed the decree. Any order made by the Court to which the decree has been sent for execution does not fall within this provision because such orders, when appealable, are appealable to the Court having ordinary appellate jurisdiction over such Court.¹

Practice—Before issuing process, the Court is bound to see that the provisions of the Code have been strictly complied with by the Court transmitting the decree for execution. The documents required are—(1) a copy of the decree; (2) a certificate of any sum remaining due, and (3) a copy of the order of execution,² and nothing more should be sent;³ so a *roobucane* declaring petitioner is entitled to execute without a copy of the decree and certificate, does not give the second Court jurisdiction.⁴ A certificate which contains all the information requisite though irregular in form is a good certificate.⁵

Stay execution—This provision seems only to contemplate stay of execution on the application or objection of the judgment debtor. This provision has been enacted to prevent precipitate execution, when the decree itself or some order passed in execution is still under appeal, and also, because the Court to which a decree has been sent for execution has no jurisdiction to decide such matters as the right of the decree-holder to execute the decree or the regularity of the transmission of the decree,⁶ or there is doubt as to the jurisdiction of the Court which passed the decree,⁷ or it has been obtained by fraud,⁸ or there is a doubt as to the amount for which it is sought to be executed.⁹ If execution is stayed under this rule, the order does not affect the right to execute.¹⁰ The Court to which the decree has been sent for execution can only stay execution temporarily,¹¹ yet it is often the better course for the latter Court to stay execution and refer the objector to the Court passing the decree,

¹ *Meharuck Ali v. Soomee Runga*, (1871) 3 All. H. C., 168.

² *Venkat Subba v. Sivaramappa*, (1863) 4 Mad. H. C., 331.

³ *Lootfoolah v. Keerut Chund*, (1874) 21 W. R., 330.

⁴ *Dhuresh Koeree v. Olfat Hossein*, (1874) 21 W. R., 219.

⁵ *Mooktakeshee Debia v. Luchmeeput Sing*, (1868) 10 W. R., 137.

⁶ *Shub Narain Singh v. Gobind Dass*, (1875) 23 W. R., 151; *Beerchunder v. Mayamma*, (1889) 5 Cal., 733.

⁷ *Chogali v. Trueman*, (1883) 7 Bom., 441; but see note under r. 7, *supra*.

⁸ *Subramanian v. Panjamma*, (1882) 4 Mad., 321.

⁹ *Keshub Chunder v. Khelat Chunder*, (1868) 9 W. R., 361.

¹⁰ *Schary Mundul v. Murari*, (1886) 13 Cal., 257.

¹¹ *Ram Lal v. Radhey Lal*, (1885) 7 All., 330.

Alternative to some other relief—That is, if the decree be for the delivery of moveable property, it shall also state the amount of money to be paid as an alternative, if delivery cannot be made O XX, r 10

Attachment—A sale is void unless the property has been properly attached,¹ unless it is under a decree for sale,² and see the cases referred to under r 92 *post*

Imprisonment—As to the power of the High Court to commit for contempt, see the under noted cases³

Insolvent—See *Tolce Bibee v. Abdool Khan*,⁴

Wrongful—A suit to recover damages on account of injuries caused by an arrest in accordance with a decree of a competent Court can only be maintained when the original suit has been finally decided in favour of the plaintiff, when the arrest was made without reasonable or probable cause, and the injury he has suffered cannot be compensated by costs⁵

31 (1) Where the decree is for any specific moveable, or for any share in a specific moveable property, it may be executed by the seizure, if practicable, of the moveable or share, and by the delivery thereof to the party to whom it has been adjudged, or to such person as he appoints to receive delivery on his behalf, or by the detention in the civil prison of the judgment-debtor, or by the attachment of his property, or by both.

(2) Where any attachment under sub-rule (1) has remained in force for six months, if the judgment-debtor has not obeyed the decree and the decree-holder has applied to have the attached property sold, such property may be sold, and out of the proceeds the Court may award to the decree-holder, in cases where any amount has been fixed by the decree to be paid as an alternative to delivery of moveable property, such amount, and, in other cases, such compensation as it thinks fit, and shall pay the balance (if any) to the judgment-debtor on his application.

(3) Where the judgment-debtor has obeyed the decree and paid all costs of executing the same which he is bound to pay, or where, at the end of six months from the date of the attachment, no application to have the property sold has

¹ *Mahadeo v. Bhola Nath*, (1881) 5 All., 86; but see the case of *Olpherts v. Mahabir Pershad*, (1882) L. R., 10 I. A., 25 p. 29; and *Sheodhyani v. Bhola Nath*, (1899) 21 All., 311.

² *Dayachand v. Hemchand*, (1880) 4 Bom., 515.

³ *Martin v. Lawrence*, (1879) 4 Cal., 635; *Hassanbhoy v. Cowasji*, (1883) 7 Bom., pp. 1, 9; *Bu Amrit, su re*, (1884) 8 Bom., 357; *Surendra Nath v. Chief Justice of Calcutta High Court*, (1884) 10 Cal., 109; L. R., 10 I. A., 171.

⁴ *Tolce Bibee v. Abdool Khan*, (1880) 5 Cal., 530; *Samarapuri v. Parry*, (1890) 13 Mad., 150.

⁵ *Raj Chunder v. Shama Soondari*, (1879) 4 Cal., 593.

been made, or, if made, has been refused, the attachment shall cease.

This rule applies to H. C. and with the exception of the words "or for the recovery of a wife," to Prov. S. C. C.

For terms of imprisonment, see s. 58

The Specific Relief Act (1 of 1877), s. 11, states in what cases a decree may be passed for the delivery of a "specific moveable."

A decree was given for certain immoveable and moveable properties specified

further that he should inquire into the nature, amount, and value of such moveables as he could not find. In appeal against this order the Calcutta High Court remarked that when the extent and value of moveable property are not precisely ascertained before decree, it is obviously necessary to ascertain what the value of the moveables not delivered to the plaintiff is in order that the Court may make, in an excessive order by way of imprisonment of property in case of non-delivery. The Court added—We must assume that the order of the Court below was made for a lawful purpose, and that the Court, on being informed by its officer, will make such further order as to it may seem just¹

erty sought to be attached is

A writ of attachment against
without notice to the defendant²

32. (1) Where the party against whom a decree for the specific performance of a contract, or for restitution of conjugal rights, or for an injunction, has been passed, has had an opportunity of obeying the decree and has wilfully failed to obey it, the decree may be enforced by his detention in the civil prison, or by the attachment of his property, or by both.

(2) Where the party against whom a decree for specific performance or for an injunction has been passed is a corporation, the decree may be enforced by the attachment of the property of the corporation or, with the leave of the Court, by the detention in the civil prison of the directors or other principal officers thereof, or by both attachment and detention.

(3) Where any attachment under sub-rule (1) or sub-rule (2) has remained in force for one year, if the judgment-debtor has not obeyed the decree and the decree-holder has applied to have the attached property sold, such property may be sold; and out of the proceeds the Court may award

¹ *Bhoomin Mohinee v. Gobind Chunder*, (1873) 19 W. R., 82.

² *Pachmanand Singh v. Chandi Dat*, (1896) 1 Cal. W. N., 170.

³ *Trilokho Nath Datta v. Radharani*, (1893) 3 Cde. W. N., xxxix.

to the decree-holder such compensation as it thinks fit, and shall pay the balance (if any) to the judgment-debtor on his application.

(4) Where the judgment-debtor has obeyed the decree and paid all costs of executing the same which he is bound to pay, or where, at the end of one year from the date of the attachment, no application to have the property sold has been made, or if made has been refused, the attachment shall cease.

(5) Where a decree for the specific performance of a contract or for an injunction has not been obeyed, the Court may, in lieu of or in addition to all or any of the processes aforesaid, direct that the act required to be done may be done so far as practicable by the decree-holder or some other person appointed by the Court, at the cost of the judgment-debtor, and upon the act being done the expenses incurred may be ascertained in such manner as the Court may direct and may be recovered as if they were included in the decree.

Illustration.

A, a person of little substance, erects a building which renders uninhabitable a family mansion belonging to B. A, in spite of his detention in prison and the attachment of his property, declines to obey a decree obtained against him by B and directing him to remove the building. The Court is of opinion that no sum realizable by the sale of A's property would adequately compensate B for the depreciation in the value of his mansion. B may apply to the Court to remove the building and may recover the cost of such removal from A in the execution-proceedings.

Act XIV of 1882, sec. 26a.

This rule applies to H. C.

Declaratory decree.—A decree in which the judgment-debtor is ordered

to do or not to do a particular thing for the performance of the decree of specific

performance of a contract of sale and payment of the purchase-money.

Specific performance of a contract.—See the views expressed in *Dhondiba v Ram Chandra* ² A decree declaring a party entitled to a consanily

¹ *Kishore Ben v. Dwarka Nath Adhikari*, (1891) 21 Cal., 781; L. R., 21 I.A., 89.

² *Dhondiba v. Ram Chandra*, (1891) 5 Bom., 551, and *Deekinandan v. Sri Ram*, (1890) 12 All., 231, p. 285, in regard to the effect of a decree for specific performance of a contract of sale and payment of the purchase-money.

recurring right to receive certain payments in kind, valued at a certain annual sum, cannot be executed under the Code.¹

Compensation—The Courts cannot compel a plaintiff to part with his legal rights and accept compensation against his will.²

Restitution of wife.—The present rule has no reference to a decree for the recovery of a wife as there can be no such decree under Indian Law since a wife cannot be treated as a chattel to be delivered to her husband. In proper cases an injunction may issue against third parties to restrain her from interference.³ A woman, who had been directed by a decree to refrain from preventing her daughter returning to her husband, permitted the not such an interference under this rule.⁴ conjugal rights for ig to return to live

with her husband.⁵

Jurisdiction—For jurisdiction of Civil Courts to entertain a suit between Hindus for restitution of conjugal rights, see *Surjyamoni v. Kali Kanta*.⁶

Cause of action—A positive refusal on the part of the wife to return to her husband is not essential to the husband's cause of action,⁷ which consists in the wife's absencing herself from her husband's house without his consent, and must therefore be deemed to arise at his house.⁸

Removal of obstructions—A decree was passed directing that "the defendants do, within six weeks after service on them of this decree, remove the

erection of a door, if the defendant erects the door, a decree may be given for its removal. See also *Shakkaram Chand v. Ghela Bhai*¹² in which the application for execution not having specified the mode in which the assistance of the Court was sought, was rejected. And the case of *Sakar Lal v. Bai Parvati*,¹³ in which a decree was obtained restraining the

¹ *Tata Chariar v. Singara Chariar*, (1882) 4 Mad., 219. And as to the effect of the law being under the management of a Collector, see, *Seth Jardaial v. Ram Sahae*, (1890) 17 Cal., 432.

² *Govind Venkaji v. Sadashiv Bharmas Shet*, (1893) 17 Bom., 771.

³ See r. 33, *post*.

⁴ *Ajmeri Kuar v. Suraj Prasad*, (1876) 1 All., 501.

⁵ *Parshotom Das v. Mani*, (1897) 21 Bom., 619. As to restitution of conjugal rights in the case of Parsas, see Act XV of 1865, s. 36; *Ardesar v. Avabai*, (1871) 9 Bom. H. C., 290; in the case of Muhammadans, *Abdul Kadir v. Sahma*, (1886) 8 All., 149; *Kumhi v. Moideen*, (1888) 11 Mad., 327; *Hamilunnessa v. Zohiruddin*, (1890) 17 Cal., 679.

⁶ *Surjyamoni v. Kali Kants*, (1901) 23 Cal., 37, pp. 41 to 44.

⁷ *Fakirganda v. Gangi*, (1897) 23 Bom., 307; see also *Binda v. Kaunsiha*, (1891) 13 All., 126.

⁸ *Lalitagar v. Bhusaraj*, (1894) 13 Bom., 316.

⁹ *Bhooban Mohun v. Nobin Chunder*, (1872) 18 W. R., 292.

¹⁰ *Protap Chunder v. Peary Chowdhraia*, (1881) 9 C. L. R., 433; 8 Cal., 174.

¹¹ *Magan Lal v. Chhota Lal*, (1902) 26 Bom., 136.

¹² *Shakkaram Chand v. Ghela Bhai*, (1895) 19 Bom., 31.

¹³ *Sakar Lal v. Bai Parvati*, (1902) 26 Bom., 253.

defendant from obstructing the access of light and air to the window of the plaintiff. In execution plaintiff prayed that the window should be pulled down. While this application was pending, defendant died and his representative was brought on the record. The lower Court directed that the decree should be executed as prayed for. *Held*, that the order was wrong and it should have been made under this provision.

sub **Order to manage**—By decree it was directed that the plaintiff and defendant should manage certain property jointly, and that the names of both should appear in all papers connected with such property: *held*, that the Court had, under this rule, jurisdiction to order attachment of the defendant's property for disobeying the decree.¹ A decree, passed in a suit under s. 92, settling a scheme of management of a temple, may be enforced, in case of infingement, by the imprisonment of the defendants, or by the attachment of their property or by both.²

Limitation—See *Binda v. Kaunashila*³

33 (1) Notwithstanding anything in rule 32, the Court, either at the time of passing a decree for the restitution of conjugal rights or at any time afterwards, may order that the decree shall not be executed by detention in prison.

Discretion of Court in executing decrees for restitution of conjugal rights.

(2) Where the Court has made an order under sub-rule (1), and the decree-holder is the wife, it may order that, in the event of the decree not being obeyed within such period as may be fixed in this behalf, the judgment-debtor shall make to the decree-holder such periodical payments as may be just, and, if it thinks fit require that the judgment debtor shall, to its satisfaction, secure to the decree-holder such periodical payments.

(3) The Court may from time to time vary or modify any order made under sub-rule (2) for the periodical payment of money, either by altering the times of payment or by increasing or diminishing the amount, or may temporarily suspend the same as to the whole or any part of the money so ordered to be paid, and again revive the same, either wholly or in part as it may think just.

(4) Any money ordered to be paid under this rule may be recovered as though it were payable under a decree for the payment of money.

¹ Gouri Prasad v. Bholanath, (1881) 8 C. L. R., 487.

² Damodarbhat v. Bhopal, (1900) 21 Bom., 45.

³ Binda v. Kaunashila, (1891) 13 All., 126, and Fakirgauda v. Gangi, (1901) 25 Bom., 307.

its officers, may, after giving reasonable warning and facility to any woman not appearing in public according to the customs of the country to withdraw, remove or open any lock or bolt or break open any door or do any other act necessary for putting the decree-holder in possession.

Act XIV of 1882, s. 263

This rule applies to H. C.

This rule, it should be observed, relates to the delivery of what is known as *khas* (immediate or direct) possession of immoveable property under a decree of Court. Where such an immoveable property is in the occupancy of a tenant or of some other person entitled to occupy the same, delivery of possession should be given, as provided by the next rule. rr 97—99 provide for any resistance or obstruction to the delivery of possession complained of by the decree-holder, and r. 100 relates to any complaint on the part of a third party as to his being dispossessed in execution of the decree. As to what is *khas* possession as contradistinguished from formal possession, see *Sita Ram v. Ram Lal*.¹ When the Court gave the plaintiff a decree to recover the shares held in certain immoveable property by some of the defendants without determining or specifying the extent of those shares, it was held that no inquiry in execution of that decree could be made as to the extent or amount of the shares, but that the plaintiff should be left to seek, as against the other co-sharers, whatever remedy he might be entitled to.²

The delivery of possession under this rule contemplates the decree-holder

A held a decree of a competent Court of Revenue for possession of certain land as against B, and obtained formal possession of the land. B was, however, allowed to remain in such necessary possession of the land as was requisite to enable him to remove a crop which was on the land. B removed his crop, and thereafter sued in a Civil Court for a declaration that he was A's tenant of the

their rights from the judgment-debtor as against the judgment debtor himself,³ but not against third persons who are not parties to the suit.⁴

Khas possession against co-sharer.—Much difficulty has been felt in this country in executing a decree obtained by the proprietor of an undivided share in immoveable property for *khas* possession as against his co-sharers and their lessee, he being no party to such a lease. It has always been held that such possession should be given, or as stated by the Calcutta High Court in the case of *Bichmo Moyee Debta v. Raj Chunder*,⁵ "until a partition takes place,

¹ *Sita Ram v. Ram Lal*, (1896) 18 All., 440 (pp. 449 and 450).

² *Arnoda Pershad v. Troyluckhonath*, (1870) 13 W. R., 123.

³ *Ram Chandra Subrao v. Ravi*, (1896) 20 Bom., 371.

⁴ *Udit Narain v. Shub Rai* (1898) 20 All., 198.

⁵ *Pandharinath v. Mahabub Khan*, (1897) 21 Bom., 99.

⁶ *Ranjit Singh v. Banwari Lal*, (1884) 10 Cal., 993.

⁷ *Bichmo Moyee Debta v. Raj Chunder*, (1866) 5 W. R. M.S., 15. And this rule was followed in the case of *Shama Soondere v. Jardine Skinner & Co.*, (1867) 7 W. R., 376.

Vic, Cap 2¹ A grantee or vendee *pendente lite* cannot question the decree or any proceeding in the cause which, from the nature of the suit and the relief prayed for, he might expect would take place² A creditor of a deceased Mahomedan cannot follow his estate into the hands of a *bona fide* purchaser for value, to whom it has been alienated by the heir-at-law; but where the alienation is made during the pendency of a suit, in which the creditor obtains a decree for payment of his debts out of the assets, the property may be followed, if the alienee took with notice or under such circumstances as to affect him by the doctrine of *lis pendens*³ A sale to third persons pending execution proceedings is a sale *pendente lite* and void against the decree-holder.⁴ So, too, in the case of a lease.⁵ Plaintiff purchased a one third share in an undivided estate and sued for partition. Pending the partition suit, the defendants, the two remaining co-sharers, leased a plot of land included in the undivided estate to the defendant. In the decree for partition, the plot of land was allotted to the plaintiff, who then sued for *khas* possession. *Held*, that the tenant, not having been a party to the partition suit, was not bound by the decree, and plaintiff was entitled only to *khas* possession of one third of the plot of land.⁶ When a member of a Hindu family during the pendency of a suit for maintenance which resulted in a decree charging the plaintiff house together with other property with the maintenance claimed, mortgaged the plaintiff house to the plaintiff. *Held*, that he was entitled so to do, and that the validity of the mortgage was not affected by the doctrine of *lis pendens*.⁷ Where the defendant in an ejectment suit had bought the village in question at a sale in execution of a decree obtained by the mortgagee against the mortgagors thereof, and it appeared that prior to his purchase the plaintiff vendor had sued to establish against the parties to that decree his title to the village and had subsequently obtained a decree in his favour: *held*, that the defendant had bought *pendente lite* and was bound by the decree so obtained. That result could not be avoided by showing that the mortgagee decree-holder had attached the village prior to the suit by the plaintiff vendor.⁸ When suits were brought for the purpose of recovering moneys due upon mortgage bonds by sale of the mortgaged properties, no question as to the right to their properties having been involved, and the defendants not appearing, *ex parte* decrees were passed against them, *held*, that the suits were not contentious under s 32, Act. IV of 1882, and the doctrine of *lis pendens* did not apply.⁹

Purchaser under decree.—The doctrine does not apply to a purchaser at a Sheriff's sale¹⁰

¹ *Bilaji Ganesh v. Khushalji*, (1874) 11 Bom. H. C., 26; *Gulab Chand v. Dhondi*, (1874) 11 Bom. H. C., 67.

² *Kasumunnissa v. Nilratan Bose*, (1882) 8 Calc., 79; 9 C. L. R., 173; 10 C. L. R., 113; *Kishory Mohun v. Mahomed*, (1891) 18 Calc., 189.

³ *B. v. W. v. M. v. M.*, (1880) 1 C. L. R., 211. *Id.* where of as a right of mortgaged

⁴ *Shivjaram v. Waman*, (1894) 22 Bom., 939; *Samal v. Babaji*, (1901) 23 Bom., 361.

⁵ *Thakur Prasad v. Gaya Sahu*, (1893) 20 All., 319.

⁶ *Khan Ali v. Pestonji Laljee Gaydar*, (1896) 1 Calc. W. N., 62. But see, *Joy Sunkari v. Bharat Chandra*, (1898) 3 Calc. W. N., 209.

⁷ *Manika v. Ellappa*, (1896) 19 Mad., 271.

⁸ *Moti Lal v. Karabuddin*, (1896) 1 L. R., 24 I. A., 170; 25 Calc., 179. See also *Har Shankar v. Shew Golam*, (1899) 26 Calc., 966.

⁹ *Upendra Chandra Singh v. Mohri Lal Marwari*, (1904) 31 Calc., 745

¹⁰ *Gour Money Daks v. Beal*, 2 Tay. and Bell., 83, p. 121; *Anund Moyee v. Bhurondro Chunder*, (1861) 1 W. R., 103; 14 Moo. L. A., 101; 8 B. L. R., 122; 16 W. R., (P. C.) 10; *Suffur Merdha v. Ram Lal*, (1871) 15 W. R., 308; see also *Lalu Mulji v. Kashidat*, (1886) 10 Bom., 400; *Chunder Nath v. Nilakant*, (1882) 8 Calc., 629; *Kristo Mohun v. Kalprosona*, (1882) 8 Calc.,

Procedure — Practically there is no difference between *lis pendens* and having notice of a suit,¹ but the doctrine does not depend on notice;² and the alienee need not be made a party to the suit, and it is a matter of indifference whether or not at the time of his becoming grantee or vendee he had *actual notice* of the existence of the suit.³

Diligence — But the party seeking relief against a purchaser without notice must come within reasonable time: he must prosecute the case closely and continuously.⁴

Registration — When the owner of a house, during the pendency of a suit by an unregistered mortgagee for foreclosure and sale mortgaged the house by a registered mortgage to another person, it was held that the second mortgagee had no title against a purchaser under a decree for sale in the suit, although such purchaser was plaintiff in the suit.⁵

Pending appeal — In the case of *Chunder Koomar v Gopee Kristo Gossamee*,⁶ Glover, J., held, that the alienation of property, the subject of a suit, after that suit had been dismissed, but before an appeal was preferred, was not opposed to the doctrine of *lis pendens*, as there was then no suit before the Court; but Dwarkanath Mitter, J. held *contra*, that the purchaser was bound to wait until the term of appeal had expired. A purchaser at a time when an appeal in a suit relating to the title to property is pending takes the property subject to the result of the appeal.⁷

Form — For form of warrant to give possession, see App E, No. 11

Litis contestatio — As to when it ceases, see *Venkatesh v Maruti*.⁸

Separate suit — See *Shama Charan v Madhab Chandra*.⁹

Possession without the intervention of Court — Possession actually taken by a person having a right to it is not the less effective, as perfecting his

¹ *Kasumunissa v Nilratan*, (1892) 8 Cal., 79

² *Lakshminidass v. Dasrat*, (1892) 6 Bom., 169

³ *Gulabchand v Dhondji*, (1874) 11 Bom. H. C., 64; *Umamoyi Barmonee v. Tarcas Prasad*, (1867) 7 W. R., 221; *Manal Fruval v. Sanagapalli*, (1871) 7 Mad. H. C., 105; *Moti Lal v Karambuddin*, (1898) 23 Cal., 179; L. R., 24 I. A., 170. As to the distinction between the procedures to be followed when an equitable lien is created *pendente lite* and when there is an absolute sale, see *Unonidisper v. Dabee v.*

Varden Seth
see *v. Reed*, 2

⁴ *Gulabchand v. Dhondji*, (1874) 11 Bom. H. C., 61. See also *Lachmin Narain v. Koteswar*, (1879) 2 All., 823; and *Prajanvan v. Biju*, (1890) 4 Bom., 34; *Kulash Chandra Ghose v. Falchard Jharris*, (1871) 8 B. L. R., 474; and *Ram Lochan v. Ram Narain*, (1878) 1 C. L. R., 296

⁵ *Chun Ina Koomar v. Gopee Kristo Gossamee*, (1873) 29 W. R., 204; but see *Kishory Mohan v. Mahammud*, (1891) 18 Cal., 189. See also *Radhika v. Radhamani*, (1884) 7 Mad., 96

⁷ *Sukhdeo Prasad v. Jamna*, (1891) 23 All., 60.

⁸ *Venkatesh v. Maruti*, (1893) 12 Bom., 217.

⁹ *Shama Charan v. Madhab Chandra*, (1883) 11 Cal., 93.

count a fresh period of limitation from the date of the possession, as against third parties.³ A suit for possession if brought by a plaintiff, who has obtained symbolical possession, is barred, if the for more than 12 years.⁴ Where a possession of land on a *batiaara* being held, it is to be barred by lapse of time obtained merely formal possession. *Held*, that such possession gave him no fresh cause of action.⁵ Symbolical possession does not break up the continuity of the adverse possession of a defendant.⁶ A plaintiff who has obtained only symbolical possession in execution of a former decree, is entitled to maintain a fresh suit against the same defendant to obtain real possession;⁷ but if he allows 12 years to elapse from the date of his taking formal possession, he loses the title conferred by the decree.⁸

Purchaser—The same principle applies when an auction-purchaser is put in possession.⁹

Under this rule and s. 47, the Court to which a decree has been transferred for execution has jurisdiction to determine whether or not such decree is barred by limitation.¹⁰

The order of Court under r. 10 is conclusive evidence that the application is not barred.¹¹

Several decrees in one—Limitation in a decree which is against several debtors, but makes each separately liable for specific sums, as mesne profits must be separately calculated against each of the debtors, since execution for realization of the amount due from one debtor is no part of proceedings against another, but is a separate decree, and must be separately considered in determining the point of limitation.¹²

Joint decree—But where a decree has been passed against a number of persons jointly, the Court is not competent to treat it in any other way than as a joint decree, or to attempt (in executing it) to adjust the respective liability of each of the debtors, and so restrict what are the decree-holder's rights under the terms of the decree.¹³

Execution—Execution should be in accordance with law, and not by consent of the parties. Thus, where the judgment-debtor, a railway employee, with the consent of the decree-holder, gave orders on the paymaster of the

¹ Mahadeo v. Parashram, (1901) 25 Bom., 358.

² Dalmar Puri v. Bepin Behary, (1891) 18 Cal., 520.

³ Doyanidhi v. Ketai Pandi, (1892) 11 C. L. R., 395.

⁴ Lakshman v. Moru, (1892) 16 Bom., 722.

⁵ Kishore Singh v. Gobind, (1873) 21 W. R., 33.

⁶ Harjivan v. Shivram, (1895) 19 Bom., 620.

⁷ Sankar v. Narsingrav, (1898) 22 Bom., 667.

⁸ Pearee Mohun v. Jugabundhu, (1875) 24 W. R., 418.

⁹ Joggobundhu Mitter v. Purnanund, (1889) 16 Cal., 530.

¹⁰ Narsingh Doyal v. Hurryhur Saha, (1880) 6 C. L. R., 499; 5 Cal., 897.

¹¹ Mangul Pershad Dicit v. Ginja Kant Lahiri, (1882) 8 Cal., 51; L. R., 8 1 A 123; Annoda Prashad v. Kurpan Ali, (1877) 1 C. L. R., 403.

¹² Hurehur Singh v. Hrudoy Narain, (1876) 25 W. R., 310, following the judgment of the Full Bench in the case of Wise v. Rajnarain Chuckerbutty, (1873) 19 W. R., 30; 10 B. L. R., 258, in which it was held that a decree against A for the rent of one period, and against B for another, is in fact two decrees, and must be separately enforced to avoid limitation.

¹³ Kally Mohun v. Dinonath, (1881) 8 C. L. R., 31.

railway company to pay into Court certain sums out of his monthly salary, such an arrangement should not have been accepted by the Court, and as the paymaster refused to recognize it, it could not be enforced.¹ This rule does not contemplate any inquiry whether the property belongs to the judgment-debtor or not.² The procedure laid down applies to all applications for the execution of decrees whether made to the Court which passed the decree or to the Court to which it has been sent by that Court for execution. The different modes of executing decrees are set forth in the following rules, but it should be noted that it is discretionary with the Court to "refuse execution at the same time against the person and property of the judgment-debtor" (r. 21).

Liability of Nazir.—As to the liability of a Nazir for non-execution of a warrant of arrest, see.³

Mortgaged property.—A mortgagee who attaches the mortgaged property cannot sell it for any claim save by a suit under s. 67 of the Transfer of Property Act.⁴

Joint-debtors.—The holder of a decree under which several persons are jointly liable can proceed against any one of the debtors.⁵ The fact that he may have given a release to some of the joint-debtors does not prevent him from executing it against the others, who can sue their co-debtors for contribution, whether a release has been granted or not.⁶ On the other hand, the person asked to contribute is not estopped by the joint decree from raising any equitable defence he may have against the person suing him.⁷ But as between the debtors jointly liable on a money-decree if one of them purchase the decree, it operates as a satisfaction of the entire decree, and execution can no longer be taken out.⁸ It may also be objected in the course of proceedings taken in execution that the decree-holder is only the *benamidar* of one of the co-debtors, or that one of the co-debtors is to some extent interested from having purchased a portion of the decree, and such objections may be taken at any time, and even if they were not taken in the course of previous proceedings.⁹

Arrest and detention in the civil prison

37. (1) Notwithstanding anything in these rules, where an application is for the execution of a decree for the payment of money by the arrest and detention in the civil prison of a judgment-debtor who is liable to be arrested in pursuance of the application, the Court may, instead of issuing a warrant for his arrest, issue a notice calling upon him to appear before the Court on a day to be

Discretionary power to permit judgment-debtor to show cause against detention in prison.

¹ *Macfarlane, in re*, (1869) 11 W. R., 69; but see the cases of *Pillai v. Pillai*, (1874) L. R., 2 L. A., 219, and *Thakoor Dyal Singh v. Sarju Pershad*, (1893) 20 Cal., 22.

² *Sahjan v. Sariatulla*, (1869) 3 B. L. R., 413.

³ *Kasturchand v. Raju*, (1890) 4 Bom., 65.

⁴ *Kaveri v. Ananthayya*, (1887) 10 Mad., 129; *Jadulal Lall v. Madhub*, (1894) 21 Cal., 34; *Azimullah v. Najmunnissa*, (1894) 16 All. 415.

⁵ *Sreenath Ghose v. Sahib Ram*, (1869) 12 W. R., 303.

⁶ *Shro Churu v. Ram Suran*, (1871) 16 W. R., 49; *Nunkoo Lall v. Dhunesh Koor*, (1872) 17 W. R., 490.

⁷ *Asman Singh v. Ajnas Koor*, (1877) 2 C. L. R., 406.

⁸ *Digambaree Debia v. Eshan Chunder*, (1871) 15 W. R., 372. See also Full Bench decision in the case between the same parties and that of *Sorooop Chunder Hazrah v. Troylolhonath Roy*, (1868) 9 W. R., 230; r. 16, *supra*.

⁹ *Obhoy Chura Roy v. Nobin Chunder*, (1875) 23 W. R., 95.

specified in the notice and show cause why he should not be committed to the civil prison.

(2) Where appearance is not made in obedience to the notice, the Court shall, if the decree-holder so requires, issue a warrant for the arrest of the judgment-debtor.

Act XIV of 1882, s. 245 B.

This rule applies to II C and Prov S C C

Application—The law does not require a copy of the decree to be filed with the application for execution,¹ it only requires an application in the form prescribed in r. 11, and on it the Judge can pass orders for execution.² If it corresponds with the terms of the decree, it should be admitted³, and if it is irregular in form it is still an application within the rule;⁴ and should not be rejected, but amended or returned for correction.⁵ Where a decree declares that if the amount due is not paid within two months, certain property shall be sold: *held*, no application should be allowed before the expiration of that period.⁶

Oral application—See r. 11 (1) *supra*

Stamp—An application should bear a stamp such as is required by the Court-Fees Act (VII of 1870, Sched II, art. 1)

If application be not so amended, it shall be rejected—When an order to amend within seven days was not carried out, but no order rejecting the application was passed *held*, the Court could allow an amendment subsequently.⁷ So where an order to amend within four days was not carried out and the petition remained on the record, a subsequent amendment was allowed.⁸

Amendment—Amendment of an informal application may be allowed even after the period prescribed by the law of limitation has elapsed,⁹ and whereas decree-holder applied, in time for execution against the person and property of his debtor generally, he was allowed on special appeal to file a list of the immoveable property he sought to sell after the period of limitation had expired,¹⁰ but where the decree-holder specified certain property in his application and subsequently, after the period of limitation had expired, filed another list of property to be sold, and prayed that the property first mentioned should be

¹ *Molhoo Dossia v. Nobin Chunder*, (1871) 16 W. R., 23.

² *Safar Ali v. Mohesh Chunder*, (1865) 4 W. R., 114, 16.

³ *Bisheshwar Roy v. Bisheshwar Bose*, (1867) 8 W. R., 277.

⁴ *Asgar Ali v. Troilokya*, (1893) 17 Cal., 631; *Hari v. Narayan*, (1888) 12 Bom., 427.

⁵ *Puriladh Mohapattnr v. Junardan*, (1866) 6 W. R., 114, 15.

⁶ *Hirdajal v. Chaddami*, (1885) 7 All., 194.

⁷ *Kaminy Mohan v. Gopal*, (1892) 8 Cal., 479.

⁸ *Fuzloor Rahman v. Altaf*, (1894) 10 Cal., 541. See, however, *Asgar Ali v. Troilokya*, (1893) 17 Cal., 631; *Weldon v. Neal*, 19 Q. B. D., 394.

⁹ *Macgregor v. Keshub Roy*, (1887) 14 Cal., 121; *Mahomed v. Abedoolah*, (1882) 12 C. L. R., 279.

¹⁰ *Macgregor v. Keshub Roy*, (1887) 14 Cal., 121; overruled—*Asgar Ali v. Troilokya*, (1893) 17 Cal., 631.

¹¹ *Sreenath Gochoo v. Yusoof Khan*, (1881) 7 Cal., 556.

¹² *Hurry Charan Bose v. Subaydar*, (1886) 12 Cal., 161. See also *Asgar Ali v. Troilokya*, (1893) 17 Cal., 631; *Weldon v. Neal*, 19 Q. B. D., 394.

Limitation—Before admitting an application, it will be necessary to see whether *prima facie* it has been made within the proper time, and is not barred by limitation. See Act XV, 1877, S. 112, art. 179 and notes under r. 10 *supra*. The period of limitation of a decree expired when the Court was closed. The decree-holder presented a petition for execution on the day on which the Court re-opened, but it was found to be defective. The Court returned it, so that it might be amended. It was then presented after amendment after the period of limitation had elapsed. *Held*, that no valid application for execution had been made before the expiration of the period of limitation, and that the application was barred.¹

38 Every warrant for the arrest of a judgment-debtor shall direct the officer entrusted with its execution to bring him before the Court with all convenient speed, unless the amount which he has been ordered to pay, together with the interest thereon and the costs (if any) to which he is liable, be sooner paid.

Warrant for arrest to direct judgment debtor to be brought up

Act XIV of 1882, s. 337.

This rule applies to H. C. and Prov. S. C. C.

For form of warrant see App. E, No. 13.

The executing officer is only empowered to arrest the defendant and detain him for such a reasonable time as is sufficient to allow of his being brought before the Court, and having an opportunity of applying for his discharge; the detention of a defendant after such reasonable time and without further authority of law is illegal.² So, where a Sheriff's officer took a prisoner, in custody under a warrant directed to the Superintendent of the Presidency Jail, to the Alipore Jail, and delivered her there, it was held that she was entitled to her discharge.³

39 (1) No judgment-debtor shall be arrested in execution of a decree unless and until the decree-holder pays into Court such sum as the Judge thinks sufficient for the subsistence of the judgment-debtor from the time of his arrest until he can be brought before the Court.

(2) Where a judgment-debtor is committed to the civil prison in execution of a decree the Court shall fix for his subsistence such monthly allowance as he may be entitled to according to the scales fixed under section 57 or, where no such scales have been fixed, as it considers sufficient with reference to the class to which he belongs.

(3) The monthly allowance fixed by the Court shall be supplied by the party on whose application the judgment-debtor has been arrested by monthly payments in advance before the first day of each month.

¹ *Raghunath v. Venkatesa* (1903) 26 Mad., 101.

² *Shunbho Chunder Halder, re, Bourke*, 59.

³ *Shamsoonnissa Begum v. Anne Love*, (1885) 11 Cal., 527.

(4) The first payment shall be made to the proper officer of the Court for such portion of the current month as remains unexpired before the judgment-debtor is committed to the civil prison, and the subsequent payments (if any) shall be made to the officer in charge of the civil prison.

(5) Sums disbursed by the decree-holder for the subsistence of the judgment-debtor in the civil prison shall be deemed to be costs in the suit :

Provided that the judgment-debtor shall not be detained in the civil prison or arrested on account of any sum so disbursed.

Act XIV of 1882, s. 339

The payment of subsistence-money must be in advance¹ otherwise the arrest or commitment is illegal, and it is for the officer of the Court and not the prisoner to see that the money is paid.²

On the 30th of September, the creditor paid subsistence-money for 30 days and the debtor had then a balance of four annas over from the subsistence-money for September. *Held*, a sufficient compliance with the terms of this rule, as the amount paid was sufficient for the whole of October,³ but where a prisoner was arrested on the 4th of August, and committed to prison on the evening of the same day, and only 27 days' subsistence-money was paid in, it was held that the provisions of this rule had not been complied with, although a sum making the amount sufficient for 28 days, was deposited next day.⁴

Every judicial officer under whose orders any civil prisoner is detained in jail shall, if the prescribed instalment of monthly allowance has not been deposited on the last day of the month, forthwith transmit an order to the officer in charge of the jail for such prisoner's release.⁵

40. (1) Where a judgment-debtor appears before the

Proceedings on appearance of judgment-debtor in obedience to notice or after arrest.

Court in obedience to a notice issued under rule 37, or is brought before the Court after being arrested in execution of

a decree for the payment of money and it appears to the Court that the judgment-debtor is unable from poverty or other sufficient cause to pay the amount of the decree or, if that amount is payable by instalments, the amount of any instalment thereof, the Court may, upon such terms (if any) as it thinks fit, make an order disallowing the application for his arrest and detention, or directing his release, as the case may be.

¹ *Kanoy Loll Doss, in re, Bourke, 51.*

² *Thomson, in the matter of, Bourke, 421.*

³ *Haladhar Dey v. Ambika Charan, (1870) 5 B. L. R., App. 80.*

⁴ *Dutt v. Cornelius, (1870) 5 B. L. R., App., 79.*

⁵ *Calc. Civ. Cir., No. 2, 1878.*

(2) Before making an order under sub-rule (1), the Court may take into consideration any allegation of the decree-holder touching any of the following matters namely :—

- (a) the decree being for a sum for which the judgment-debtor was bound in any fiduciary capacity to account ;
- (b) the transfer, concealment or removal by the judgment-debtor of any part of his property after the date of the institution of the suit in which the decree was passed, or the commission by him after that date of any other act of bad faith in relation to his property, with the object or effect of obstructing or delaying the decree-holder in the execution of the decree ;
- (c) any undue preference given by the judgment-debtor to any of his other creditors ;
- (d) refusal or neglect on the part of the judgment-debtor to pay the amount of the decree or some part thereof when he has, or since the date of the decree has had, the means of paying it ;
- (e) the likelihood of the judgment-debtor absconding or leaving the jurisdiction of the Court with the object or effect of obstructing or delaying the decree-holder in the execution of the decree.

(3) While any of the matters mentioned in sub-rule (2) are being considered, the Court may, in its discretion, order the judgment-debtor to be detained in the civil prison, or leave him in the custody of an officer of the Court, or release him on his furnishing security, to the satisfaction of the Court, for his appearance when required by the Court.

(4) A judgment-debtor released under this rule may be re-arrested.

(5) Where the Court does not make an order under sub-rule (1), it shall cause the judgment-debtor to be arrested if he has not already been arrested and, subject to the other provisions of this Code, commit him to the civil prison.

Act XIV of 1882, s. 337 A.

This applies to H. C. and Prov. S. C. C.

Under this rule, a Court is bound to cause the arrest of the judgment-debtor at once¹. The power to order his arrest is discretionary. The linnacy of a judgment debtor is a good cause for disallowing an application for his arrest.²

Appeal—A judgment debtor who had been arrested in execution of a decree of a District Munsif, made an application for his release under this rule and his application was granted. *Acld*, that an appeal lay against the order granting the application.³

Attachment of property

41 Where a decree is for the payment of money the decree-holder may apply to the Court for an order that—

Examination of judgment debtor as to his property.

(a) the judgment-debtor, or

(b) in the case of a corporation, any officer thereof, or

(c) any other person,

be orally examined as to whether any or what debts are owing to the judgment-debtor and whether the judgment-debtor has any and what other property or means of satisfying the decree; and the Court may make an order for the attendance and examination of such judgment-debtor, or officer or other person, and for the production of any books or documents.

Act XIV of 1882, s. 267.

This rule applies to H. C. and Prov. S. C. C.

Meaning of decree—This enquiry is not for the purpose of ascertaining the meaning of a decree, and evidence outside the record is not admissible to determine its meaning. That should appear on the face of the decree itself, and if it does not, the decree cannot be executed. It is the duty of the Judge to take care that his decree is so precise that it is capable of execution without leaving it to the Court of execution to decide what the Judge intended to decree. If, by reason of an uncertainty in a mortgage deed, or an uncertainty in the plaint, or an uncertainty in the evidence, the Judge could not ascertain what particular right the plaintiff was entitled to, he ought not to give the plaintiff a decree so uncertain that the Court of execution could not know what he intended to award.⁴

Property covered by decree.—But evidence may always be taken to

the judgment-debtor is, at least in honesty, bound to point out what is the actual property, the subject of the decree;⁵ the judgment-creditor may, if he has applied to attach debts, call upon the debtor to produce his account books.⁶ Where,

¹ Gubboy v. Ramdoyal Chow bay, (1897) 2 Cal. W. N., 388.

² Bhanabhai v. Chotalbhai, (1898) 22 Bom., 961.

³ Abdul Rahman v. Mahomed Kassar, (1898) 21 Mad., 29.

⁴ Dwarkanath Halder v. Kumola Kant, (1869) 12 W. R., 99.

⁵ Bhugobai Singh v. Ram Adham, (1874) 22 W. R., 330.

⁶ Ajoodhya Parshad v. Middleton, (1871) 3 All. H. C., 331. See also, Rajendro Kishore v. Hyabul Singh, (1872) 17 W. R., 379.

however, a decree is given against two co-sharers in a property, it can be executed only as against them, and no enquiry can be made in executing that decree by delivery of possession in respect to the amount of the shares of those persons in relation to others. That should be determined, if necessary, in a separate suit.¹ Property "liable to be seized" means any property attachable under a decree. A mortgagee in possession of attached property may be examined under this rule.²

42. Where a decree directs an inquiry as to rent or mesne profits or any other matter, the property of the judgment debtor may, before the amount due from him has been ascertained, be attached, as in the case of an ordinary decree for the payment of money.

Attachment in case of decree for rent or mesne profits or other matter, amount of which to be subsequently determined.

Act XIV of 1882, s. 255.

This rule applies to H. C. and Prov. S. C. C.

In a suit for damages for mesne profits against several defendants, each of whom has taken possession of a distinct portion of a share, the damages may be apportioned amongst them, otherwise, where the defendants have taken joint possession.³

Execution for mesne profits should not be allowed to issue against a *pro forma* defendant.⁴

The actual occupiers, as well as the lessors, will be held liable for mesne profits.⁵

Decree binding—Where a decree declared a person entitled to mesne profits from A, but the amount was not ascertained during A's life-time: *held*, A's representatives were not liable unless they were made parties to the suit defining the liability.⁶

43. Where the property to be attached is moveable property, other than agricultural produce,

Attachment of moveable property, other than agricultural produce in possession of judgment debtor.

in the possession of the judgment-debtor, the attachment shall be made by actual seizure, and the attaching officer shall keep the property in his own custody or in the custody of one of his subordinates, and shall be responsible for the due custody thereof:

Provided that, when the property seized is subject to speedy and natural decay, or when the expense of keeping it in custody is likely to exceed its value, the attaching officer may sell it at once.

Act XIV of 1882, s. 269

This rule applies to H. C. and Prov. S. C. C.

¹ *Ananda Pershad v. Triyuckonath*, (1870) 13 W. R., 123.

² *Premji Trikulnias, in re*, (1893) 17 Bom., 514.

³ *Krishna Mohun v. Kunjo Bahari*, (1881) 9 C. L. R., 1.

⁴ *Monajan v. Kashi Nath*, (1879) 5 C. L. R., 305.

⁵ *Madan Mohun v. Ram Hoss*, (1889) 6 C. L. R., 357.

⁶ *Balha Prasad v. Lal Sahab*, (1891) 13 All., 53, p. 65.

Before the present Act crops not severed from the ground were considered to be moveable property. This Act, sec 2 (13), has included growing crops within the definition of moveable property,¹ neither tiled huts;² nor trees,³ nor the interest of a tree *fructus* holder in Malins,⁴ but fruit,⁵ and stone sugar mills are moveables.⁶ A thatch when severed from the house is moveable property.⁷ Tiled huts are immovable property and the Small Cause Court has no jurisdiction to try a question of title to such huts as between an attaching creditor and a third person.⁸

Effect of payment—A decree-holder attached money deposited in Court which he considered as due to his debtor, and obtained payment and entered up satisfaction. Plaintiff in the suit in which the money was deposited obtained a decree declaring the money was not that of the other judgment-debtor, *Held*, entering up satisfaction did not prevent new execution.⁹

Seized—Seizure does not mean actual seizure, and includes such constructive seizure as is referred to in r. 46.¹⁰ When a warrant of attachment was executed by affixing it to the outer door of the warehouse in which goods belonging to the judgment debtor were stored, this was held to amount to actual seizure.¹¹

44 Where the property to be attached is agricultural produce, the attachment shall be made by affixing a copy of the warrant of attachment,—

(a) where such produce is a growing crop, on the land on which such crop has grown, or

(b) where such produce has been cut or gathered, on the threshing-floor or place for treading out grain or the like or fodder-stack on or in which it is deposited,

and another copy on the outer door or on some other conspicuous part of the house in which the judgment-debtor ordinarily resides or, with the leave of the Court, on the outer door or on some other conspicuous part of the house

¹ *Sadu v. Sambhu*, (1832) 6 Bom., 592; *Madayya v. Yenkata*, (1888) 11 Mad., 193; *Chela Lal v. Mulchand*, (1892) 14 All., 39; see also *Hormaji Irani*, in re, (1889) 13 Bom., 87.

² "3) 10 W. R., 416; 2 B. L. R., W. N., 470; *Nattu Miah v. 17 W. R., 309; Denu Nath W. N., 470.*

³ *Umed Rani v. Daulat Ram*, (1833) 5 All., 564; *Sakharam Mulshet v. Vishram*, (1893) 19 Bom., 207; *Tofail Ahmad v. Banco Madhub*, (1875) 24 W. R., 394; see also *Krishna Rao v. Babaji*, (1900) 24 Bom., 31.

⁴ Reference, (1889) 12 Mad., 203.

⁵ *Nasir Khan v. Karamat Khan*, (1880) 3 All., 168.

⁶ *Harmungal Singh v. Athul Singh*, (1872) 4 All. H. C., 15. But see, *Miller v. Brindaban*, (1870) 4 Cal., 916.

⁷ *Rajkumar v. Prannath*, (1871) 7 B. L. R., App 41; 15 W. R., 499.

⁸ *Amrita Lal Kaly v. Nibaran Chandra*, (1904) 31 Cal., 340; 8 Cal. W. N., 246.

⁹ *Lakshmina v. Appala*, (1884) 7 Mad., 157.

¹⁰ *Toola v. The Bombay Tramway Co*, (1837) 11 Bom., 448.

¹¹ *Multan Chand v. Bank of Madras*, (1904) 27 Mad., 346.

in which he carries on business or personally works for gain or in which he is known to have last resided or carried on business or personally worked for gain; and the produce shall thereupon be deemed to have passed into the possession of the Court.

45. (1) Where agricultural produce is attached, the Court shall make such arrangements for the custody thereof as it may deem sufficient and, for the purpose of enabling the Court to make such arrangements, every application for the attachment of a growing crop shall specify the time at which it is likely to be fit to be cut or gathered.

Provisions as to agricultural produce under attachment

(2) Subject to such conditions as may be imposed by the Court in this behalf either in the order of attachment or in any subsequent order, the judgment-debtor may tend, cut, gather and store the produce and do any other act necessary for maturing or preserving it; and if the judgment-debtor fails to do all or any of such acts, the decree-holder may, with the permission of the Court and subject to the like conditions, do all or any of them either by himself or by any person appointed by him in this behalf, and the costs incurred by the decree-holder shall be recoverable from the judgment-debtor as if they were included in, or formed part of, the decree.

(3) Agricultural produce attached as a growing crop shall not be deemed to have ceased to be under attachment or to require re-attachment merely because it has been severed from the soil.

(4) Where an order for the attachment of a growing crop has been made at a considerable time before the crop is likely to be fit to be cut or gathered, the Court may suspend the execution of the order for such time as it thinks fit, and may, in its discretion, make a further order prohibiting the removal of the crop pending the execution of the order of attachment.

(5) A growing crop which from its nature does not admit of being stored shall not be attached under this rule at any time less than twenty days before the time at which it is likely to be fit to be cut or gathered.

These two rules are new and provide for the attachment of growing crops as well as crops actually cut or gathered.

Attachment of debt,
share and other pro-
perty not in possession
of judgment-debtor

46 (1) In the case of—

- (a) a debt not secured by a negotiable instrument,
- (b) a share in the capital of a corporation,
- (c) other moveable property not in the possession of the judgment-debtor, except property deposited in, or in the custody of, any Court,

the attachment shall be made by a written order prohibiting,—

- (i) in the case of the debt, the creditor from recovering the debt, and the debtor from making payment thereof until the further order of the Court;
- (ii) in the case of the share, the person in whose name the share may be standing from transferring the same or receiving any dividend thereon;
- (iii) in the case of the other moveable property except as aforesaid, the person in possession of the same from giving it over to the judgment-debtor.

(2) A copy of such order shall be affixed on some conspicuous part of the court-house, and another copy shall be sent, in the case of the debt, to the debtor, in the case of the share, to the proper officer of the corporation, and in the case of the other moveable property (except as aforesaid), to the person in possession of the same.

(3) A debtor prohibited under clause (i) of sub-rule (1) may pay the amount of his debt into Court, and such payment shall discharge him as effectually as payment to the party entitled to receive the same.

Act XIV of 1882, s. 268.

This rule applies to H C and Prov. S C. C.

Official Assignee.—An order of attachment under this rule operates so as to give the judgment-creditor certain rights in execution. It does not operate, when these rights are not exercised before the presentation of a petition in insolvency, so as to create in favour of the judgment-creditor a title which prevails against that of the Official Assignee under the vesting order in insolvency, made after the order of attachment.¹

¹ *Krishnaswamy v. Official Assignee of Madras*, (1903) 20 Mad., 673

debt,
her pro
possession
debtor

- 46 (1) for performance of duty as a servant, the property cannot be sold by the debtor is entitled to it, get the interest before the date on which the sale can satisfaction of the judgment-creditor's for attachment before judgment. A the judgment-debtor was declared an preferred a claim, held, that he was
- (a) a debt not secured,
(b) a share in the cap,
(c) other moveable p

the judgment-deb the mortgage is intended to be sold, or if it in, or in the cu moveable property in order to recover it by

the attachment shall be the subject of the sale.⁴ Where the mortgage of a mortgagee out of possession are the procedure by which such attachment must this rule, r 58 cannot be applied.⁵

- (i) in the case of ing the del will be ineffectual if no notice is affixed in accord- ment the Court; ^{see}—A revenue Court decree is in the position of dealt with under this rule⁷

- (ii) in the attachment—The Court can summon any person name the nature and value of the property,⁸ and if it finds a each debt up for sale and make delivery under r 79.⁹ if ferring; but, the Court cannot make any order on him to pay, but there receiver who can sue, or sell the debt.¹⁰ A person who, as th an order under this rule cannot apply under r. 58

- (iii) in tent removed¹¹ Where a debt which had been attached 38, former Code,) was paid out of Court to the only person, exco due been paid into Court as required by the terms of the had been entitled to withdraw the money from Court, and such as certified to the Court, it was held such payment amounted to a compliance with the requirements of this rule.¹²

- (2) red in execution—A debt attached under this rule and paid falls

conspicuous
be sent, in Where the property to be attached consists of the of the shrc int of share share or interest of the judgment-debtor in the es. in moveable property belonging to him said another as co-owners, the attachment shall be made by

may Karuthan v. Subramanya, (1886) 9 Mad., 203.
paym Nursing Dass v. Tulsiram, (1878) 2 Bom., 538
tho Kristnisawamy v. Official Assignee, (1903) 26 Mad., 673.
Sami v. Krishnasami, (1887) 10 Mad., 169

Karimunnissa v. Phulechand, (1893) 15 All., 134.

Satya v. Madhub, (1905) 9 Calc. W. N., 693.

Auha v. Abu Jafar, (1891) 21 All., 405

Harilal v. Abhesang, (1880) 4 Bom., 323

Siriah v. Muckanachary, (1887) 10 Mad., 191.

Toolsa v. Antone, (1887) 11 Bom., 448.

Harilal v. Abhesang, (1880) 4 Bom., 323.

Fida Husain v. Maula Baksh, (1899) 21 All., 145.

Sorabji v. Govind, (1892) 16 Bom., 61, p. 64.

a notice to the judgment-debtor prohibiting him from transferring the share or interest or charging it in any way.

This is a new provision and is applicable to H. C. and Prov. S. C. C.

48 (1) Where the property to be attached is the salary or allowances of a public officer or of a servant of a railway company or local authority, the Court, whether the judgment-debtor or the disbursing officer is or is not within the local limits of the Court's jurisdiction, may order that the amount shall, subject to the provisions of section 60, be withheld from such salary or allowances either in one payment or by monthly instalments as the Court may direct: and, upon notice of the order to such officer as the Government may by notification in the Gazette of India or in the local official Gazette, as the case may be, appoint in this behalf, the officer or other person whose duty it is to disburse such salary or allowances shall withhold and remit to the Court the amount due under the order, or the monthly instalments, as the case may be.

(2) Where the attachable proportion of such salary or allowances is already being withheld and remitted to a Court in pursuance of a previous and unsatisfied order of attachment, the officer appointed by the Government in this behalf shall forthwith return the subsequent order to the Court issuing it with a full statement of all the particulars of the existing attachment.

(3) Every order made under this rule, unless it is returned in accordance with the provisions of sub-rule (2), shall, without further notice or other process, bind the Government or the railway company or local authority, as the case may be, while the judgment-debtor is within the local limits to which this Code for the time being extends and while he is beyond those limits if he is in receipt of any salary or allowances payable out of His Majesty's Indian revenues or the funds of a railway company carrying on business in any part of British India or local authority in British India, and the Government or the railway company or local authority, as the case may be, shall be liable for any sum paid in contravention of this rule.

This is a new provision and is applicable to H. C. and Prov. S. C. C.

49 (1) Save as otherwise provided by this rule, property belonging to a partnership shall not be attached or sold in execution of a decree other than a decree passed against the firm or against the partners in the firm as such.

(2) The Court may, on the application of the holder of a decree against a partner, make an order charging the interest of such partner in the partnership property and profits with payment of the amount due under the decree, and may, by the same or a subsequent order, appoint a receiver of the share of such partner in the profits (whether already declared or accruing) and of any other money which may be coming to him in respect of the partnership, and direct accounts and inquiries and make an order for the sale of such interest or other orders as might have been directed or made if a charge had been made in favour of the decree-holder by such partner, or as the circumstances of the case may require.

(3) The other partner or partners shall be at liberty at any time to redeem the interest charged or, in the case of a sale being directed, to purchase the same.

(4) Every application for an order under sub-rule (2) shall be served on the judgment-debtor and on his partners or such of them as are within British India.

(5) Every application made by any partner of the judgment-debtor under sub-rule (3) shall be served on the decree-holder and on the judgment-debtor, and on such of the other partners as do not join in the application and as are within British India.

(6) Service under sub-rule (4) or sub-rule (5) shall be deemed to be service on all the partners, and all orders made on such applications shall be similarly served.

This is a new rule which applies to H. C. and Prov. S. C. C. It serves to protect partnership property from execution of decrees against the partners personally and follows sect. 23 of the English Partnership Act of 1890.

Accounts—The discretion to direct the taking of accounts should only be exercised in special circumstances as for instance with a view to dissolution.¹

Execution of decree
against firm.

50. (1) Where a decree has been passed against a firm, execution may be granted—

(a) against any property of the partnership;

¹ Brown v. Hutchison, (1893) 2 Q. B., 126.

a notice to the judgment-debtor prohibiting him from transferring the share or interest or charging it in any way.

This is a new provision and is applicable to H. C. and Prov. S. C. C.

48. (1) Where the property to be attached is the salary or allowances of a public officer or of a servant of a railway company or local authority, the Court, whether the judgment-debtor or the disbursing officer is or is not within the local limits of the Court's jurisdiction, may order that the amount shall, subject to the provisions of section 60, be withheld from such salary or allowances either in one payment or by monthly instalments as the Court may direct; and, upon notice of the order to such officer as the Government may by notification in the Gazette of India or in the local official Gazette, as the case may be, appoint in this behalf, the officer or other person whose duty it is to disburse such salary or allowances shall withhold and remit to the Court the amount due under the order, or the monthly instalments, as the case may be.

Attachment of salary or allowances of public officer or servant of railway company or local authority)

(2) Where the attachable proportion of such salary or allowances is already being withheld and remitted to a Court in pursuance of a previous and unsatisfied order of attachment, the officer appointed by the Government in this behalf shall forthwith return the subsequent order to the Court issuing it with a full statement of all the particulars of the existing attachment.

(3) Every order made under this rule, unless it is returned in accordance with the provisions of sub-rule (2), shall, without further notice or other process, bind the Government or the railway company or local authority, as the case may be, while the judgment-debtor is within the local limits to which this Code for the time being extends and while he is beyond those limits if he is in receipt of any salary or allowances payable out of His Majesty's Indian revenues or the funds of a railway company carrying on business in any part of British India or local authority in British India, and the Government or the railway company or local authority, as the case may be, shall be liable for any sum paid in contravention of this rule.

This is a new provision and is applicable to H. C. and Prov. S. C. C.

made by actual seizure, and the instrument shall be brought into Court and held subject to further orders of the Court.

Act XIV of 1882, sec. 270.

This rule applies to H. C. and Prov. S. C. C.

52. Where the property to be attached is in the custody of any Court or public officer, the attachment shall be made by a notice to such Court or officer, requesting that such property, and any interest or dividend becoming payable thereon, may be held subject to the further orders of the Court from which the notice is issued :

Provided that, where such property is in the custody of a Court, any question of title or priority arising between the decree-holder and any other person, not being the judgment-debtor, claiming to be interested in such property by virtue of any assignment, attachment or otherwise, shall be determined by such Court.

Act XIV of 1882, s. 272.

This rule applies to H. C. and Prov. S. C. C.

Practice—The Court has no power to refuse an application for attachment under this provision.¹ All questions relating to the appropriation of money deposited in a Court should be heard by the Court making the order of attachment.²

The claims should be dealt with in the manner laid down in rr. 58-63, and a suit will lie to set aside an order such as is contemplated by the proviso to this rule that is, an order determining any question of title or priority as between the decree holder and any other person in respect of money in deposit in a Court.³

Effect of order to pay.—Where an order issued directing a Judge to pay certain moneys to A, and the amount was attached by B before payment, it was held that the effect of the order being to vest the money in A, the Judge could not go into any question of priority between A and B.⁴

Sufficient attachment—The fact that a notice of attachment has been served on the Court in which the money is deposited is sufficient to complete the attachment. The refusal of the Judge to receive such a notice cannot make that void which would otherwise be a good attachment.⁵

In the custody of a Court or public officer.—"Custody" here means *actual* custody.⁶ Where the money attached is money deposited with the Collector and not in the Court, neither the Judge making the attachment nor that officer has authority to decide claims to the deposit; it must be done

¹ Noor Jehan v. Mashitty, (1881) 8 C. L. R., 17.

² Gopeo Nath v. Achcha Bibee, (1881) 7 Cal., 553.

³ Tikum v. Sheo Ram, (1892) 19 Cal., 236.

⁴ Gopeo Nath v. Achcha Bibee, (1881) 7 Cal., 553; and compare Saefoollah v. Luchmeeput, (1870) 13 W. R., 58.

⁵ Tiel & Co. v. Abdool Hye, (1876) 19 W. R., 37.

⁶ Muttukaruppan v. Mutturamalinga, (1884) 7 Mad., 48.

- (b) against any person who has appeared in his own name under rule 6 or rule 7 of Order XXX or who has admitted on the pleadings that he is, or who has been adjudged to be, a partner ;
- (c) against any person who has been individually served as a partner with a summons and has failed to appear :

Provided that nothing in this sub-rule shall be deemed to limit or otherwise affect the provisions of section 247 of the Indian Contract Act, 1872.

(2) Where the decree-holder claims to be entitled to cause the decree to be executed against any person other than such a person as is referred to in sub-rule (1), clauses (b) and (c), as being a partner in the firm, he may apply to the Court which passed the decree for leave, and where the liability is not disputed, such Court may grant such leave, or, where such liability is disputed, may order that the liability of such person be tried and determined in any manner in which any issue in a suit may be tried and determined.

(3) Where the liability of any person has been tried and determined under sub rule (2), the order made thereon shall have the same force and be subject to the same condition as to appeal or otherwise as if it were a decree.

(4) Save as against any property of the partnership, a decree against a firm shall not release, render liable or otherwise affect any partner therein unless he has been served with a summons to appear and answer.

R. S. O. 482, r. 8.

This rule applies to H. C. and Prov. S. C. C.

Minors.—As to the liability of infant partners, see section 247 of the Indian Contract Act, and see also *Harris v. Benckham*.¹

Deceased Partner—If a partner who has entered appearance as such dies before judgment his estate not liable except in so far as it consists of partnership property.²

Issue to try liability—Whether A was or had held himself out to be a partner is a good issue.³

51 Where the property is a negotiable instrument not deposited in a Court, nor in the custody of a public officer, the attachment shall be

Attachment of negotiable instruments.

¹ *Harris v. Benckham* (1827) 2 Q. B. 531.

² *Ellis v. Wadsworth* (1829) 1 Q. B. 714.

³ *Woods v. Hyman & Co.* (1873) 1 K. B. 524. See generally Ann. Prac. notes to O. 482, r. 8.

- (ii) the holder of the decree sought to be executed or his judgment-debtor applies to the Court receiving such notice to execute its own decree.

(2) Where a Court makes an order under clause (a) of sub-rule (1), or receives an application under sub-head (ii) of clause (b) of the said sub-rule, it shall, on the application of the creditor who has attached the decree or his judgment-debtor, proceed to execute the attached decree and apply the net proceeds in satisfaction of the decree sought to be executed.

(3) The holder of a decree sought to be executed by the attachment of another decree of the nature specified in sub-rule (1) shall be deemed to be the representative of the holder of the attached decree and to be entitled to execute such attached decree in any manner lawful for the holder thereof.

(4) Where the property to be attached in the execution of a decree is a decree other than a decree of the nature referred to in sub-rule (1), the attachment shall be made, by a notice by the Court which passed the decree sought to be executed, to the holder of the decree sought to be attached, prohibiting him from transferring or charging the same in any way; and, where such decree has been passed by any other Court, also by sending to such other Court a notice to abstain from executing the decree sought to be attached until such notice is cancelled by the Court from which it was sent.

(5) The holder of a decree attached under this rule shall give the Court executing the decree such information and aid as may reasonably be required.

(6) On the application of the holder of a decree sought to be executed by the attachment of another decree, the Court making an order of attachment under this rule shall give notice of such order to the judgment-debtor bound by the decree attached; and no payment or adjustment of the attached decree made by the judgment-debtor in contravention of such order after receipt of notice thereof, either through the Court or otherwise, shall be recognized by any Court so long as the attachment remains in force.

A decree upon a mortgage is not a money decree within the meaning of this rule.¹ A mortgage debt is moveable property: its sale in execution carries with it the right to proceed against the mortgaged property.² A money decree being attached as directed by this rule, its adjustment subsequent to such attachment cannot be recognized by the Court.³ A right to recover mesne profits is not within the meaning of the rule. It applies only to cases in which the right attached is one expressly settled by the decree.⁴

Other decrees.—Clause 4 containing these words applies to decrees other than money-decrees.⁵ It and not r. 54 applies to the attachment of a decree for redemption.⁶

Sale of decree.—The Allahabad High Court has held that the Code does not contemplate the sale of a decree in execution of another decree;⁷ and the practice is the same in Madras.⁸ This has not been the practice in Bengal.⁹ A money decree cannot be sold after being attached. All other decrees are attachable and saleable.¹⁰ A decree for dissolution of partnership may be regarded as a money decree and can be attached but not sold. The proper remedy is by proceedings under this rule.¹¹

Revenue Court decree.—A Revenue Court decree is not liable to attachment and sale in execution of a decree of a Civil Court under this rule.¹²

Step in aid of execution.—An application under this rule is a step in aid of execution.¹³ An application by a judgment-creditor to execute a decree which had been attached, though disallowed, is an application in accordance with law.¹⁴

Court which passed the decree.—The Court can execute the attached decree on application of the attaching creditor.¹⁵ Where an application to a Court which was not the Court which passed it, a decree for foreclosure was attached by a creditor of the decree-holder, it was held that it was not competent to the Court which passed the decree to follow up the attachment by substituting the name of the attaching creditor in place of that of the judgment-debtor.¹⁶

¹ *Macnaghten v. Surji Prasad*, (1899) 4 Cal. W. N., xxxv, followed in *Jogendra v. Hiraaya Kumar*, (1903) 2 Cal. L. J., 499, but the distinction is not of much value having regard to the new wording of the present rule.

² *Taravadi Bhola Nath v. Bai Kashi*, (1902) 26 Bom., 303. See also, *Bajinath Lohar v. Binoyendra Nath*, (1901) 6 Cal. W. N., 5.

³ *Gopal Nanashet v. Joharimal*, (1892) 16 Bom., 522.

⁴ *Vasudeva v. Narayana*, (1901) 21 Mad., 311.

⁵ *Sultan Kuar v. Gulzari*, (1879) 2 All., 290.

⁶ *Naigir v. Bhaskar*, (1886) 10 Bom., 411. See "MORTGAGE DECREE, &c.," r. 54, *infra*.

⁷ *Sultan Kuar v. Gulzari*, (1879) 2 All., 290.

⁸ *Tiruvengala v. Vythilinga*, (1883) 6 Mad., 418.

⁹ *Gopal v. Mohan*, (1891) 16 Cal. W. N., 21.

¹⁰ *Gopal v. Mohan*, (1891) 16 Cal. W. N., 21.

¹¹ *Gopal v. Mohan*, (1891) 16 Cal. W. N., 21.

¹² *Gopal v. Mohan*, (1891) 16 Cal. W. N., 21.

¹³ *Gopal v. Mohan*, (1891) 16 Cal. W. N., 21.

¹⁴ *Gopal v. Mohan*, (1891) 16 Cal. W. N., 21.

¹⁵ *Siddlingappa v. Shankarappa*, (1903) 27 Bom., 556.

¹⁶ *Aulis v. Abu Jafar*, (1899) 21 All., 403.

¹⁷ *Lachman v. Thondt Ram*, (1885) 7 All., 382.

¹⁸ *Adhar Chandra Dass v. Lal Mohan Dass*, (1899) 21 Cal., 778; 1 Cal. W. N., 676.

¹⁹ *Peary Mohan v. Homesh Chunder*, (1888) 15 Cal., 371; *Rangasami Chetti v. Yettasami Modali*, (1891) 17 Mad., 78.

²⁰ *Bathina Don v. Baji Lal*, (1901) 26 All., 91.

Notice—A sale by the Court after receipt of notice under this rule is not made valid by the notice omitting to state the amount of the decree under which attachment issues.¹

54 (1) Where the property is immoveable, the attachment shall be made by an order prohibiting the judgment-debtor from transferring or charging the property in any way, and all persons from taking any benefit from such transfer or charge.

(2) The order shall be proclaimed at some place on or adjacent to such property by beat of drum or other customary mode, and a copy of the order shall be affixed on a conspicuous part of the property and then upon a conspicuous part of the court-house, and also, where the property is land paying revenue to the Government, in the office of the Collector of the district in which the land is situate.

Act XIV of 1882, sec. 274.

This rule applies to H. C.

A prohibitory order under this rule does not constitute a dispossession of the judgment-debtor.²

Jurisdiction—A Court can sell a mortgage-bond covering lands lying wholly outside its jurisdiction³ but not the land unless under s 17.⁴

Territorial, of Munsifs.—O. XXI, rr. 13 and 14 declare how application for attachments of immoveable property should be made. Where separate local jurisdiction was given to Munsifs under s 18, Act VI of 1871, one Munsif could not directly attach property wholly situated within the jurisdiction of another,⁵ and the same rule applied to a Subordinate Judge,⁶ otherwise, if it was partly within and partly without jurisdiction.⁷ The life-interest of a Hindu widow in the income of her husband's immoveable estate is attachable under this rule.⁸

Mortgage-debt.—A mortgage-debt must be attached under this rule.⁹ But where a mortgage-bond was attached under this provision and sold, and it was

¹ *Manick Lal Seal v. Banamali*, (1905) 32 Cal., 1104; (1906) 3 Cal. L. J., 27; 10 Cal. W. N., 193.

² *Narayanrav v. Balkrishna*, (1890) 4 Bom., 529. For form of order, see Sched. IV, No 141.

³ *Balkrishna v. Masuma*, (1883) 5 All., 142, p. 157; L. R., 9 I. A., 182.

⁴ *Prem Chand v. Mokhoda*, (1890) 17 Cal., 699. But see, *Gopi Mohan v. Doyabai Nundun*, (1892) 19 Cal., 13, *Tincowri Debye v. Shib Chandra Pal*, (1891) 21 Cal., 639.

⁵ *Obhoy Churn Coondoo v. Golam Ali*, (1881) 9 C. L. R., 361, 7 Cal., 410.

⁶ *Dakhina Churn v. Bilash*, (1891) 18 Cal., 526.

⁷ *Ram Lal v. Bama Sundari*, (1886) 12 Cal., 307; *Gopi Mohan v. Doyabai Nundun*, (1892) 19 Cal., 13.

⁸ *Natha v. Dhunbarji*, (1899) 23 Bom., 1.

⁹ *Appasami v. Scott*, (1886) 9 Mad., 5, *Sami Ayyar v. Krishnasami*, (1887) 10 Mad., 169, and under s 46, *Somath v. Govind Chandra*, (1893) 9 Cal., 511; *Debedra Kumar v. Shiv Patnalk*, (1893) 21 Cal., 1; 18 Mad., 477; see also, L. R., 9 I. A., 182, p. 182.

A decree upon a mortgage is not a money decree within the meaning of this rule.¹ A mortgage debt is moveable property its sale in execution carries with it the right to proceed against the mortgaged property.² A money decree being attached as directed by this rule, its adjustment subsequent to such attachment cannot be recognized by the Court.³ A right to recover mesne profits is not within the meaning of the rule. It applies only to cases in which the right attached is one expressly settled by the decree.⁴

Other decrees.—Clause 4 containing these words applies to decrees other than money-decrees.⁵ It and not r 54 applies to the attachment of a decree for redemption.⁶

Sale of decree.—The Allahabad High Court has held that the Code does not contemplate the sale of a decree in execution of another decree;⁷ and the practice is the same in Madras.⁸ This has not been the practice in Bengal.⁹ A money decree cannot be sold after being attached. All other decrees are attachable and saleable.¹⁰ A decree for dissolution of partnership may be regarded as a money decree and can be attached but not sold. The proper remedy is by proceedings under this rule.¹¹

Revenue Court decree.—A Revenue Court decree is not liable to attachment and sale in execution of a decree of a Civil Court under this rule.¹²

Step in aid of execution.—An application under this rule is a step in aid of execution.¹³ An application by a judgment-creditor to execute a decree which had been attached, though disallowed, is an application in accordance with law.¹⁴

Court which passed the decree.—The Court can execute the attached decree on application of the attaching creditor.¹⁵ Where an application to a Court which was not the Court which passed it, a decree for foreclosure was attached by a creditor of the decree-holder, it was held that it was not competent to the Court which passed the decree to follow up the attachment by substituting the name of the attaching creditor in place of that of the judgment-debtor.¹⁶

¹ *Macnaghten v. Surja Prasad*, (1899) 4 Cal. W. N., xxxv, followed in *Jogendra v. Hiranya Kumar*, (1905) 2 Cal. L. J., 492, but the distinction is not of much value having regard to the new wording of the present rule.

² *Tarvali Bhola Nath v. Bai Kashi*, (1902) 26 Bom., 305. See also, *Bajrath Lohan v. Binoyendra Nath*, (1901) 6 Cal. W. N., 5.

³ *Gopal Nanashet v. Joharimal*, (1892) 16 Bom., 522.

⁴ *Vasudeva v. Narayana*, (1901) 24 Mad., 341.

⁵ *Sultan Kuar v. Gulzari*, (1879) 2 All., 290.

⁶ *Nalgar v. Bhaskar*, (1886) 10 Bom., 414. See "MORTGAGE DECREE, &c.," r. 54, *post*.

⁷ *Sultan Kuar v. Gulzari*, (1879) 2 All., 290.

⁸ *Tiruvengala v. Vythilinga*, (1887) 6 Mad., 418.

⁹ *G. v.*, R., 34; *Johane-*
. Bom.,
. Cal.,
. its was

followed

¹⁰ *Gopal Nanashet v. Joharimal*, (1892) 16 Bom., 522.

¹¹ *Siddingsappa v. Shankarappa*, (1903) 27 Bom., 556.

¹² *Aulia v. Abu Jafar*, (1899) 21 All., 405.

¹³ *Lachman v. Thondai Ram*, (1885) 7 All., 352.

¹⁴ *Adhar Chandra Das v. Lal Mohan Das*, (1899) 24 Cal., 778; 1 Cal. W. N., 676.

¹⁵ *Peary Mohan v. Homesh Chunder*, (1888) 15 Cal., 371; *Rangasami Chetti v. Periasami Mudali*, (1895) 17 Mad., 18.

¹⁶ *Barthra Dan v. Bai Lal*, (1904) 26 All., 91.

Notice—A sale by the Court after receipt of notice under this rule is not made valid by the notice omitting to state the amount of the decree under which attachment issues.¹

54 (1) Where the property is immoveable, the attachment shall be made by an order prohibiting the judgment-debtor from transferring or charging the property in any way, and all persons from taking any benefit from such transfer or charge.

(2) The order shall be proclaimed at some place on or adjacent to such property by beat of drum or other customary mode, and a copy of the order shall be affixed on a conspicuous part of the property and then upon a conspicuous part of the court-house, and also, where the property is land paying revenue to the Government, in the office of the Collector of the district in which the land is situate.

Act XIV of 1882, sec 274

This rule applies to H. C.

A prohibitory order under this rule does not constitute a dispossession of the judgment-debtor.²

Jurisdiction—A Court can sell a mortgage-bond covering lands lying wholly outside its jurisdiction³ but not the land unless under s. 17.⁴

Territorial, of Munsifs—O. XXI, rr. 13 and 14 declare how application for attachments of immoveable property should be made. Where separate local jurisdiction was given to Munsifs under s. 18, Act VI of 1871, one Munsif could not attach property in the jurisdiction of another.⁵

it was partly
Hindu widow in
this rule.⁶

Mortgage-debt.—A mortgage-debt must be attached under this rule.⁷ But where a mortgage-bond was attached under this provision and sold, and it was

¹ *Mantek Lal Seal v. Banamali*, (1905) 32 Cal. 1101; 3 Cal. L. J., 27; 10 Cal. W. N., 103.

² *Narayanav v. Balkrishna*, (1890) 4 Bom., 629. For order, see Sched. IV, No. 141.

³ *Balkrishna v. Masuma*, (1893) 5 All., 142, p. 157. 1892.

⁴ *Ann v. Jha*, 1901, 10 Cal. 301; 7 Cal. L. J., 10.

⁵ *Dakhina Churn v. Bilash*, (1891) 18 Cal., 307; 7 Cal. L. J., 10.

⁶ *Ram Lal v. Bama Sundari*, (1886) 12 Cal., 307; 7 Cal. L. J., 10.

⁷ *Nundun*, (1892) 19 Cal., 13.

⁸ *Natha v. Dhunbarji*, (1899) 23 Bom., 1.

⁹ *Appasami v. Scott*, (1896) 9 Mad., 5; *Sami Ayyar v. Shivarami*, (1887) 11 Mad., 100.

¹⁰ *Ann v. Jha*, (1883) 9 Cal., 51.

¹¹ *Debendra Kumar v. R. Patnaik*, (1893) 20 Cal., 18.

¹² *Ann v. Jha*, (1887) 11 Mad., 437; see also 18 Cal. L. J., 10.

objected that the bond had not been also attached under r. 46, and that the sale was bad, it was held that the purchaser could realise the debt from the hypothecated property, though whether the purchaser could recover the debt by a personal remedy was not decided.¹ The sale of a mortgage-debt described as such in execution of a decree carried with it the security without attaching the mortgaged property under this rule.² An equity of redemption can be attached under this rule by an order prohibiting the judgment-debtor from dealing with it and all persons from receiving it, such order being proclaimed and notified as directed by the rule.³

Sale under mortgage—It is not necessary to issue an attachment in the case of a mortgage-decree where the decree contains a direction to sell,⁴ nor in the case of a mortgage-bond under which immoveable property is given as collateral security and it is desired to enforce the collateral security by sale.⁵

In Bengal, the execution of a mortgage-decree is governed by the rule made under the Transfer of Property Act.

Mortgage decree : immoveable property.—A mortgage-decree may be unmoveable property within this rule.⁶

By beat of drum or other customary mode.—In Bengal, it is usual to notify this by sticking up a bamboo as well as by beat of drum. Omission to beat the drum is a material irregularity.⁷ A copy must be affixed on a conspicuous part of the property attached,⁸ but not on every lot, if the property is broken into lots for sale.⁹ The order under this rule must precede the posting of notices under r. 68.¹⁰ See note under r. 60. Objections as to the absence of formalities cannot be taken for the first time before the Judicial Committee.¹¹

First mortgagee in possession—The proper mode of attaching a factory pledged, subject to the claims of a prior mortgagee in possession, should be constructive, by issue of a written notice under this rule. The decree-holder
 utting peons
 of a mort-
 procedure by
 16; this rule

¹ *Sami Ayyar v. Krishnasami*, (1887) 10 Mad., 169. See also, *Balkrishna v. Masuma*, (1883) 5 All., 142, p. 157; *L. R.*, 9 I. A., 184, p. 196.

² *Baldev Dhanrup v. Ramchandra Balwant*, (1893) 10 Bom., 121.

³ *Parashram Harlal v. Govind Ganesh*, (1897) 21 Bom., 226.

⁴ *Dayachand v. Hemchand*, (1880) 4 Bom., 515.

⁵ *Kamath Das v. Sudhir Patnaik*, (1893) 20 Cal., 805; see also, *Venkataramammah v. Ramish*, (1878) 2 Mad., 108; *Naigar v. Bhaskar*, (1886) 10 Bom., 444; *Mosely v. Steel & Co.*, (1887) 14 Cal., 661; but see, *Douhal v.* and the following cases
L. R., 10 I. A., 107;

. v. Gulab Rai, (1876)
., 142.

⁷ *Trimbal Senana*, (1886) 10 Bom., 501.

⁸ *Kalita Jafar v. Coomaz*, (1881) 9 C. L. R., 114.

⁹ *De Penha v. Rajat Set*, (1888) 12 Bom., 368; and see, *Moulvi Abdul Kashem v. Benode*, (1894) 12 Cal. W. N., 707.

¹⁰ *Mohi Lal v.* (1881) 7 Cal., 31; but see the case of *Rahchandar v. Kantha*, (1882) 4 All., 200.

¹¹ *Sam Krishna v. Surfannan*, (1881) 6 Cal., 129; *L. R.*, 7 I. A., 157.

¹² *Mudhan Mohun v. Jekul Dore*, (1867) 10 Moo. I. A., 563, p. 571.

Karim *Phul Chandel*, (1893) 15 All., 131.

Interpretation—An attachment without specifying the share is an attachment of the debtor's entire interest.¹

Removal of attachment after satisfaction of decree.

55. Where—

- (a) the amount decreed with costs and all charges and expenses resulting from the attachment of any property are paid into Court, or
- (b) satisfaction of the decree is otherwise made through the Court or certified to the Court, or
- (c) the decree is set aside or reversed,

the attachment shall be deemed to be withdrawn, and, in the case of immoveable property, the withdrawal shall, if the judgment debtor so desires, be proclaimed at his expense, and a copy of the proclamation shall be affixed in the manner prescribed by the last preceding rule.

Act XIV of 1882, s. 275

This rule applies to H. C. and Prov. S. C. C.

If the amount of the decree and costs, &c., have been paid and the attachment withdrawn, an assignee has a good title against persons claiming under this rule,² and the same result follows if the money has been paid, although the attachment has not been withdrawn.³

56. Where the property attached is current coin or currency notes, the Court may, at any time during the continuance of the attachment, direct that such coin or notes, or a part thereof sufficient to satisfy the decree

Order for payment of coin or currency notes to party entitled under decree.

be paid over to the party entitled under the decree to receive the same.

Act XIV of 1882, sect. 277.

This rule applies to H. C. and Prov. S. C. C.

For form of order see. App. E. No. 25

57. Where any property has been attached in execution of a decree but by reason of the

Determination of attachment.

decree-holder's default the Court is unable to proceed further with the application for execution,

it shall either dismiss the application or for any sufficient

¹ *Suroop Narain v. Run Tohm*, (1872) 18 W. R., 106

² *Murga Churn v. Monmohini*, (1888) 15 Cal., 771.

³ *Ganga Din v. Kushali*, (1885) 7 All., 702; *Sorabji v. Govind*, (1892) 16 Bom., 91, p. 106. See also, *Umesh Chander v. Raj Ballabh*, (1892) 8 Cal., 279. *Bank of Upper India v. Sheo Prasad*, (1897) 19 All., 192.

reason adjourn the proceedings to a future date. Upon the dismissal of such application the attachment shall cease.

This is a new provision and applies to H. C. and Prov. S. C. C.

Its object is to put an end to the doubts, which have from time to time arisen as to the continuance of an attachment in cases where an order has been made "striking off proceedings" or "removing proceedings from the file." Such orders are not contemplated by and have no justification under the Code.

Investigation of claims and objections.

58 (1) Where any claim is preferred to, or any objection is made to the attachment of, any property attached in execution of a decree on the ground that such property is not liable to such attachment, the Court shall proceed to investigate the claim or objection with the like power as regards the examination of the claimant or objector, and in all other respects, as if he was a party to the suit:
Investigation of claims to, and objections to attachment of, attached property
 Provided that no such investigation shall be made where the Court considers that the claim or objection was designedly or unnecessarily delayed.

(2) Where the property to which the claim or objection applies has been advertised for sale, the Court ordering the sale may postpone it pending the investigation of the claim or objection.

Act XIV of 1882, s. 278.

This rule applies to H. C. and Prov. S. C. C.

For form of notice to attaching creditor, see App. E., No. 26.

But an order of the Small Cause Court made in a proceeding under this

not exclusive of the remedy by suit ^a

Postponement.—A refusal to postpone apparently does not affect limitation in a suit brought under r 63 ^d

Application of this rule.—Before any claim can be investigated under this rule it is necessary to ascertain whether the claim of the intervenor is based on a right originating before or after the attachment made by the decree-holder; ^e and in the former case when the decree-holder alleges that the claimant is a *tenmidar* for the judgment-debtor, the Court is bound to enquire ^f The Judge

^a *Dona Nath v. Nuffer Chunder*, (1898) 3 Cal. W. N., 590

^b *Krishnabhatipati Deva v. Vikrama Deva*, (1895) 18 Mad., 17.

^c ^d *Sundar Singh v. Ghazi*, (1896) 19 All., 419; *Raghunath v. Sarosh K. R. Kama* (1897) 23 Bom., 296.

^e *Kanah Mukhun Lall v. Sah Koonlan*, (1874) L. R., 2 I. A., 210.

^f *Madhuch Jelan v. Syud Shah*, (1866) 5 W. R., 318, 23.

^g *Karim v. Nolon Chunder*, (1873) 20 W. R., 202.

should not refuse to make an inquiry under this rule in a proper case, and he will be compelled by the High Court to do so.¹ Rules 58-63 have no reference to any claim preferred or objection made by any person who is on the record as a party to the suit,² but the claims of third parties whether put forward by themselves or by a party to the suit must be dealt with under these rules.³ It may be noticed that a judgment creditor who attaches property which does not belong to his judgment-debtor commits a trespass, for which he is responsible in damages, even though he may have acted without malice and mistakenly.⁴

Does not apply—A certain box was attached in execution of a decree against one Mathur, whose father, alleging that it was his property and not Mathur's, paid the bailiff the amount of the decree in order to release it from attachment. He then applied to the Judge to have the money refunded to him. The Judge held the box to be his property and ordered repayment. *Held*, that in ordering repayment the Judge acted without jurisdiction. The proper course was to take steps under this provision to have the attachment on the property removed. By paying the amount of the decree into Court, it became necessary to file a suit for the recovery of the money so paid,⁵ as money paid to release an attachment in execution of a decree cannot be made the subject of a claim.⁶ Persons who had originally been made parties to a suit, but had been expressly exempted from the operation of the decree, are not parties to the suit within the meaning of s. 47 with regard to objections taken by them in respect of the attachment of their property by the decree-holder. Such objections must be held to be objections under this rule.⁷ This rule does not affect attachments made under r. 46,⁸ (see note under r. 46,) nor applies to claims to property directed to be sold by a mortgage-decree under ss. 86-88 of the Transfer of Property Act.⁹ The procedure in this rule is inapplicable in the case of a mortgage decree for sale and, if applied, r. 63 will not bar a suit by either party.¹⁰

This rule does not apply unless the property has already been attached,¹¹ nor to property ordered by decree to be sold.¹²

Bengal Tenancy Act—S. 170 of the Bengal Tenancy Act bars a claim under this rule to a tenure or holding attached in execution of a decree for arrears of rent due thereon in all cases where it is shown that the decree is one for such arrears.¹³

Does apply—Where property belongs to A and B jointly and in execution of a decree against A, anything more than A's right and interest in the property is attached, B has a right to come in and claim that the attachment may be re-

¹ *Greesh Chunder v. Kashessuree*, (1867) 8 W. R., 26; *Jameela v. Luchmun Panday*, (1879) 4 C. L. R., 74.

² *Murugesu v. Hayat Sahib*, (1899) 23 Bom., 237.

³ *Rama Nathan v. Leivas*, (1900) 23 Mad., 195.

⁴ *Damodhar v. Lallu*, (1871) 8 Bom. H. C., 177; *Goma v. Gokaldas*, (1879) 3 Bom., 74.

⁵ *Varajlal v. Kachia*, (1898) 22 Bom., 473.

⁶ *Mahamed Beg v. Jaggernauth*, (1866) 1 Ind. Jar. N. S., 248.

⁷ *Mukariab v. Hurmatunnissa*, (1896) 18 All., 52.

⁸ *Hanlal v. Abhesang*, (1880) 4 Bom., 328; *Rambutty Koor v. Kamesur*, (1871) 22 W. R., 36.

⁹ *Dreeholls v. Peters*, (1887) 14 Cal., 631; *Himatram v. Khushal Jethiram*, (1891) 18 Bom., 98.

¹⁰ *Joy Prokash Singh v. Abhoy Kumar Chund*, (1896) 1 Cal. W. N., 701, and see, *Hukam v. Raghunbir*, (1905) A. W. N., 157.

¹¹ *Muhammad Yahya v. Lalta*, (1906) A. W. N., 62.

¹² *Hukam Singh v. Raghunbir Saran*, (1905) 27 All., 390.

¹³ *Anrita Lal v. Nensi Chand*, (1901) 23 Cal., 332; *Chandra Sekhar v. Rani Manjee*, (1899) 3 Cal., W. N., 346; *Makbul Ahmed v. Bakhal Das*, (1899) 4 Cal. W. N., 732; *Khetra v. Kritharthamayi*, (1905) 32 Cal., 570; 3 Cal. L. J., 470; 10 Cal. W. N., 547.

reason adjourn the proceedings to a future date. Upon the dismissal of such application the attachment shall cease.

This is a new provision and applies to H. C. and Prov. S. C. C.

Its object is to put an end to the doubts, which have from time to time arisen as to the continuance of an attachment in cases where an order has been made "striking off proceedings" or "removing proceedings from the file." Such orders are not contemplated by and have no justification under the Code.

Investigation of claims and objections.

- 58 (1) Where any claim is preferred to, or any objection is made to the attachment of, any property attached in execution of a decree on the ground that such property is not liable to such attachment, the Court shall

Investigation of claims to, and objections to attachment of, attached property

proceed to investigate the claim or objection with the like power as regards the examination of the claimant or objector, and in all other respects, as if he was a party to the suit:

Provided that no such investigation shall be made where the Court considers that the claim or objection was designedly or unnecessarily delayed.

- (2) Where the property to which the claim or objection applies has been advertised for sale, the Court ordering the sale may postpone

Postponement of sale

it pending the investigation of the claim or objection.

Act XIV of 1882, s. 278

This rule applies to H. C. and Prov. S. C. C.

For form of notice to attaching creditor, see App. E., No. 26

But an order of the Small Cause Court made in a proceeding under this rule is an order made in a suit within the meaning of s. 37 of Act XIV of 1882 and as such is final.¹ This rule is permissive. There is no penalty for not applying under this rule.² The provisions of this and the rule immediately succeeding are not exclusive of the remedy by suit.³

Postponement.—A refusal to postpone apparently does not affect limitation in a suit brought under r. 63.⁴

Application of this rule.—Before any claim can be investigated under this rule it is necessary to ascertain whether the claim of the intervenor is based on a right originating before or after the attachment made by the decree-holder;⁵ and in the former case when the decree-holder alleges that the claimant is a *tenimidar* for the judgment-debtor, the Court is bound to enquire.⁶ The Judge

¹ *Dano Nath v. Nuffar Chunder*, (1898) 3 Cal. W. N., 590.

² *Krishnabhupati Devn v. Vikrama Devn*, (1895) 18 Mad., 17.

³ *Sundar Singh v. Ghau*, (1896) 18 All., 410; *Baghunath v. Sarosh K. R. Kama* (1899) 23 Bom., 266.

⁴ *Sah Mahbub Lall v. Sah Koomlun*, (1874) L. R., 2 I. A., 210.

⁵ *Mahabub Khan v. Syed Shih*, (1866) 5 W. R., 218.

⁶ *Karim v. Nubun Chunder*, (1873) 20 W. R., 222.

otherwise, if he objects as trustee of third parties not before the Court.¹ A transferee in possession may raise the same defence as his transferor, the judgment-debtor, could have raised.² The representative of a judgment-debtor in possession of property sought to sold in execution is not bound to file an objection under this rule but may wait and defend a suit for possession by the purchaser.³

Receiver—If the debtor is declared insolvent and a receiver is appointed this does not prevent a person claiming under this rule.⁴

Attachment before judgment—By O XXXVIII, r. 8 this rule applies to attachment before judgment.⁵ In this last case it was held that where a landlord, in a suit against his tenant for rent, attached before judgment certain growing crops under section 16, Act VI (B. C.) of 1862, the claim of an intervenor ought to be investigated in the same manner as if it were a claim made under s. 23 & 269, Act VIII of 1859, as to property attached in execution of a decree.

Designedly or unnecessarily delayed—It will be noticed that it is optional with a Court to allow a claim or objection to be made, when there has been intentional delay in making it. Where a Court has refused or has neglected to adjudicate a claim its order cannot act prejudicially to the claimant.⁶

Practice—The claimant in a case under this rule should begin. The *onus* is on him to prove his claim that the goods or property attached belonged to him, and were in his possession, and therefore not in that of the judgment-debtor. His evidence must be confined to his own claim, and not to establish the right of a third party.⁷ Where several persons, independently of one another put in claims under s. 278 (former code) and it appeared that they each claimed to be in possession of the same portion of the property under attachment, it was held that the Court was bound to try each claim separately as between the claimant and the decree-holder and it should not have thrown out all the claims, because they were inconsistent with one another.⁸ Where an objection has been made and disallowed, it cannot be renewed by the same person in the same attachment.⁹ If in a previous attachment against the alleged representative of the judgment-debtor no objection has been raised to his responsibility as such representative, he cannot raise it on a subsequent attachment.¹⁰ An order in favour of one of several decree-holders or an objection under this rule does not enure to the benefit of other decree-holders who are not parties to the proceedings.¹¹

Res-judicata—The contest is between the decree holder and the intervenor the decree holder does not represent the debtor so as to make the

¹ Roop Lall v. Bekam, (1883) 15 Cal., 417; see notes under s. 47 and r. 60, *infra*.

² Dallumal v. Hari Das, (1901) 23 All., 267; Ramanathan v. Leuva, (1900) 23 Mad., 195. See also the observations of Riddade, J. in Murigeya v. Hayat Sahel, (1899) 23 Bom., 237.

³ Ram Indumati v. Jogishar, (1900) 23 All., 644; Seth Chand v. Durga Dei, (1889) 12 All., 313.

⁴ Paras Ram v. Karam Singh, (1889) 9 All., 232.

⁵ Sava Ramji v. Jadavji Nathu, (1864) 2 Bom. H. C., 142; Jara Ramji v. Jadavji Nathu, (1862) 1 Bom. H. C., 224; and Kartick Chunder v. Mookta Ram, (1863) 10 W. R., 21.

⁶ Roghoo Nath Doss v. Bydinath, (1870) 14 W. R., 364; Jugobundho Bose v. Sachya, (1871) 16 W. R., 22; 8 B. L. R., App. 39; Sah Mukhun, v. Sah Koundun, (1874) L. R., 2 L. A., 210; 24 W. R., 75; 15 B. L. R., 228.

⁷ Nga Tha v. Burn, (1867) 11 W. R., (F. B.), 8; 2 B. L. R., 91.

⁸ Shirodo Moyee v. Noban Chunder, (1900) 11 W. R., 255; 2 B. L. R., 333.

⁹ Khelat Chunder v. Bhuggobatty Chura, (1870) 14 W. R., 144.

¹⁰ Mahatab Chund v. Pearce Dossee, (1866) 6 W. R., Mis., 61.

¹¹ Jagannath v. Ganesh, (1890) 18 All., 413.

possessed of either for himself or as trustee for the judgment-debtor, and when the question of possession is disposed of in favour of the objector, the Judge should not go into that of title.¹ The only question proper to be decided under this rule is whether the property attached is in the possession of the judgment debtor or some person in trust for him, or whether it is in the possession of a third party not in trust for him.²

The words "possessed" in r. 59 and "possession" in rr. 60 and 61 are not used in a restricted sense as relating to mere tangible or physical possession. They include constructive possession, or possession in law, of debts and other intangible property.³

Practice.—The application ought either to be dismissed, or numbered and registered as a suit.⁴ The *onus* is on the applicant to prove his claim,⁵ by any kind of evidence sufficient for the purpose,⁶ and the Court is bound to receive the evidence offered in support of the claim,⁷ provided such claim be made at a proper time, *i.e.*, before sale.⁸

60. Where upon the said investigation the Court is satisfied that for the reason stated in the claim or objection such property was not, when attached, in the possession of the judgment-debtor or of some person in trust for him, or in the occupancy of a tenant or other person paying rent to him, or that, being in the possession of the judgment-debtor at such time, it was so in his possession, not on his own account or as his own property, but on account of or in trust for some other person, or partly on his own account and partly on account of some other person, the Court shall make an order releasing the property, wholly or to such extent as it thinks fit, from attachment.

Act XIV of 1882, s. 280.

This rule applies to H. C. and Prov. S. C. C.

Jurisdiction.—This rule contemplates not only the entire release of the property, but also the retention of the attachment to such extent as the Court thinks fit.⁹

Form of order.—Where the Court is of opinion that the property attached ought not to be sold, the proper order for the Court to make is a simple order releasing the property from attachment. "It may be that the order of release is based on the fact that the Court considers it proved that the property belongs to the claimant, but nevertheless the order cannot, and certainly ought not to

¹ *Hamid Bakht v. Baktear Chand*, (1887) 14 Cal. 617.

² *Mahtab Chand v. Hurdeo Narain*, (1871) 16 W. R., 119.

³ *Chidambara v. Ramasamy*, (1904) 27 Mad. 67.

⁴ *Sahoo Gokul v. Zynub*, (1869) 1 All. H. C. 176.

⁵ *Gooroo Dass v. Sonu Munee*, (1873) 20 W. R., 315; *Hurriah Chunder v. Bhobun Moye*, (1865) 4 W. R., 99.

⁶ *Bimode Lall v. Gireedhar*, (1874) 22 W. R., 392.

⁷ *Bhooharinee Dabee v. Nil Monce Singh*, (1875) 21 W. R., 422.

⁸ *Maharajah of Burdwan v. Heera Lall Seal*, (1869) 11 W. R., 54.

⁹ *Yashvant v. Vitthola*, (1883) 12 Bom., 231.

contain any declaration of the claimant's title as against the judgment-debtor.¹ And where, under this rule property which has been attached is ordered to be released, the order for release is made with reference merely to the particular claimant who has obtained the order: the order is not to be looked on as a general decision (of which all the world can have the benefit) that the property does not belong to the judgment-debtor.² See "APPLICATION OF THIS RULE," r. 58, *ante*. Release can only be had under this rule and the Court must be satisfied that the conditions laid down herein exist.³ The Court has no power to order a sale subject to a claim.⁴

Against whom—And the only person against whom an order can be passed under this rule is the decree-holder,⁵ referred to under r. 63,⁶ and not the judgment-debtor, who is not a party except in name;⁷ see "OTHER SUITS: LIMITATION," r. 63. If the claimant proves that the property attached was at the date of attachment wholly or partly his, an order should be passed releasing the property to that extent;⁸ and that is the only order which should be passed.⁹

Co-sharers—Where in executing a decree against the father and eldest son of a joint Mutakshara family, the other sons, not on the record, claimed their shares, the case was held to fall within this rule.¹⁰ So, where A got a partition decree against the *karta* without making the other members parties, the latter obtained release of their shares under this rule;¹¹ and where the half share in certain property was attached in execution of a decree as belonging to the judgment debtor, and a third party objected on the ground that out of that share two-eighths belonged to him and only one-eighth to the judgment-debtor, it was held that this claim was one that should have been investigated, and that, if it were established, that share should be released from attachment;¹² and see notes under s. 41 and r. 58.

In trust partly on account of some other person—This rule must be read with s. 60 and only refers to such portion of the property as the trustee has a disposing power over. Khurumissa devised certain property in *wakf* to her

to create the *wakf* expressed in it that property in trustee, and it was argued that, if there was a margin of profit, it could be sold. It was held that the margin of profit could not be determined unless in a suit in which all the persons interested in the endowment were parties, and as no property nor any specific portion of it could be taken out of the property.

¹ *Bhyrah Lall v. Meer Abdul*, (1867) 8 W. R., 93; *Gobhaty*, (1870) 14 W. R., 144.

² *Imam Bindee Begum v. Mahomed Tukee*, (1867) 8 W.

³ *Chimankul v. Marleol*, (1906) 8 B. M. L. R., 791.

claim should have been allowed.¹ And where a claimant was found in possession of property as trustee in *trust*, it was held that the Court executing the decree could not go beyond the question of possession and decide that the deed was invalid and the property had devolved on the judgment debtor as heir.² Where A contracted to lay down a certain quantity of pavement for B, and, having carried paving stones to the works to the value of Rs. 100, received an advance of that sum from A, it was held that the stones should be released from attachment on B's intervention.³ One Ukerda Punja at Veramgam consigned certain bags of seed to Velji Hirji & Co., at Bombay for sale on commission and drew *hundis* against the goods for Rs. 3,200, which at his request Velji Hirji & Co. accepted and paid on receiving the railway receipts by post. The goods were to be sold on arrival on Ukerda Punja's account and the proceeds credited to him as against the advance made by the payment of the *hundis*. On the arrival of the goods at Bombay, they were attached by Bharmal Shripal & Co., who had obtained decree against Ukerda Punja. *Held*, that Velji Hirji & Co., were entitled to the goods and that at the date of the attachment they were in possession of Ukerda Punja by the Railway Company "on account of or in trust for" Velji Hirji, in the sense in which that expression is used in this rule.⁴

If, upon the investigation—That is, if, upon the investigation of the claim of an objector.⁵ In an investigation under r. 60, the Court has to determine the question of possession merely and cannot go into the question of title. If the possession of the person holding the property be on his own account, the fact that the judgment-debtor may have a beneficial interest or some title in it, cannot be gone into.⁶

Nature of investigation—The judge should confine himself to determine whether or not the property was in the possession of the claimant on his own account, at the time when it was attached.⁷

Appeal.—No appeal lies.⁸

Remedy by suit—A suit will lie to establish the plaintiff's right to property, though no claim under r. 58 and an order under r. 61 has been made. The object of r. 58 is to give a claimant a speedy and summary remedy, but not to deprive him of his remedy by suit.⁹

Limitation—When a claim to a *mokarari* has been allowed under this rule, a suit for a declaration that the *mokarari* was fraudulent and *benzvi* and for possession and mesne profits was held barred under art. 11, Sch. II of the Limitation Act, because not brought within one year of the order.¹⁰

61. Where the Court is satisfied that the property

Disallowance of claim to property attached. was, at the time it was attached, in the possession of the judgment-debtor as his own property and not on account of any other person, or as in the possession of some other person in trust for him,

Gishen Chand v. Nahr Hossein, (1887) L. R., 15 I. A., 1; 15 Cal., 329.

Mid Bakht v. Buktair, (1887) 14 Cal., 617; followed in *Sheoraj Nandan v. Bal Suran*, (1891) 18 Cal., 290; and see *Burjorji v. Chunbai*, (1892) 16 I., p. 12.

(1870) 2 All. H. C., 337.

Co. v. Bharmal, (1897) 21 Bom., 237; (1899) 23 Bom., 423.

v. Administration.

Is. v. Nadir Hossein, (1887) L. R., 15 I. A., 329.

Monmohun Dass v. Radha Kanto Dass, (1900) 23 Cal., 329.

Koylash Chunder v. Koylash Chunder, (1884) 11 Cal., 329.

Dayaram v. Govardhan Das, (1904) 23 Bom., 453.

Raghunath Mukund v. Sarosh Kama, (1899) 23 Bom., 453.

Rajaram Pandey v. Raghubananian Tewary, (1897) 24 Cal., 329.

(1887) 15 Cal., 329; and see,

or in the occupancy of a tenant or other person paying rent to him, the Court shall disallow the claim.

Act XIV of 1882, s. 281.

This rule applies to H. C. and Prov. S. C. C.

Nature of the decision—The proper order to make under this rule is that the claim be disallowed.¹

When sufficient—The order will be correct in cases where the claimant does not appear in support of his claim;² or fails to produce any evidence;³ as well as in cases where the claimant fails to produce evidence worthy of credit.⁴ In all these cases there is an adjudication and an order adverse to the claimant or objector which may make it necessary for him to sue to have it set aside,⁵ and see the cases under "LIMITATION," r. 63.

Whom it affects—An order passed under this rule enures to the benefit only of the person in whose favour it is passed, i. e., the attaching creditor.⁶ Thus, the judgment-creditor, or persons claiming under him, cannot set up as a bar that a claim made by their adversary for the release from attachment of the property in dispute, was dismissed as against a judgment-creditor who had attached it in execution of his decree.⁷ And where the claimant is in actual possession, the effect of an order disallowing his claim is that he is in possession, without any title.⁸ The fact that Government may have released certain lands from settle-

"LIMITATION," r. 63.

Application of rule—This rule has not been applied to claims in property attached before judgment, for O XXXVIII, r. 9 which prescribes the manner of investigation, is silent as to the result.⁹

Limitation—The date of disposal of the claim is the date from which limitation in execution runs.¹⁰ When a Court disallows a claim to attached property owing to the claimant's not having given any evidence, there cannot be said to have been any investigation under r. 58, the order is not one under r. 61, and art. 11 of the Limitation Act does not apply.¹² In 1878, the plaintiff purchased at a Court sale the first defendant's interest in certain land, but he did not obtain possession. In 1888, the same property was purchased by the fourth defendant in execution of another decree against the same judgment-debtor. It

¹ Mohadeb Mundul v. Modhoo, (1871) 16 W. R., 59.

² Tripoora Soonduree v. Ijgudoomssee, (1875) 21 W. R., 411; Dhuuput Singh v. Indur Chunder, (1870) 13 W. R., 121.

³ Suenanto Hajrah v. Tajooddeen, (1874) 21 W. R., 409; Gouroo Doss v. Soni Monce, (1873) 20 W. R., 313.

⁴ Goombur v. Hubeckoomssee, (1871) 15 W. R., 311.

⁵ Kamfate v. Issur Chunder, (1874) 22 W. R., 39; Brijoo Kishore Nag v. Ram Dyal, (1874) 21 W. R., 133; Sardhart Lal v. Ambika Pershad, (1888) 15 Cal., 521; L. R., 15 L. A., 127; fall in Bahum Bux v. Abdul Kader (1905) 32 Cal., 537; Khub Lal v. Ram Lochan, (1890) 17 Cal., 290.

⁶ Khub Lal, v. Ram Lochan, (1890) 17 Cal., 290.

⁷ Poshroomssee v. Kureemoomssee, (1874) 21 W. R., 230; Gunga Narain v. Haradhun, (1866) 6 W. R., 157.

⁸ Brijoo Kishore v. Ram Dyal, (1874) 21 W. R., 133.

⁹ Nanyee Churn v. Jogendra Nath, (1874) 21 W. R., 365.

¹⁰ Jarrer Pestonji, (1896) 20 Bom., 403, p. 407.

¹¹ Becharam v. Abdul, (1885) 11 Cal., 55.

¹² Vallar Singh v. Toril Mahton, (1896) 1 Cal. W. N., 21.

appeared that the plaintiff raised an objection by petition in the course of the proceedings in execution of the last mentioned decree, but his petition was dismissed on his vakil stating that he was not in possession. The plaintiff then sued in 1891 for the property purchased by him *held*, that no order had been passed under r. 61 and that the suit was not barred under the Limitation Act, Sch. II, art. 11.¹

In trust—See “IN TRUST, &c.” r. 60.²

No appeal—No appeal lies from an order under this rule.³

62. Where the Court is satisfied that the property is subject to a mortgage or charge in favour of some person not in possession, and thinks fit to continue the attachment, it may do so, subject to such mortgage or charge.

Continuance of attachment subject to claim of incumbrancer.

Act XIV of 1882, s. 282.

This rule applies to H. C. and Prov. S. C. C.

Subject to a mortgage—A sale subject to a mortgage means a sale made expressly subject by the sale certificate.⁴

If property is sold subject to a mortgage, and bought in by the mortgagee, the debt is satisfied if the value of the property is sufficient to cover the debt.⁵

Where a mortgagee is in possession of the mortgaged property when it is attached in execution of a decree against the mortgagor, he can claim to have the attachment withdrawn,⁶ though an equity of redemption may be sold in execution of a decree.⁷ Mortgages noted in the sale proclamation as claims upon the property sold should be entered in the certificate of sale and computed as part of the purchase money, if they have been admitted by the parties, established by decree or declared under r. 62 to be charges on the property and the sale has been held subject to them.⁸

63. Where a claim or an objection is proffered, the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of such suit, if any, the order shall be conclusive.

Saving of suits to establish right to attached property.

Act XIV of 1882, s. 283.

This rule applies to H. C., and Prov. S. C. C., and does *not* apply to the Calcutta S. C. C.⁹

The essential condition precedent to a suit under this rule is the making of an attachment of some property, of objection being taken to such attachment,

¹ *Munisami Reddi v. Arumchala Reddi*, (1893) 18 Mad., 207.

² *Bishen Chand v. Nadir Hossein*, (1897) L. R., 15 I. A., 1, p. 11; 15 Calc., 329.

³ *Abdul Rahman v. Muhammad Yar*, (1882) 4 All., 100.

⁴ *Nagindas v. Halalkore*, (1881) 5 Bom., 470.

⁵ *Dulchand v. Ram Kishen Singh*, (1891) 7 Calc., 618; L. R., 8 I. A., 93.

⁶ *Kassirav v. Vithaldas*, (1873) 10 Bom. H. C., 100.

⁷ *Saraswati Debi v. Nabadwip Chandra*, (1870) 5 B. L. R., 340. But see *Nath v. Gobindmani*, (1869) 4. B. L. R., O. C., 83.

⁸ *Shantappa Chedambaraya v. Subrao Ramchandra*, (1891) 18 Bom., 175.

⁹ *Ismail Solomon v. Mahomed Khan*, (1891) 18 Calc., 296.

34, (1891) 2, and see, tri,

or in the occupancy of a tenant or other person paying rent to him, the Court shall disallow the claim.

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Nature of the decision.—The proper order to make under this rule is that the claim be disallowed.¹

When sufficient.—The order will be correct in cases where the claimant does not appear in support of his claim;² or fails to produce any evidence;³ as well as in cases where the claimant fails to produce evidence worthy of credit.⁴ In all these cases there is an adjudication and an order adverse to the claimant or objector which may make it necessary for him to sue to have it set aside;⁵ and see the cases under "LIMITATION," r. 63.

Whom it affects.—An order passed under this rule enures to the benefit only of the claimant. Thus, the bar that a property in which he has an interest is attached to it in execution, the effect of an order disallowing his claim is that he is in possession, without any title.⁶ The fact that Government may have released certain lands from settle-

"LIMITATION," r. 63.

Application of rule.—This rule has not been applied to claims to property attached before judgment, for O XXXV111, r. 9 which prescribes the manner of investigation, is silent as to the result.¹⁰

Limitation.—The date of disposal of the claim is the date from which limitation in execution runs.¹¹ When a Court disallows a claim to attached property owing to the claimant's not having given any evidence, there cannot be said to have been any investigation under r. 58, the order is not one under r. 61, and art. 11 of the Limitation Act does not apply.¹² In 1878, the plaintiff purchased at a Court sale the first defendant's interest in certain land, but he did not obtain possession. In 1888, the same property was purchased by the fourth defendant in execution of another decree against the same judgment-debtor. It

¹ Mohulch Mundul v. Modhoo, (1871) 16 W. R., 59.

² Tripura Sundares v. Jijutomissi, (1875) 24 W. R., 411; Dhunput Singh v. Bidar Chunder, (1870) 13 W. R., 121.

³ Freeman v. Hujrah v. Tajwahleem, (1874) 21 W. R., 409; Gooroo Doss v. Sona Monee, (1873) 20 W. R., 313.

⁴ Goudhar v. Hubachomissi, (1871) 15 W. R., 311.

⁵ Kaminee v. Isur Chunder, (1874) 22 W. R., 39; Brij Kishore Nag v. Ram Dyal, (1874) 21 W. R., 133; Surbhari Lal v. Ambika Pershad, (1884) 15 Cal., 521; L. R., 15 L. A., 121; Iltimad Bahm Bux v. Abdul Kader (1905) 32 Cal., 537; Khub Lal v. Ram Lochan, (1898) 17 Cal., 200.

⁶ Khub Lal v. Ram Lochan, (1890) 17 Cal., 200.

⁷ Kutchumissi v. Kutchumomissi, (1874) 21 W. R., 230; Gunga Narain v. Haradhan, (1866) 6 W. R., 157.

⁸ Brij Kishore v. Ram Dyal, (1874) 21 W. R., 133.

⁹ Nimaye Churn v. Jagendra Nath, (1874) 21 W. R., 363.

¹⁰ Jaffer Pestonji, (1896) 20 Bom., 403, p. 407.

¹¹ Techaram v. Alul, (1885) 11 Cal., 51.

¹² Vallar Singh v. Toril Ration, (1896) 1 Cal. W. N., 21.

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In trust—See "IN TRUST, &C," r. 60²

No appeal—No appeal lies from an order under this rule³

62 Where the Court is satisfied that the property is subject to a mortgage or charge in favour of some person not in possession, and thinks fit to continue the attachment, it may do so, subject to such mortgage or charge.

Continuance of attachment subject to claim of incumbrancer.

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This rule applies to H. C. and Prov. S. C. C.

Subject to a mortgage—A sale subject to a mortgage means a sale made expressly subject by the sale certificate⁴

If property is sold subject to a mortgage, and bought in by the mortgagee, the debt is satisfied if the value of the property is sufficient to cover the debt.⁵

Where a mortgagee is in possession of the mortgaged property when it is attached in execution of a decree against the mortgagor, he can claim to have the attachment withdrawn,⁶ though an equity of redemption may be sold in execution of a decree.⁷ Mortgages noted in the sale proclamation as claims upon the property sold should be entered in the certificate of sale and computed as part of the purchase money, if they have been admitted by the parties, established by decree or declared under r. 62 to be charges on the property and the sale has been held subject to them.⁸

63 Where a claim or an objection is preferred, the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of such suit, if any, the order shall be conclusive.

Saving of suits to establish right to attached property.

Act XIV of 1882, s. 283. This rule is the making of attachment of some property, of objection to such attachment.

The essential condition precedent to a suit is the making of attachment of some property, of objection to such attachment.

¹ *Munisami Reddi v. Arunachala B.* 1902 2 All. 203.

² *Bishen Chand v. Nadir Hossain* (1834) 6 B. R., 13 L. A., 1, p. 11; 13 Cal., 17.

³ *Abdul Rahman v. Muhammad* 1860 3 B. R., 24 All., 100.

⁴ *Narayan v. Halalkore*, (1831) 1860, 470.

⁵ See on *Ram Kishan Singh* (1831) 7 Cal., 618; 1 L. R., 8 L. A., 91.

⁶ *Narayan v. Vishaladas*, (1873) 10 Bom. H. C., 100.

⁷ *Saraswat. Debi v. Nabadwip Chandra*, (1870) 5 B. L. R., 340. *Pal v. Nath v. Gobindmani*, (1869) 4. B. L. R., O. C., 62.

⁸ *Shantappa Chedambaraya v. Subrao Ramchandra*, (1897) 14 B. R., 114.

⁹ *Ismail Solomon v. Mahomed Khan*, (1821) 13 Cal., 290.

or in the occupancy of a tenant or other person paying rent to him, the Court shall disallow the claim.

Act XIV of 1882, s. 281.

This rule applies to H. C. and Prov. S. C. C.

Nature of the decision.—The proper order to make under this rule is that the claim be disallowed.¹

When sufficient.—The order will be correct in cases where the claimant does not appear in support of his claim,² or fails to produce any evidence;³ as well as in cases where the claimant fails to produce evidence worthy of credit.⁴ In all these cases there is an adjudication and an order adverse to the claimant or objector which may make it necessary for him to sue to have it set aside;⁵ and see the cases under "LIMITATION," r. 63.

Whom it affects.—An order passed under this rule enures to the benefit only of the person in whose favour it is passed, *i.e.*, the attaching creditor.⁶ Thus, the judgment-creditor, or persons claiming under him, cannot set up as a bar that a claim made by their adversary for the release from attachment of the property in dispute, was dismissed as against a judgment-creditor who had attached it in execution of his decree.⁷ And where the claimant is in actual possession, the effect of an order disallowing his claim is that he is in possession, without any title.⁸ The fact that Government may have released certain lands from settlement in payment of revenue on the ground that they were appropriated to a religious endowment, does not exempt them permanently from being attached and sold in execution of a decree against the person who may hold them, if it be proved that he held them entirely for his own use,⁹ see also the cases under "LIMITATION," r. 63.

Application of rule.—This rule has not been applied to claims in property attached before judgment, for O XXXVIII, r. 9 which prescribes the manner of investigation, is silent as to the result.¹⁰

Limitation.—The date of disposal of the claim is the date from which limitation in execution runs.¹¹ When a Court disallows a claim to attached property owing to the claimant's not having given any evidence, there cannot be said to have been any investigation under r. 50, the order is not one under r. 61, and art. 11 of the Limitation Act does not apply.¹² In 1878, the plaintiff purchased at a Court sale the first defendant's interest in certain land, but he did not obtain possession. In 1888, the same property was purchased by the fourth defendant in execution of another decree against the same judgment-debtor. It

¹ *Mohd-b-Mur Lal v. Mohd-b*, (1871) 16 W. R., 79.

² *Tripura Sundar v. Jugal Kunder*, (1875) 21 W. R., 411; *Dhnapat Singh v. Bader Chunder*, (1870) 15 W. R., 121.

³ *Freemant v. Hajrah v. Tayebdeen*, (1871) 21 W. R., 409; *Croton Doss v. Sona Moosa*, (1873) 20 W. R., 313.

⁴ *Gandharu Hulecherrera*, (1871) 15 W. R., 311.

⁵ *Kamboo v. Issur Chunder*, (1874) 22 W. R., 39; *Brij Kishore Nag v. Ram Dyal*, (1874) 21 W. R., 173; *Sardar Lal v. Anilaka Pershad*, (1885) 15 Cal., 521; L. R., 15 I. A., 123, 134; *Rafiq Doss v. Abdul Kader* (1895) 22 Cal., 577; *Khub Lal v. Ram Doss*, (1899) 17 Cal., 299.

⁶ *Khub Lal v. Ram Doss*, (1899) 17 Cal., 299.

⁷ *Indra Prasad v. Kunder Chunder*, (1874) 21 W. R., 229; *Gunga Narain v. Haradun* (1894) 6 W. R., 157.

⁸ *Brij Kishore v. Ram Dyal*, (1874) 21 W. R., 133.

⁹ *Singay Churn v. Jagendra Nath*, (1874) 21 W. R., 565.

¹⁰ *Jaffer Pestunji*, (1886) 20 Bom., 497.

¹¹ *Peckaram v. Abdul*, (1887) 11 Cal., 53.

¹² *Mallik Singh v. Toor Mahlon*, (1896) 1 Cal. W. N., 21.

under rr. 60, 61, 62 ¹ nor to a suit between rival claimants; ² nor to a suit by a person whose property was held in execution proceedings not to have been attached, ³ nor to a suit instituted by a claimant who continued to be in possession after the rejection of her claim, and the property was subsequently sold under a second attachment ⁴ Where the suit is not to follow certain property but its proceeds, one year's limitation does not apply. Thus, where A got a decree against M's widow for wrongful conversion of his timber by M, and attached the property of M's brother, the attachment was disallowed. A then sued to execute against the property. It was held that M's brother having sold the timber and benefited by the same, A could follow the proceeds in his hands, and the limitation was six years from the date defendant received the money. ⁵ The right of a reversioner to sue accrues on the death of the widow. The fact that he has made an unsuccessful application for possession in execution proceedings against the widow and has not sued under this rule (s. 283, former code) does not debar him from filing a regular suit. ⁶ Art. 12, cl. (b) of Sch. II of the Limitation Act XV of 1877, does not apply to a suit to recover property sold ostensibly in execution of a decree, but the sale of which was in fact authorized by the decree under which the said property purported to have been sold ⁷ And where the Court rejected an application made by the claimant praying to stay the sale, in order to enable him to get the conveyance executed in his favour by the judgment-debtor put in, after having it registered, it was held that one year's limitation did not apply. ⁸

Step in aid of execution.—A suit to set aside an order in a claim case is not a step in aid of execution. ⁹

Sale generally.

64 Any Court executing a decree may order that any property attached by it and liable to sale, or such portion thereof as may seem necessary to satisfy the decree, shall be sold, and that the proceeds of such sale, or a sufficient portion thereof, shall be paid to the party entitled under the decree to receive the same.

Act XIV of 1882, s. 284

This rule applies to H. C. and also to Prov. S. C. C., so far as it relates to moveable property.

May.—The word "may" means "shall"; but still when property is sold in execution of a decree, it cannot be sold again at the instance of a decree-holder who attached it before the attachment effected by the decree-holder under whose decree it is sold ¹⁰

¹ Roghhoonath Doss v. Bydonath, (1870) 14 W. R., 361.

² Doorgaram v. Nuro Singh, (1869) 11 W. R., 131.

³ Pullamma v. Pradosham, (8895) 18 Mad., 316.

⁴ Luckhee Prea v. Khyroollah, (1870) 14 W. R., 367.

⁵ Gooroo Das Pyne v. Ram Narain Sahoo, (1883) L. R., 11 I. A., 59.

⁶ Tai v. Ladu, (1896) 20 Bom., 801.

⁷ Nazar Ali v. Kedar Nath, (1897) 19 All., 303.

⁸ Mukham Lal v. Koundun Lal, (1875) 15 B. L. R., 223; 21 W. R., 75; L. R., 2 I. A., 210.

⁹ Pammanandun v. P. S. S. S., (1890) 17 Calc., 263.

¹⁰ Kashy Nath v. S. S. S., (1896) 12 Calc., 317. This rule is not an exception to O. X. S. S., (1833) 6 Mad., 98.

- (c) any incumbrance to which the property is liable ;
- (d) the amount for the recovery of which the sale is ordered ; and
- (e) every other thing which the Court considers material for a purchaser to know in order to judge of the nature and value of the property.

(3) Every application for an order for sale under this rule shall be accompanied by a statement signed and verified in the manner hereinbefore prescribed for the signing and verification of pleadings and containing, so far as they are known to or can be ascertained by the person making the verification, the matters required by sub-rule (2) to be specified in the proclamation.

(4) For the purpose of ascertaining the matters to be specified in the proclamation, the Court may summon any person whom it thinks necessary to summon and may examine him in respect to any such matters and require him to produce any document in his possession or power relating thereto.

Act XIV of 1882, sect. 267.

This rule applies to H. C. and Prov. S. C. C.

Void sales—The sales contemplated by this rule are sales in execution of decrees, and the procedure and the rules laid down regarding them are framed on the assumption that the property to be sold has been already attached,¹ and that property not attached and not proclaimed cannot be sold,² and where the property has been attached and the sale was dismissed but decreed on is rule has no gage decree, been sold to

him at a private sale.⁴

Owner : estoppel.—The real owner, if not a party, is not bound to come forward, and unless he does something which binds him, he is not affected by the sale.⁵

Proclamation.—The object of issuing a proclamation is to give notice to intending purchasers, and not to the judgment-debtor;⁶ to inform them of what are, and case 8 If

¹ Denonauth Ruckit v. Mutty Lal Paul, (1862) 1 Hyde, 153.

² Ram Onogroho v. Montoran, (1866) 6 W. R., 223; Fida Husain v. Kutub, (1885) 7 All., 33; *contra*—Kishory Mohun v. Mahomed, (1891) 18 Cal., 183; s. c. (1895) 22 Cal., 999; L. R., 22 I. A., 129.

³ Ram Chand v. Pitam, (1889) 10 All., 506.

⁴ Himatram v. Khushal Jethiram, (1884) 18 Bom., 93.

⁵ Biswantapa v. Rana, (1885) 9 Bom., 80, p. 91.

⁶ Laek Ram v. Mohesh, (1869) 12 W. R., 188.

⁷ Abdool Kureem v. Jaun Ali, (1872) 18 W. R., 56.

⁸ Ishan Chunder Mitter v. Baksh Ali, (1863) Marsh., 614.

Decree for money.—A decree for money cannot be sold.¹ See note to r. 53, "SALE OF DECREE"

65. Save as otherwise prescribed, every sale in execution of a decree shall be conducted by an officer of the Court or by such other person as the Court may appoint in this behalf, and shall be made by public auction in manner prescribed.

Act XIV of 1882, s 286

This rule applies to H. C., and to Prov. S. C. C.

Jurisdiction—Sales under decrees passed without jurisdiction and afterwards set aside on that account are null and void,² and so are sales under decrees barred by limitation.³ But a separate suit to prove that the decree was barred at the time of sale will not lie.⁴

Notice—When a Court postponed a sale, but information not reaching the Nazir in time, he sold the property *held*, the sale was void.⁵

Court may appoint—The words "whom the Court may appoint" apply not only to the words "any other person," but also to the "officer of the Court;" otherwise any officer might, without any authority, take upon himself to sell property in execution. Thus, if in the absence of a Subordinate Judge, a District Judge were to carry on a sale, it would be set aside with a proof of substantial injury,⁶ but where a Munsiff, absent through illness, empowered his *peishkar* to carry on a sale, the sale was upheld; there was no proof of substantial injury.⁷

The fact that a creditor and his attorney have directed the Sheriff to seize property does make the latter the creditor's agent for the purpose of selling it.⁸

66. (1) Where any property is ordered to be sold by public auction in execution of a decree, the Court shall cause a proclamation of the intended sale to be made in the language of such Court.

(2) Such proclamation shall be drawn up after notice to the decree-holder and the judgment-debtor and shall state the time and place of sale, and specify as fairly and accurately as possible—

(a) the property to be sold;

(b) the revenue assessed upon the estate or part of the estate, where the property to be sold is an interest in an estate or in part of an estate paying revenue to the Government;

¹ *Jotin Nath Chowdhry v. Dwarka Nath Dey*, (1893) 20 Cal., 111.

² *Jatin Nath v. Braj Nath*, (1870) 6 B. L. R., App., 90.

³ *G. Ram Agar v. Lakhurams D. B.*, (1870) 5 B. L. R., 68.

⁴ *Najib Ali v. Mohd. Baccarullah*, (1873) 11 B. L. R., 42.

⁵ *Sardul Lal v. Umarchandani*, (1870) 12 All., 96; and see, *Zainulabidin v. Muhammad*, (1888) 10 All., 166.

⁶ *J. L. Nath Roy v. Hari Baksh* (1879), 12 W. R., 273.

⁷ *O. v. Charles Dwyer Saemundries*, W. R., 1861, p. 41.

⁸ *D. Raj Ally v. Mahomed Idris*, (1874) 3 Cal., 506; 6 Cal., 356.

Order : charge — An order of sale after attachment, on a money-decree create a valid charge on the property ;¹ a money-decree on a mortgage-bond does not.²

Construction — The sale of a decree for possession of land does not carry the meane profits due to the debtor,³ and the sale of a decree partly executed only enables the purchaser to execute what remains to be carried out.⁴

Error in sale — If a Court directs the sale of property not warranted by the decree, the person aggrieved may follow his property by a regular suit.⁵ And if the sale proclamation asserts an interest in the judgment-debtor which does not exist, the purchaser can follow the money into the hands of the Sheriff, or even of the execution-creditor, if the money has been paid to him.⁶ If the property of which sale is sought is a debt, and the Court receives notice from the alleged debtor that no debt exists, the Court should satisfy itself as to the existence or otherwise of the debt, and if it comes to the conclusion that no debt exists, should abstain from proceeding to a sale ;⁷ but it cannot call upon the debtor to show cause why the debt should not be paid into Court.⁸

If the Court believes the property to be sold is of occupancy tenure it is duty to notify the fact in the proclamation.⁹

Representative — It is only in cases where it is manifest that the judgment-debtor must have been sued as a representative that the Court has allowed a sale in terms of the interest of the judgment-debtor, to convey the interests of others apparently not parties to the suit ; except where the person contesting the sale was bound to pay the debt for which the decree was passed.¹⁰

Revenue assessed — Not stating the revenue is an irregularity, but this objection should be taken in the first Court, when seeking to set aside a sale.¹¹

Any incumbrance — In the case of the mortgage, the amount of the mortgage-debt unpaid should be stated.¹² If a decree-holder knowing of the existence of an incumbrance does not notify it, the land passes free from it.¹³ A third person purchasing the mortgaged property *bona fide* at a sale in execution of a money decree obtained by the mortgagee against the mortgagor obtains a good title free from the mortgage lien, unless the sale is subject to it.¹⁴ The absence of specification in the sale proclamation of incumbrances is a material irregularity under Rule 90.¹⁵ It is the duty of the decree-holder to notify encumbrances.¹⁶

¹ *Suraj Bansi Koer v. Sheo Pershad*, (1880) 5 Calo. 148 ; L. R., 6 I. A., 83 ; *Bal-kishen v. Sitaram*, (1883) 7 All. 731 ; *Madho Pershad v. Mehrban*, (1891) 18 Calo., 157 ; L. R., 17 I. A., 191.

² *Radha Kant v. Sadafut Mahomed*, (1881) 21 W. R., 86.

³ *Ganesh Lal Tewari*, (1881) 6 Calo., 243.

⁴ *Grishehunder v. Jibaneswari*, (1881) 6 Calo., 243.

⁵ *Assamathem v. Luchmeeput*, (1879) 4 Calo., 142 ; *Dorah Ally v. Executor of Mohecooddeen*, (1878) 3 Calo., 806.

⁶ *Framji Besanji v. Hormaji*, (1878) 2 Bom., 253.

⁷ *Harilal v. Abhesang*, (1880) 4 Bom., 323.

⁸ *Siriah v. Muckanachary*, (1887) 10 Mad., 191.

⁹ *Basdev Prasad v. Juthen Ram*, (1905) 27 All., 684.

¹⁰ *Loki Malton v. Ajub Lal*, (1878) 4 C. L. R., 465.

¹¹ *Macnaghten v. Mahabir Pershad*, (1883) 9 Calo., 658.

¹² *Megh Lal Pooroo v. Shab Pershad*, (1881) 7 Calo., 41.

¹³ *Kt* See also, *Nursing Narain* to effect of stating in the sale *Seth Gokal Dass v. Murl,*

¹⁴ *Husain v. Shankargiri*, (1899) 23 Bom., 119.

¹⁵ *Moti Lal Roy v. Bhawan Kumari*, (1901) 6 Calo. W. N., 836.

¹⁶ *Giribala Debia v. Mina Kumari*, (1900) 5 Calo. W. N., 497.

the parties who went to that auction had referred to the decree, they would have found that the debt for which the sale was to take place was not the widow's but Juggomohun's, and that the property to be sold under the decree was not the widow's but Juggomohun's, because Juggomohun was really the debtor, and the widow was sued merely in her representative character." But the Privy Council expressly approved and upheld the principle expressed by Peacock, C. J., in this case ¹ and in a later case another Bench refused to follow the decision in the 18th volume of the W. R., and declared that the decision in Marshall's case was good law. ² And, here on an execution-sale, there is a

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O. XXI, r. 94) Clums admitted by the parties or established by decree should be entered in the proclamation of sale as charges on the property, though they have come to the knowledge of the Court in an enquiry under this provision only and have not been made the subject of an order under r. 66. ³ The declaratory portion of a sale-proclamation is not, by itself, sufficient to override the description of the property in the body of the document. ⁴

The proclamation should specify the details referred to in this rule; for an omission may form a ground for cancelling the sale, in case any substantial injury has ensued; otherwise not. ⁵ Thus, the omission of the jumma and the name of the decree-holder in the proclamation does not vitiate a sale, unless the debtor has suffered loss. ⁶ Where the holder of two decrees attaches property in execution of one of the decrees, he has a right to state in the sale-proclamation that he also claims the same property as liable to sale in satisfaction of his second decree. ⁷ Where a mortgagee gets separate decrees for instalments of the same debt, the mortgaged property should not be sold under one decree subject to the other, but out and out. ⁸ When a mortgagee sold the mortgaged property under a money decree, but the mortgage lien was not announced at the sale; and that the omission to notify the mortgage could not be treated as an estoppel, and that the registration of the mortgage was notice. The auction-purchaser was, therefore, bound by the mortgage. ⁹

Rent decrees—The order of attachment and proclamation of sale must issue simultaneously. The latter must contain certain additional particulars. ¹⁰

Value of property to be sold—This should be stated in the proclamation of sale. ¹¹ There is no rule of law requiring publication of the value in the notification. ¹²

¹ *Manager of Darbhanga v. Ramaput Singh*, (1872) 10 B. L. R., 291; 17 W. R., 422.

² *Nazerrutti v. Ameerooddeen*, (1875) 21 W. R., 3. See also, *Halkhory Lall v. Sheo Churn*, (1875) 21 W. R., 100.

³ *Uma Churn Sen v. Gobind Chunder Mozumdar*, (1877) 1 C. L. R., 460.

⁴ *Shantappa Chetambaraya v. Subbarao Ramchandra*, (1891) 18 Bom., 175.

⁵ *Dwarka Nath v. Aloka Chunder*, (1883) 9 Calc., 611.

⁶ *Aruna Chelliam v. Aruna Chelliam*, (1889) 12 Mad., 19.

⁷ *Dhoop Singh v. Gowree Mull*, S. D. N. W., 1860, p. 533.

⁸ *Boiskee Lall v. Khuruckdharee*, (1869) 12 W. R., 79.

⁹ *Dastar v. Ishwari Das*, (1891) 15 Bom., 222; L. R. 18 I. A., 22, 146.

¹⁰ *Dhan Lal v. Banji*, (1896) 20 Bom., 209. But see, *Martland v. Dhondoo*, (1893) 22 Bom., 621; and *Ram Chandra v. Jairam*, (1894) 22 Bom., 686, and note to r. 13, ante.

¹¹ See Act VIII of 1885, s. 163.

¹² *Bharatour Prashad v. Shyam Krishna*, (1882) 8 Calc. W. N., 257; not so—*Kashi Pershad Singh v. Diloop Narain Sahu*, (1903) 8 Calc. W. N., 261. But see, *Sunderdeo Madhoo Tagore v. Haruruk Chand*, (1908) 12 Calc. W. N., 512.

¹³ *Sofatmal v. Phul Kuar*, (1898) 20 All., 412; L. R., 25 I. A., 116; 2 Calc. W. N., 520.

Order : charge — An order of sale after attachment, on a money-decree creates a valid charge on the property,¹ a money-decree on a mortgage-bond does not.²

Construction — The sale of a decree for possession of land does not carry the mesne profits due to the debtor;³ and the sale of a decree partly executed only enables the purchaser to execute what remains to be carried out.⁴

Error in sale — If a Court directs the sale of property not warranted by the decree, the person aggrieved may follow his property by a regular suit.⁵ And if the sale proclamation asserts an interest in the judgment-debtor which does not exist, the purchaser can follow the money into the hands of the Sheriff, or even of the execution-creditor, if the money has been paid to him.⁶ If the property of which sale is sought is a debt, and the Court receives notice from the alleged debtor that no debt exists, the Court should satisfy itself as to the existence or otherwise of the debt, and, if it comes to the conclusion that no debt exists, should abstain from proceeding to a sale;⁷ but it cannot call upon the debtor to show cause why the debt should not be paid into Court.⁸

If the Court believes the property to be sold is of occupancy tenure it is duty to notify the fact in the proclamation.⁹

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¹ *Suraj Bansi Koer v. Sheo Pershad*, (1890) 5 Cal., 149; L R, 6 I A, 88; *Bal-krishan v. Sitaram*, (1895) 7 All, 731; *Madho Pershad v. Mehrban*, (1891) 18 Cal., 157; L R., 17 I. A., 191.

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⁸ *Siriah v. Muckanachary*, (1897) 10 Mad., 194.

⁹ *Basdev Prasad v. Juthen Ram*, (1905) 27 All., 634.

¹⁰ *Lok Mahlon v. Ajai Lal*, (1878) 4 C. L. R., 465.

¹¹ *Macnaghten v. Mahabir Pershad*, (1893) 9 Cal., 656.

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the parties who went to that auction had referred to the decree, they would have found that the debt for which the sale was to take place was not the widow's but Juggomohun's, and that the property to be sold under the decree was not the widow's but Juggomohun's, because Juggomohun was really the debtor, and the widow was sued merely in her representative character." But the Privy Council expressly approved and upheld the principle expressed by Peacock, C. J. in this case¹ and in a later case another Bench refused to follow the decision in the 18th volume of the W. R., and declared that the decision in Marshall's reports was good law². And where, on an execution-sale, there is a discrepancy between the condition of the proclamation of what is to be sold, and the certificate of what has been sold, the High Court at Calcutta has held that the authority in the decree should be affected by the sale, (s. 65 and decree should

be entered in the proclamation of sale as charges on the property, though they have come to the knowledge of the Court in an enquiry under this provision only and have not been made the subject of an order under r. 66⁴. The declaratory portion of a sale-proclamation is not, by itself, sufficient to override the description of the property in the body of the document.⁵

referred to in this rule; for in case any substantial part of the jumma and the revenue due is not paid, the Court may vary a sale, unless the decree attaches property in execution of one of the decrees, he has a right to state in the sale-proclamation that he also claims the same property as liable to sale in satisfaction of his second decree⁶. Where a mortgagee gets separate decrees for instalments of the same debt, the mortgaged property should not be sold under one decree subject

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³ *Uma Churn Sen v. Gobind Chunder Mozumdar*, (1877) 1 C. L. R., 460.

⁴ *Shantappa Chelamlaya v. Subba Ramchandra*, (1891) 18 Bom., 175.

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⁹ *Daulat v. Ichardas*, (1891) 15 Bom., 222; L. R. 18 I. A., 21, 146.

¹⁰ *Dhondo v. Raoji*, (1896) 26 Bom., 209. But see, *Martand v. Dhondo*, (1899) 22 Bom., 624; and *Ram Chandra v. Jaiaram*, (1898) 22 Bom., 686, and note to r. 17, ante.

¹¹ See Act VIII of 1885, s. 163.

¹² *Parasuram Prasad v. Sham Krishna*, (1882) 8 Calc. W. N., 257; not so—*Kashi Pershad Singh v. Baldeep Nairan Sahu*, (1893) 8 Calc. W. N., 261. But see, *Sunderdas Mohun Tagore v. Baruk Chaud*, (1898) 12 Calc. W. N., 512.

¹³ *Sudatand v. Phul Kuar*, (1898) 29 All., 412; L. R., 25 I. A., 146; 2 Calc. W. N., 521.

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and subsequently resold the property. The Privy Council held that no second sale should have been allowed after the first had been confirmed.¹

Confirmed.—Certain representative judgment-debtors objected to the sale of certain property and claimed it as their own. Their objections were disallowed, and they appealed to the High Court; but before the appeal came on for hearing, the sale was confirmed as regards a portion of the property, and it was held that the sale having been confirmed for a long time could not be set aside, but that the petitioner's sale to the unsold portion should be tried.² But where a sale of certain immoveable property took place after an order postponing the sale, and before it reached the officer conducting the sale, and it was held that the Court would, on application of the decree-holder, set aside the sale.³ Where a decree directs the sale of A's property and B, if the decree holder is unable, from opposition, to sell A's property and proceeds against B's, but cannot realise his decree therefrom, he has not lost his right to re-attach and re-sell A's property.⁴ The confirmation of sale is no bar to an application by the judgment-debtor to have it declared that in execution of the decree the property could not be sold, that he had no disposing power in it, and that, therefore, the sale pressed no interest to the purchaser.⁵

Appeal.—An appeal lies from the first part of this rule under O XLIII, r. 1, (j).⁶

Where a minor applied through his mother on the 11th of January, and the application was rejected on the ground that his mother was not his proper guardian, and the minor again applied through a guardian, but after confirmation of the sale, it was held that the order was under the first portion of this rule.⁷ An appeal lies from an order under this rule refusing to set aside a sale on the ground that the applicant had no *locus standi* to apply under r. 91.⁸

Parties.—If the auction-purchaser is made a party to the proceedings, he can appeal, if the sale is set aside,⁹ if he is not, the sale cannot be set aside.¹⁰

Second appeal.—No second appeal lies from an order under this rule.¹¹

... must be brought within ... character from that in ... the defendant is sold, and

¹ *Sarda Prasad v. Lachmeput Singh*, (1872) 17 W. R., 289.

² *Potter Begum v. Indarjeet Koor*, (1869) 12 W. R., 201. See also, *Mahomed Hossein v. Kokil Singh*, (1841) 7 Cal., 91.

³ *Mian Jan v. Man Singh*, (1879) 2 All., 604.

⁴ *Stephenson v. Unnals Doree*, (1866) 6 W. R., 18.

⁵ *Durga Charan v. Kali Prasanna*, (1894) 3 Cal. W. N., 506; 26 Cal., 727; 1013 *Umed v. Jan*, (1876) 19 All., 613.

⁶ *Anand Chander v. Nitar Phoompi*, (1889) 16 Cal., 429; *Dakshina Mohun v. Pacumati*, (1899) 4 Cal. W. N., 475, p. 479.

⁷ *Bahadur Singh v. Kishan*, 1887) 9 All., 411.

⁸ *Jay Singh v. Hakim Chandel*, (1902) 29 Cal., 518.

⁹ *Al Singh v. Dahir*, (1879) 2 All., 332; *Kanthi Ram v. Bankey Lal*, (1879) 2 All., 399.

¹⁰ *Chara v. Bathabai*, (1883) 6 Mad., 237. See also "who may apply," r. 90.

¹¹ *W. N.*, 337; *Nana Kumar v. Golan*, (1877) 8 Cal., 709; *Gopal Lal*, (1874) 21 Cal., 709; *Uma Kanta Roy v. Dina*, (1892) 10 Cal., 121. See also *Bansulhar v.*

Kuar, (1884) 10 All., ...

¹² 1877, s. 1, cl. 11, art. 12; *Mahomed Hossein v. Parundur*, (1883) 11 Cal., 727; *Mahomed Sayed v. Navroop*, (1886) 10 Bom., 214.

¹³ *Chand v. Anan Jemini*, (1884) 9 C. L. R., 18.

he does not sue, or the sale to a second purchaser passes nothing and does not affect the rights of the first purchaser,¹ or the sale is *ultra vires* and passes nothing,² or he was not a party to and not bound by the decree and the proceedings under which the defendant claimed,³ though apparently if instead of selling the right, title and interest of A in land the tenure itself is sold, a stranger must sue within 12 months.⁴

Purchaser—The period of limitation for an application under this rule by a purchaser is sixty days under art. 172, Sched. II of the Limitation Act.

Minor—A minor gets the benefit of s. 7 of the Limitation Act.⁵

Suit to set aside an order—No regular suit lies to set aside an order under this rule by a person who is a party in the cause,⁶ if an irregularity occurs in the course of the execution proceedings, it must be raised by a party in execution, and not by regular suit,⁷ and this Code applies,⁸ unless the person has been a party to the suit in a different capacity.⁹ If an order has been passed on grounds not warranted by the rule, such as refusing to confirm a sale, because a re-sale would be advantageous to all the parties, it may be contested in a regular suit by the bidder whose rights have been injuriously affected;¹⁰ and a suit will lie by the auction purchaser, if the sale is not confirmed for insufficient reasons,¹¹ or where any person other than the decree-holder, or the person whose property has been sold, has been allowed to object.¹²

Rent law—No suit lies to set aside a sale under s. 174 of the Bengal Revenue Act.¹³

Revenue sale—A plaintiff can proceed simultaneously in the Civil and in the Revenue Court. If the sale be validly set aside by the Revenue Court, a decree must follow in the suit. A Civil Court has no authority to reverse the order of a Revenue Court which sets aside a sale.¹⁴ A revenue sale of an estate where there is no arrear due is void and can be set aside by a Civil Court,¹⁵ even though this ground has not been declared and specified in an appeal to the Commissioner under s. 33, Act XI of 1859.¹⁶ Under s. 33, Act XI of 1859, a sale cannot be annulled by a Civil Court unless upon a ground previously taken by the plaintiff in an appeal to the Commissioner.¹⁷ That

¹ *Moti Lal v. Karrabuddin*, (1893) 25 Cal., 179; L. R., 24 I. A., 170.

² *Sadagopa v. Jamuna*, (1892) 5 Mad., 54.

³ *Venkata Narasiah v. Subbama*, (1882) 4 Mad., 178; *Nilakandan v. Thandamma*, (1886) 9 Mad., 460.

⁴ *Surtanna v. Durgi*, (1884) 7 Mad., 238; *Haji v. Atharaman*, (1884) 7 Mad., 512.

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⁶ *Viraraghava v. Venkatacharyar*, (1882) 5 Mad., 217.

⁷ *Molan Mohun v. Baroda Soondari*, (1881) 8 C. L. R., 216; *Mohendro Narain v. Gopal*, (1899) 17 Cal., 769.

⁸ *Prangour v. Himanta*, (1886) 12 Cal., 597.

⁹ *Kali Mohun v. Anandamoni*, (1881) 9 C. L. R., 18; *Collector of Monghyr v. Hurdai Naram*, (1889) 5 Cal., 435.

¹⁰ *Amrit Misser v. Gurdin Pardan*, (1876) 7 All. H. C., 183.

¹¹ *Sukhai v. Daryai*, (1876) 1 All., 374; *Bandi v. Kalka*, (1887) 9 All., 602; *Azimuddin v. Baldeo*, (1890) 3 All., 554; see also, *Diwan Singh v. Bharat Singh* (1890) 3 All., 206.

¹² *Man Kuar v. Tara Singh*, (1885) 7 All., 593; see note under n. 47. As to equitable estoppel of the auction purchaser's right to bring a suit to have the sale confirmed, see *Ram Dhal v. Mahtab Singh*, (1896) 3 All., 701.

¹³ *Kabilaso Koer v. Raghu Nath*, (1891) 18 Cal., 491.

¹⁴ *Gunesar Singh v. Gonesh Das*, (1894) 25 Cal., 789.

¹⁵ *Balkishen Das v. Simpson*, (1898) 25 Cal., 833; L. R., 25 I. A., 151.

¹⁶ *Harkhoo Singh v. Bunsidhur Singh*, (1889) 25 Cal., 870; 2 Cal. W. N., 360.

¹⁷ *Gowri Saaker v. Janki Pershad*, (1889) L. R., 17 I. A., 57; *Deonandan Singh v. Manbodh Singh*, (1903) 8 Cal. W. N., 757; 32 Cal., 111.

and subsequently resold the property. The Privy Council held that no second sale should have been allowed after the first had been confirmed.¹

Confirmed.—Certain representative judgment-debtors objected to the sale of certain property and claimed it as their own. Their objections were disallowed, and they appealed to the High Court; but before the appeal came on for hearing, the sale was confirmed as regards a portion of the property, and it was held that the sale having been confirmed for a long time could not be set aside, but that the petitioner's title to the unsold portion should be tried.² But where a sale of certain immovable property took place after an order postponing the sale had been passed, but before it reached the officer conducting the sale, and it was confirmed, it was held that the Court would, on application of the decree-holder, review the order and set aside the sale.³ Where a decree directs the sale of A's property first and then of B's, if the decree holder is unable, from opposition, to sell A's property and proceeds against B's, but cannot realise his decree therefrom, he has not lost his right to re-attach and re-sell A's property.⁴ The confirmation of sale is no bar to an application by the judgment-debtor to have it declared that in execution of the decree the property could not be sold, that he had no disposing power in it, and that, therefore, the sale proved no interest to the purchaser.⁵

Appeal—An appeal lies from the first part of this rule under O XI, III, r. 1, (j).⁶

Where a minor applied through his mother on the 11th of January, and the application was rejected on the ground that his mother was not his proper guardian, and the minor again applied through a guardian, but after confirmation of the sale, it was held that the order was under the first portion of this rule.⁷ An appeal lies from an order under this rule refusing to set aside a sale on the ground that the applicant had no *locus standi* to apply under r. 91.⁸

Parties—If the auction purchaser is made a party to the proceedings, he can appeal, if the sale is set aside,⁹ if he is not, the sale cannot be set aside.¹⁰

Second appeal—No second appeal lies from an order under this rule.¹¹

Limitation—A suit to set aside an execution sale must be brought within one year from the date of confirmation,¹² unless the plaintiff in the second suit was a party to the execution proceedings in a different character from that in which he sues,¹³ or only the right, title and interest of the defendant is sold, and

¹ *Sarola Prasad v. Lachmipat Singh*, (1872) 17 W. R., 280.

² *Bates Begum v. Indrajit Koor*, (1869) 12 W. R., 201. See also, *Mahomed Hossain v. Kokil Singh*, (1881) 7 Cal., 91.

³ *Mian Jan v. Man Singh*, (1870) 2 All., 686.

⁴ *Stephenson v. Unnoda Dassie*, (1868) 6 W. R., 18.

⁵ *Durga Charan v. Kali Prasanna*, (1878) 3 Cal. W. N., 586; 26 Cal., 727; *Id.*: *Unad v. Jas*, (1876) 19 All., 613.

⁶ *Anand Chunder v. Nitya Bhoomij*, (1859) 16 Cal., 429; *Dakshina Mohun v. Pasumati*, (1899) 4 Cal. W. N., 475, p. 479.

Iden Singh v. Kishan, (1887) 9 All., 411.

Jay Singh v. Hukum Chand, (1902) 29 Cal., 518.

Iden Singh v. Dular, (1879) 2 All., 372; *Kanthi Ram v. Bankey Lal*, (1879) 2 All., 390.

Chhara v. Bathala, (1880) 6 Mad., 277. See also "who may apply," r. 90, *Id.*

Iden v. Manohar Koor, (1899) 3 Cal. W. N., 333; *Nana Kumar v. Gopal Koor*, (1891) 18 Cal., 422; *Gopi Koor v. Gopal Lal*, (1874) 21 Cal., 799; *Boya v. Palmo Lohan*, (1895) 22 Cal., 502; *Uma Kanta Roy v. Dina Nayak*, (1911) 24 Cal., 4; 5 Cal. W. N., 121. See also *Banadhar v. Koor*, (1891) 18 All., 411.

¹² Of 1877, Sched. II, art. 12; *Mahomed Hossain v. Purnulur*, (1885) 11 All., 27; *Mahomed Sayad v. Navroji*, (1886) 10 Bom., 211.

Id. v. *Ananvarani*, (1881) 9 C. L. R., 18.

as to the correctness of the judgment upon which the execution issues." Apparently the Lordships of the Privy Council are of opinion that a purchaser not a party to the suit, need only see if there is a valid decree and an order for sale, and his title is not affected by irregularities of procedure which are cured by the certificate of sale. If this be so this decision seems to diminish the authority of some of the undernoted cases¹ in so far as they decide that sales are not voidable, but void on account of irregular procedure. When a person, a stranger to the proceedings, purchases property *bona fide* at an auction-sale held in execution of a decree, the sale to him cannot be set aside on the ground that the decree had already been satisfied out of Court at the time the sale was held.²

Purchase by creditor.—But if the creditor is the purchaser the same rule does not apply. In the undernoted case,³ the defendant had sued the plaintiff previously and obtaining a decree, sold his property after appeal filed. At one sale he purchased, at another, a stranger. The decree was subsequently modified by the High Court, and then plaintiff sued to set aside both sales on the ground that the decree had been modified. The Courts in India made no distinction between the decree-holders who had purchased and the persons who, not parties, had purchased *bona fide*. Their lordships said:—"It appears to their lordships that there is a great distinction between the decree-holders who came in and purchased under their own decree, which was afterwards reversed on appeal, and the *bona fide* purchasers who came in and bought at the sale in execution of the decree to which they were no parties and at the time when that decree was a valid decree and when the order for sale was a valid order." And where a judgment creditor sold and bought the property of his judgment-debtor pending appeal and the decree was reversed, he was compelled to make restitution.⁴

Notice.—A creditor who purchases, purchases with notice of what has taken place previously in the proceedings between him and the debtor.⁵

Form of decree.—Where at the suit of certain members of a *tarwad*, a sale at which the plaintiff purchased was set aside, though one of the debts in the original suit was binding on the *tarwad*, the decree gave a charge on the property for that debt.⁶

Minor.—A sale is not binding if made under a decree against a minor based on a mortgage by his guardian, who exceeded his authority in mortgaging, and did not defend the suit, and the purchaser had notice of the same;⁷ but where the guardian acted fraudulently and confessed judgment, the purchaser, not having notice, was allowed a lien for the advances made.⁸

Limitation.—Where a minor is bound by the decree, he must sue to set aside the sale within three years from attaining majority.⁹

¹ *Ram Chand v. Pitam Mal*, (1888) 10 All., 506; *Rameswari v. Doorgalass*, (1891) 6 Cal., 103; *Chelami Lal v. Amir*, (1895) 7 All., 676; *Palani v. Sivalunga*, (1885) 8 Mad., 6.

² *Yellappa v. Ram Chandra*, (1897) 21 Bom., 463.

³ *Zamul Akhla v. Muhammad*, (1887) L. R., 15 I. A., 12; 10 All., 166.

⁴ *Sadasivayyar v. Muttu Sabaspathi*, (1882) 5 Mad., 106. See also, *Set Umedmal v. Srinath Ray*, (1900) 27 Cal., 810; *Chandani Singh v. Ramdasi Singh*, (1904) 31 Cal., 499; and *Nathadu Sahib v. Nallu Mudaly*, (1904) 27 Mad., 98.

⁵ *Pettachi v. Chinnu Tambiar*, (1887) 10 Mad., 241, p. 250.

⁶ *Kunhi Mannu v. Chali*, (1891) 14 Mad., 494.

⁷ *Dabee Dutt v. Subodra*, (1876) 25 W. R., 449; *Jungee Lal v. Sham Lal*, (1873) 20 W. R., 120.

⁸ *Bunseedhur v. Binlesoree Dutt*, (1863) 10 Moo. I. A., 454; but see, *Ram Jewun v. Sham Lal*, (1873) 20 W. R., 123.

⁹ *Raghubar Dyal v. Bhukya*, (1886) 12 Cal., 69.

Section 47.—And if property is sold in pursuance of an order passed under s. 47, the order has the force of a decree;¹ and it is very doubtful, if such an order is not appealed against whether it can afterwards be impeached on the ground of want of jurisdiction;² and when the contest arises between parties to the suit, s. 47 prevents any separate suit on the ground of fraud.³ A suit by a minor who was fully represented by the Court of Wards, to set aside a sale is barred by s. 47 and r. 92.⁴

Suit for possession.—In a suit for possession under art. 138 of the Limitation Act, XV of 1877, *i.e.* when the judgment-debtor was in possession at the date of the sale, limitation runs from the date of the actual sale, and not from the date of its confirmation.⁵

Purchase by a stranger.—In the case of *Balkrishna v. Masuma*,⁶ the defendant mortgaged a talook to Bisesbar Prashad, whose interest was purchased in execution by Narain Das, the father of Balkrishna. In answer it was urged that the requirements of s. 249, Act VIII of 1859, had not been complied with; execution having issued in a district other than that in which the mortgaged property was situate and thirty days' notice not having been given, the sale was void. This view prevailed in the District Court as well as in the High Court; but in appeal their lordships of the Privy Council said: "With respect to the first case, their lordships think the judgment dismissing the suit on the ground that the plaintiff was not the purchaser of Bisesbar's mortgage, on the ground of the sale being irregular and of the Court not having jurisdiction to execute the decree, was wrong. *The irregularities referred to, if they existed, were cured by the certificate of sale, and, though the Court may not have had jurisdiction to attach lands out of its district, it had jurisdiction to sell in execution the right to enforce the bond.*"

The case of *Rewa Mahton v. Ram Kishen Singh*,⁷ is somewhat similar. In it there were cross-decrees and the property was sold in execution of the decree for the smaller amount, contrary to the express provision of r. 18. The High C

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into the question of fraud or no fraud, held that the execution issued by the Moonsif, and all the subsequent proceedings were a nullity and must be set aside. The defendant-appellant purchased *bona fide* and for a fair value property exposed for sale under an execution issued by a Court of competent jurisdiction upon a valid judgment. Their lordships are of opinion that the High Court came to an erroneous decision with regard to the construction of r. 18, and that the judgment of the High Court in this respect must be set aside. A purchaser under a sale in execution is not bound to inquire whether the judgment-debtor had a cross-judgment of a higher amount any more than he would be bound in an ordinary case to enquire whether a judgment upon which an execution issued has been satisfied or not. Those are questions to be determined by the Court issuing the execution. To hold that a purchaser at a sale in execution is bound to enquire into such matters would throw a great impediment in the way of purchases under execution. *If the Court has jurisdiction*, a purchaser is no more bound to enquire into the correctness of an order for execution than he is

¹ *Murari Singh v. Prayag Singh*, (1885) 11 Cal., 362.

² *Bishmun Singh v. Land Mortgage Bank*, (1884) L. R., 12 I. A., 7; 11 Cal., 244; *Basti Ram v. Fattu*, (1886) 8 All., 146.

³ *Saroja Churn v. Mahomed*, (1885) 11 Cal., 376; *Siva Pershad v. Nundo Lal*, (1891) 18 Cal., 139; *Mohendro Narain v. Gopal*, (1890) 17 Cal., 769; *Gokul Ahad v. Judhister*, (1903) 30 Cal., 142.

⁴ *Subramanya v. Siva Subramanya*, (1894) 17 Mad., 316.

⁵ *Kishori Mohun Raj v. Chunder Nath Pal*, (1887) 14 Cal., 644; *Venkatalingsam v. Veerasami*, (1894) 17 Mad., 89.

⁶ *Balkrishna v. Masuma*, (1883) 5 All., 142; L. R., 9 J. A., 182.

⁷ *Rewa Mahton v. Ram Kishen Singh*, (1885) L. R., 13 I. A., 106; 14 Cal., 18.

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Limitation.—Where a minor is bound by the decree, he must sue to set aside the sale within three years from attaining majority.⁹

¹ *Ram Chand v Pitam Mal*, (1888) 10 All, 506; *Rameswari v. Doorgadass*, (1881) 6 Cal, 103; *Chedami Lal v Amir*, (1885) 7 All, 676; *Palani v. Sivalunga*, (1883) 8 Mad, 6.

² *Yellappa v Ram Chandra*, (1897) 21 Bom., 463.

³ *Zainul Abidin v. Muhammad*, (1887) L. R., 15 I. A., 12; 10 All., 166.

⁴ *Salarivayyar v. Muttu Sabapathi*, (1882) 5 Mad, 106. See also, *Set Umedmal v. Srinath Ray*, (1900) 27 Cal, 810; *Chaman Singh v. Ramdasi Singh*, (1904) 31 Cal, 499; and *Nathadu Sahib v. Nalla Mudaly*, (1901) 27 Mad., 98.

⁵ *Pettichi v. Chinna Tambiar*, (1887) 10 Mad, 241, p. 250.

⁶ *Kunhi Mannan v. Chali*, (1891) 14 Mad., 491.

⁷ *Dabee Dutt v. Subodra*, (1876) 25 W. R., 449; *Jungeo Lal v. Sham Lal*, (1873) 20 W. R., 120.

⁸ *Banseedhur v. Bindesoree Dutt*, (1863) 10 Moo I A, 454; but see, *Ram Jewun v. Sham Lal*, (1873) 20 W. R., 123.

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Section 47.—And if property is sold in pursuance of an order passed under s. 47, the order has the force of a decree;¹ and it is very doubtful, if such an order is not appealed against whether it can afterwards be impeached on the ground of want of jurisdiction;² and when the contest arises between parties to the suit, s. 47 prevents any separate suit on the ground of fraud.³ A suit by a minor who was fully represented by the Court of Wards, to set aside a sale is barred by s. 47 and r. 92.⁴

Suit for possession.—In a suit for possession under art 138 of the Limitation Act, XV of 1877, *i.e.* when the judgment-debtor was in possession at the date of the sale, limitation runs from the date of the actual sale, and not from the date of its confirmation.⁵

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The case of *Rewa Mahton v. Ram Kishen Singh*,⁷ is somewhat similar. In it there were cross-decrees and the property was sold in execution of the decree for the smaller amount, contrary to the express provision of r 18. The

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¹ *Murari Singh v. Pryag Singh*, (1885) 11 Cal., 362.

² *Bishenmun Singh v. Land Mortgage Bank*, (1884) L. R., 12 I. A., 7; 11 Cal., 244; *Basti Ram v. Fattu*, (1886) 8 All., 146.

³ *Sarola Churn v. Mahomed*, (1885) 11 Cal., 376; *Siva Pershad v. Nando Lal*, (1891) 18 Cal., 139; *Mohendro Narain v. Gopal*, (1890) 17 Cal., 769; *Golam Ahid v. Judhister*, (1903) 30 Cal., 142.

⁴ *Subramanya v. Siva Subramanya*, (1894) 17 Mad., 316.

⁵ *Kishori Mohun Rai v. Chunder Nath Pal*, (1887) 14 Cal., 644; *Venkatalingam v. Veerasami*, (1894) 17 Mad., 89.

⁶ *Balkrishna v. Masuma*, (1883) 5 All., 142; L. R., 9 I. A., 182.

⁷ *Rewa Mahton v. Ram Kishen Singh*, (1885) L. R., 13 I. A., 106; 14 Cal., 18.

Under r 93 a suit will lie to recover purchase-money paid at a Court sale for property to which it is found that the judgment-debtor had no title. The cause of action in such a case does not accrue till the purchaser is deprived of the property which was sold to him.¹

Parties—The purchaser should make the judgment-debtor a party to his application,² or his legal representative.

Regular suit—A purchaser can also sue for a declaration,³ and on obtaining it apply to the proper Court for his purchase-money⁴ or to recover the money on the ground of a total failure of consideration,⁵ or that the sale has been set aside in regular suit on the ground of fraud.⁶ And where the purchase money was returned, but without interest, a suit for interest was allowed.⁷ It was held under Act VIII that if the Court reversing the sale omitted to order repayment of the purchase-money, the purchaser could sue to recover it in a regular suit;⁸ even though he put the property up for sale, unless guilty of fraud.⁹ If there is not a total failure of consideration, or the purchaser bought with a knowledge of a defect in the jurisdiction of the officer carrying out the sale, it is possible he might not succeed in recovering his purchase-money in a regular suit.¹⁰

How far title is warranted at Court sales—When a Court sale is not vitiated by fraud, the only extent to which the purchaser can claim relief is that indicated by r 93. The effect of rr. 91, 93 and 94 is that the right, title and interest of the judgment-debtor passes to the purchaser at a Court sale, subject, however, to the condition that the purchaser may recover back his purchase money, when he finds that the judgment-debtor had no saleable interest at all. The implied warranty of title in respect of sales by private contract can not be extended to Court sales, so far as justified by r 93.¹¹ Although there is a deficiency in area of the property sold, an auction-purchaser is not entitled to compensation, when he fails to prove that he has sustained loss by misdescription in the sale proclamation, but he is entitled to an abatement of rent for such deficiency.¹²

Limitation—The limitation for an application under this rule is provided by art. 178 of the Limitation Act, XV of 1877 art. 181 Sched. I Act IX of 1908;¹³ while a regular suit is governed by art. 120 of Act XV of 1877, art. 120 Sched. I Act IX of 1908.¹⁴

¹ *Gurudawa v. Gangaya*, (1898) 22 Bom., 783.

² *Kuppayyan v. Ramasami*, (1893) 6 Mad., 197; or his legal representative, *Bala Kadar v. Gulam Mohidin*, (1893) 7 Bom., 424.

³ *Virasami v. Athu*, (1884) 7 Mad., 593.

⁴ *Kunhi Moidin v. Tarayil*, (1893) 8 Mad., 101; *Benodo v. Moresh*, (1882) 12 C. L. B., 331.

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¹¹ *Makundi Lal v. Kansila*, (1876) 1 All., 563.

¹² *Raghular v. Bank of India*, (1883) 5 All., 361.

¹³ *Greesh Chunder v. Lookhoda Moyo*, (1861) 1 W. R., 55.

¹⁴ *Brojendar Roy v. Jugurnath*, (1866) 6 W. R., 147.

¹⁵ *Doral Ally v. Abdul Azeer*, (1877) L. R., 5 I. A., 116, at p. 123; see, *Surenitra v. Beni*, (1900) 10 Cal. W. N., 274.

¹⁶ *Sundara v. Venkata Vorada*, (1891) 17 Mad., 228.

¹⁷ *Doyal Krishna v. Amrita Lal*, (1902) 29 Cal., 370.

¹⁸ *Girihari v. Sital Prasad*, (1899) 11 All., 372.

¹⁹ *Nilkanta v. Imam Sahib*, (1893) 16 Mad., 361.

Revision.—If the judgment-debtor has any saleable interest in the property, the Court has no jurisdiction to order a refund, and the order directing a refund can be set aside under s 115.¹

94. Where a sale of immoveable property has become absolute, the Court shall grant a certificate specifying the property sold and the name of the person who at the time of sale is declared to be the purchaser. Such certificate shall bear date the day on which the sale became absolute.

Act XIV of 1882, sect. 316

See notes to section 65 *ante*.

95. Where the immoveable property sold is in the occupancy of the judgment-debtor or of some person on his behalf or of some person claiming under a title created by the judgment-debtor subsequently to the attachment of such property and a certificate in respect thereof has been granted under rule 94, the Court shall, on the application of the purchaser, order delivery to be made by putting such purchaser, or any person whom he may appoint to receive delivery on his behalf in possession of the property, and, if need be, by removing any person who refuses to vacate the same.

Act XIV of 1882, sect. 318. Act VIII of 1859, s 318.

This rule applies to H. C.

For form, see App E. No 39

the property, unless he proved twelve years' adverse possession.⁵

If the purchaser does not get physical possession of the property in execution when he is entitled to it, he can in Bombay bring a suit for it on the ground that he has obtained symbolical possession;⁶ and in Madras;⁷ and in Allahabad;⁸

¹ *Kunhamed v Chythu*, (1886) 9 Mad., 437.

² *Har Kishore v. Sudoy Chunder*, (1872) 17 W. R., 80.

³ *Khatoo v. Furukh Ali*, (1866) 6 W. R., Muz., 103; approved in *Lakshmana v. Naraiahayami*, (1884) 7 Mad., 167.

⁴ *Gopal Das v. Than Singh*, (1882) 4 All., 181.

⁵ *Attotram Doss v. Balunkee Doss*, (1870) 14 W. R., 357.

⁶ *Devidas v. Pirjada*, (1884) 8 Bom., 377; *Shankar Disto v. Narsingrav*, (1893) 22 Bom., 667.

⁷ *Nagreddi v. Ramanna*, (1881) 7 Mad., 592; *Seru v. Muttusami*, (1887) 10 Mad., 53.

⁸ *Jagan Nath v. Baldeo*, (1883) 5 All., 395; foll. in *Tatardhari v. Sundar Lal*, (1909) 7 Cal. L. J., 384.

and where the assignee of a purchaser was refused possession under this rule, a regular suit was allowed,¹ and a suit will lie when it is shown that the attempt to get possession under this rule has been unsuccessful.² And in Bengal, where there is a mere formal proclamation of the purchaser's possession, without any further act of possession, the purchaser is allowed to sue for possession within twelve years from the date of the judgment-debtor's possession;³ the remedy given under this rule is additional and not exclusive.⁴ A purchaser at a sale in execution of a mortgage-decree cannot get possession under r. 95 when the mortgagor has granted a lease of the property *pendente lite*, but must bring a regular suit for the purpose. As the purchaser could not be compelled to take a title which would involve him in litigation, the sale was set aside and the purchase-money refunded.⁵ When the sale of a permanent tenure was confirmed without previous payment of the landlord's fee in the manner required by s. 13 of the Bengal Tenancy Act, the judgment-debtor cannot raise an objection to the delivery of possession under this rule on the ground that the sale was invalid.⁶ But an objection under this rule can be raised by the judgment-debtor on the ground that the decree was obtained by some of certain co-sharer landlords, which could not have the effect of making his occupancy holding, not transferable by custom, saleable in execution of it.⁷

Suit—A suit for possession will lie although an application under this rule has been refused as being out of time.⁸

A purchaser of an undivided share in a joint family property cannot apply under this rule but must sue.⁹

Limitation—In case of a perpetual lease by the defendant and in favour of the lessee,¹⁰ the application is barred if made more than three years from the date of the certificate of sale.¹¹ When an execution purchaser would be barred, an assignee from him would equally be barred.¹² The right of a purchaser to apply for possession under r. 95 accrues to him "when the certificate has been granted," i. e., issued to him. Limitation runs from that date.¹³

Appeal—If the decree-holder is the purchaser, any dispute under this rule is governed by s. 47.¹⁴

¹ *Seru Mohun v. Bhagoban*, (1893) 9 Cal., 602.

² *Iswar Pershad v. Jai Narain*, (1886) 12 Cal., 100.

³ *Jogobundhu v. Purnanand*, (1889) 16 Cal., 570; *Hari Mohan Shaha v. Babur Ali*, (1897) 24 Cal., 715.

⁴ *Kishori Mohun v. Chunder Nath*, (1897) 14 Cal., 611. As to the distinction between physical and constructive possession, see *Batul Begam v. Mansur Ali*, (1898) 20 All., 315.

⁵ *Santomoney Dassoo v. Kedar Nath Sadkhan*, (1898) 3 Cal. W. N., xii.

⁶ *Mohim Chandra v. Ram Lochan*, (1902) 7 Cal. W. N., 591.

⁷ *Durga Chiran v. Kali Prasanna*, (1899) 26 Cal., 727; 3 Cal. W. N., 586.

⁸ *Sheo Narain v. Nur*, (1907) 29 All., 463.

⁹ *Telumalai v. Srinivasa*, (1906) 29 Mad., 294.

¹⁰ *Dalmir Puri v. Bepin Behary*, (1891) 18 Cal., 520.

¹¹ *Hanmantrav v. Subaji*, (1894) 8 Bom., 257.

¹² *Arunaga v. Chockalingam*, (1892) 15 Mad., 331; *Pullayya v. Ramayya*, (1895) 18 Mad., 144.

¹³ *Kashi Nath Trimbak v. Daming Zuran*, (1893) 17 Bom., 228; dis. from in *Ranjit Singh v. Baldeo*, (1903) 30 All., 390. See also, *Asudoolah v. Akbar Ali*, (1867) 7 W. R., 60. But see, *Venkata Lingum v. Veerasami*, (1894) 17 Mad., 89, where it has been held that limitation runs from the date of the actual sale.

¹⁴ *Muttia v. Appasami*, (1899) 13 Mad., 591. But the decisions are in conflict—and no appeal lies—*Chulam Shabbir v. Dwarka Prasad*, (1896) 18 All., 36; *Bhtmal Daa v. Ganesha Koer*, (1896) 1 Cal. W. N., 638; *Madhusudan v. Gobinda Prsa*, 27 Cal., 31.

This rule applies to H. C. and to Prov. S. C. C., so far as it relates to moveable property.

This rule applies to applications made by the decree-holder,¹ within one calendar month, excluding the date on which the resistance took place.² It is not imperative, and the omission to take action under it does not preclude a decree-holder from bringing a fresh suit to recover possession, if he is ousted after and sion bay meaning of r. 97: the rule is not rendered inapplicable by the fact that the obstructor claims to be a *mulgeni* tenant.⁷

Time of such resistance or obstruction—Limitation is thirty days from the date of the obstruction complained of. But where a warrant has been issued and returned not executed owing to obstruction, and a second then issues and its execution is obstructed, time runs from the date of the second obstruction.⁸

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date if the complaint is
limitation does not

applying.

This rule is for the benefit of a purchaser at a sale in execution, and applies to cases in which he has been resisted or obstructed in taking possession by the judgment-debtor or somebody on his behalf,¹⁰ but he is not bound to make any complaint and may make a fresh application for delivery.¹¹

Section 47.—Where the purchaser is decree-holder, s. 47 applies.¹²

98. Where the Court is satisfied that the resistance or obstruction was occasioned without any just cause by the judgment-debtor or by some other person at his instigation, it shall direct that the applicant be put into possession of the property, and where the applicant is still resisted or obstructed in obtaining possession, the Court may also, at the instance of the applicant, order the judgment-debtor, or any person acting at his instigation, to be detained in the civil prison for a term which may extend to thirty days.

¹ Mathiab Koomari, *petitioner*, (1873) 19 W. R., 62.

² Dadu v. Balgouda, (1867) 5 Bom., H. C., 39.

³ Jugmohun Tewarce v. Bukleo Naik (1863) 3 Agra, 162.

⁴ Balvant v. Babaji, (1884) 8 Bom., 602; Trimbak v. Narayan, (1884) 8 Bom., 481.

⁵ Muttia v. Appasami, (1890) 13 Mad., 504.

⁶ Kasam Shaleb v. Maruti, (1889) 13 Bom., 532.

⁷ Gopala v. Fernandes, (1893) 16 Mad., 127.

⁸ Ramasekara v. Dharmaraya, (1882) 5 Mad., 113.

⁹ Muttia v. Appasami, (1890) 13 Mad., 501.

¹⁰ Onookool Chunder v. Barola Kant, (1870) 13 W. R., 467.

¹¹ Muttia v. Appasami, (1890) 13 Mad., 501.

¹² Muttia v. Appasami, (1890) 13 Mad., 504.

Act XIV of 1882, sects 329, 330

This rule applies to H. C. and to Prov. S. C. C., so far as relates to moveable property.

For form, see App., E. No. 41

Purview of this rule—Every obstruction must be caused either by the judgment-debtor, or at his instigation by persons who have no real interest in the property, or by third parties. This rule deals with the two first cases; the third is dealt with by r. 99¹. Thus, if the decree-holder claims certain lands as having passed under the decree, and the debtor asserts that they were not included in it (and this would be necessary for a valid defence) the case falls within this rule². An order under this rule passed against a person who has at the instigation of the judgment-debtor obstructed a decree-holder does not bar a suit³.

Penal Code—The resistance of process of a civil Court is punishable by a Court of criminal jurisdiction.⁴

Practice—The Judge should fix a day, hear the evidence adduced on each side, and decide the case,⁵ and if he directs that the property shall be delivered in whole or in part, he should order that possession be given in one or other of the ways described in the Code.⁶

Appeal—There is apparently no appeal, unless one of the parties is the purchaser, and then the case would fall under s. 47.⁷ An order passed between parties under this rule is appealable under s. 47.⁸

Limitation—An application under this rule must be made within 30 days of the obstruction, but when the application is converted into a suit under r. 103, the rights of the parties have to be decided as if an ordinary suit for possession had been instituted by the decree-holder against the defendant.⁹

99 Where the Court is satisfied that the resistance or obstruction was occasioned by any person (other than the judgment-debtor) claiming in good faith to be in possession of the property on his own account or on account of some person other than the judgment-debtor, the Court shall make an order dismissing the application.

Resistance or obstruction by *bona fide* claimant

Act XIV of 1882, sects 331, 335

This rule applies to H. C. and to Prov. S. C. C., so far as relates to moveable property.

Possession.—The word possession is not limited to actual physical possession; so when premises sought to be recovered in execution are in the occupation of tenants and the landlord of such tenants obstructs the officer executing the decree, the claims of such landlord may be investigated under this rule.¹⁰

¹ Govinda Nair v. Kesava, (1878) 3 Mad., 18. See, Salamba v. Martyara, (1892) 16 Bom., 711.

² Prannath Roy v. Preonath, (1867) 8 W. R., 393.

³ Bishen Dyal Singh v. Sagar Singh, (1867) 2 Cal. W. N., 311.

⁴ Queen v. Bhagat Dafadar, (1868) 2 B. L. R., (F. B.) 21.

⁵ Sadhoo Suran v. Bhuggoo, (1869) 12 W. R., 93.

⁶ Brojo Mohun v. Shooda Monee, (1867) 8 W. R., 79.

⁷ Muttia v. Appasami, (1890) 13 Mad., 501.

⁸ Govinda Nair v. Kesava, (1878) 3 Mad., 18.

⁹ Namdev v. Ram Chandra Gomaji, (1891) 18 Bom., 37.

¹⁰ Mancharam v. Fakir Chand, (1901) 25 Bom., 478.

This rule applies to H. C. and to Prov S. C. C., so far as it relates to moveable property.

This rule applies to applications made by the decree-holder,¹ within one calendar month, excluding the date on which the resistance took place.² It is not imperative, and the omission to take action under it does not preclude a decree-holder from bringing a fresh suit to recover possession, if he is ousted after his formal possession, and in possession.³ T. bay Act meaning of r 97. the rule is not rendered inapplicable by the fact that the obstructor claims to be a *mulgeni* tenant.⁷

Time of such resistance or obstruction.—Limitation is thirty days from the date of the obstruction complained of. But where a warrant has been issued and returned not executed owing to obstruction, and a second then issues and its execution is obstructed, time runs from the date of the second obstruction.⁸

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This rule is for the benefit of a purchaser at a sale in execution, and applies to cases in which he has been resisted or obstructed in taking possession by the judgment-debtor or somebody on his behalf,¹⁰ but he is not bound to make any complaint and may make a fresh application for delivery.¹¹

Section 47.—Where the purchaser is decree-holder, s. 47 applies.¹²

98. Where the Court is satisfied that the resistance or obstruction was occasioned without any just cause by the judgment-debtor or by some other person at his instigation, it shall direct that the applicant be put into possession of the property, and where the applicant is still resisted or obstructed in obtaining possession, the Court may also, at the instance of the applicant, order the judgment-debtor, or any person acting at his instigation, to be detained in the civil prison for a term which may extend to thirty days.

Resistance or obstruction by judgment-debtor.

¹ Mathab Koomari, *petitioner*, (1873) 19 W. R., 62.

² Dudu v. Balgouda, (1867) 5 Bom., H. C., 33.

³ Jugmohun Tewaree v. Buldeo Naik (1868) 3 Agra, 162.

⁴ Bahant v. Babaji, (1884) 8 Bom., 602; Trimbak v. Narayan, (1884) 8 Bom., 481.

⁵ Mutia v. Appasami, (1890) 13 Mad., 504.

⁶ Kasam Shaleb v. Maruti, (1889) 13 Bom., 552.

⁷ Gopala v. Fernandes, (1893) 16 Mad., 127.

⁸ Ramasekara v. Dharmaraja, (1882) 5 Mad., 113.

⁹ Mutia v. Appasami, (1890) 13 Mad., 504.

¹⁰ Onookool Chunder v. Buroda Kant, (1870) 13 W. R., 467.

¹¹ Mutia v. Appasami, (1890) 13 Mad., 504.

¹² Mutia v. Appasami, (1890) 13 Mad., 504.

Nature of investigation.—The Courts in hearing a case under this rule are not limited to the question of possession. They can decide any question of title arising between the contending parties in connection with the right of possession.¹ In a proceeding under r 93 where possession is shown to have been with the plaintiff, the defendants are not, without showing title in themselves at liberty to impeach the plaintiff's title or to set up a *jus tertii*.²

101. Where the Court is satisfied that the applicant *Bona fide claimant to* was in possession of the property on his own account or on account of some person *to be restored to possession* other than the judgment-debtor, it shall direct that the applicant be put into possession of the property.

Act XIV of 1882, sects 332, 335

This rule applies to H. C and Prov. S. C. C., so far as relates to moveable property

Object of this rule.—The object of this rule seems to be that there should be a power in the Court to prevent anything which would be an offence against the public peace taking place and where there is obstruction or resistance on an attempt being made to obtain possession,³ the Court, in order to prevent future litigation, should enquire into the relative rights of the parties.⁴ The losing party may sue to establish his right to, or to the present possession of, the property within one year from the date of the order under art. 11A Sched. I, Act IX of 1908,⁵ and the plaintiff is entitled to take advantage of s. 5 of the same Act so that the decision in the case of *Kudomessurce Dasee v. Enam Ali*,⁶ declaring that no deduction should be allowed from the period of limitation, because the Courts were closed, supposing it to have been good law, cannot be considered in force now.⁷ A purchaser at a Court's sale of the interest of one member of an undivided Hindu family ought not to be put in exclusive possession of the whole undivided land but only in joint possession *property by suing on a mort-*
property. One of the other
*restored to possession.*¹⁰

Does not apply.—It does not apply to the case of a person who has got possession, but cannot collect his rent afterwards.¹¹ For if the purchaser has been put in possession peaceably, the Court has nothing more to do in execution.¹² Delivery of possession is complete as soon as the steps prescribed by

¹ *Moulakhan v. Gorikhan*, (1890) 14 Bom., 637; followed in *Mahip Rai v. Dwarka Rai*, (1905) 27 All., 453; see also, *Meer Abdoo Sobhan v. Brahina Deo*, (1870) 14 W. R., 140, and see, *Rakhai Churn v. Watson & Co.*, (1899) 10 Calc., 50.

² *Bapujirao v. Fateeng.*, (1899) 22 Bom., 967.

³ *Sharoda Pershad v. Dhunpat*, (1873) 19 W. R., 219.

⁴ *Fidaye Shikdar v. Ozeoddeen*, (1867) 7 W. R., 87; *Huro Pershad v. Ramnassur*, (1875) 24 W. R., 461.

⁵ *Zuhoorun v. Mahomed Wajed*, (1872) 18 W. R., 87; Sched. I, art. 11, 11A, Act IX of 1908; *Protab Chunder v. Brojolall*, (1863) B. L. R., (F. B.), 638.

⁶ *Kudomessurce Dasee v. Enam Ali*, (1871) 20 W. R., 167.

⁷ *Bango Vithal v. Rukhivadas*, (1874) 11 Bom. H. C., 174.

⁸ *Kallapa v. Venkatesh*, (1881) 5 Bom., 676.

⁹ *Dugippa v. Venkatramnaya*, (1881) 5 Bom., 493; *Patil Hari v. Hakamchand*, (1886) 10 Bom., 363; but see, *Balaji v. Ganesh*, (1881) 5 Bom., 490.

¹⁰ *Govind Balvant v. Lakshman*, (1894) 18 Bom., 522.

¹¹ *Zuhoorun v. Mahomed Wajed*, (1872) 18 W. R., 87.

¹² *Sivu v. Muttasann*, (1887) 10 Mad., 53; *Srinath Ghosh v. Annoda Prasad* (1896) 1 Calc. W. N., 192.

r. 96 have been taken; and any subsequent act of resistance is not, the resistance or obstruction referred to in this rule.¹ Delivery of symbolical possession under r. 96 does not give the person in actual possession a right to apply under the rule.² Symbolical possession does not amount to dispossession.³

Revision.—An order under this rule is liable to revision under s. 115;⁴

In a suit for the same, if the defendant purchased the property who had been a party to the suit and in whose favour the decree was in so far that it declared his right to continue in possession, applied to be restored to possession and obtained an order in his favour. Thereupon, the assignee auction-purchaser applied in revision to have the order restoring the usufructuary mortgagee to possession set aside; *held*, that the order in question was an order which could properly be made under r. 101, and being unappealable, an application for revision thereof might lie.⁵

Death of defendant.—Where the order for possession has been obtained before the death of the defendant and possession taken after his death, an objection under this rule must be decided in accordance with it.⁷

Not the judgment-debtor.—If, in execution of decree, a claim made by a third party in possession is rejected, he can either bring a regular suit or wait till he is dispossessed under this rule;⁶ and then he may take action under it or bring a regular suit within the ordinary period of limitation,⁹ or he may do both.¹⁰

What amounts to dispossession.—Planting a bamboo and making proclamation to the occupants of an estate that it has been adjudged to some other, is sufficient dispossession of a landlord to warrant him to apply under this rule.¹¹

Practice.—When an application has been filed under this rule the Court should examine the applicant should or should not be admitted as defendant, even though he may be the cause of trial;¹² or that he be rejected. But if it should be as landlord,¹³ or as mortgage

¹ *Wajid Hossein v. Abdul Kadir*, (1870) 13 W. R., 418.

² *Kisori Lal v. Shih Lal*, (1896) 1 Cal. W. N., 313.

³ *Ibrahim Mullik v. Ramjida Rakshit*, (1878) 3 Cal., 710; but see, *Brajabala v. Gurudas*, (1906) 33 Cal. 497; 3 Cal., L. J., 293.

⁴ *Sheoraj Singh v. Bonwari*, (1881) 6 All., 172.

⁵ *Zuhoorun v. Mahamed Wajed*, (1872) 18 W. R., 87.

⁶ *Sabhajit v. Srigopal*, (1895) 17 All., 222.

⁷ *Biyyakka v. Fakira*, (1889) 12 Mad., 211.

⁸ *Ferguson v. Nil Komul*, (1874) 23 W. R., 270.

⁹ *Kisheu Soondur v. Fakeerooddeen Mahomed*, W. R., 1864, p. 61.

¹⁰ *As to Bombay, see the case of Gulabhai v. Jinabhai*, (1889) 13 Bom., 213. See note to r. 102.

¹¹ *Collector of Bogra v. Krishna Indra*, (1868) 2 B. L. R., A. C., 301; 11 W. R., 191.

¹² *Obhoy Churn v. Rajendro Coomar*, (1871) 16 W. R., 233.

¹³ *Ram Gopal v. Paorno Chunder*, (1869) 13 W. R., 475; *Huree Kishore v. Kaleo Kishore*, (1862) 8 W. R., 114.

¹⁴ *Kaleo Narain v. Protap Chunder*, (1869) 12 W. R., 231; *Ruttun Koer v. Tussuduck*, (1874) 22 W. R., 103.

¹⁵ *Bhyrab Sircar v. Sham Manjee*, (1871) 15 W. R., 70; *Danco Malhub v. Nund Lal*, (1874) 22 W. R., 123.

possession,¹ or in actual possession as mortgagee of the defendant² and has been dispossessed under the decree or under colour of it, this is sufficient. If the parties are agreed that the applicant has been dispossessed by the defendant in execution, the application should not be rejected on the ground that he has not;³ nor on the ground that the applicant had not originally obtained possession in a strictly legal manner.⁴ An objector who is not in possession, but whose sole ground of intervention is that he holds a *bona fide* title derived from the defendant, is not entitled to be heard under this rule,⁵ nor a person claiming a right of way over land taken possession of in execution of a decree can intervene under this rule, but he must bring a regular suit to establish his right.⁶ To entitle a party to come in under this rule, he must prove that he was in possession of the land in suit, and was dispossessed by another party, alleging the land to form part of land decreed to him.⁷

Several applications—If there are several applications, each application should be tried separately so as to prevent this rule from being made a means of disposing of disputes between several claimants.⁸

Onus of proof—The onus is on the applicant.⁹ It is sufficient for him to prove his possession, without proof of title.¹⁰ He should confine himself to proving possession, and leave the decree-holder to prove his right to take possession,¹¹ and probably a decree-holder has no right to take possession under a decree which is barred by limitation, but this has not been decided.¹²

Joint Hindu family—A member of a joint Hindu family cannot say that he is in possession of any particular portion of the joint property on his own account. His possession is the possession of the family.¹³

Res-judicata—Where a complaint was dismissed for default before inquiry the applicant was not precluded from bringing a suit within one year from date of the order.¹⁴

Limitation—The application should be filed within thirty days—Act IX, 1908, Sched II, art 165.

An application for removal of obstruction stops the time for adverse possession from running.¹⁵

Jurisdiction—If, while a case under this rule is pending, the Court is deprived of jurisdiction, through the land which is the subject-matter of the suit being transferred to another district, the case should not be dismissed, but the record ought to be transferred to the other district.¹⁶

¹ *Asgur Ali v. Asgur*, (1873) 20 W. R. 373.

² *Shafiuddin v. Lochan*, (1879) 2 All. 91; see also *Hassun v. Ahmed*, (1869) 11 W. R. 146.

³ *Jadoo Kapsale v. Issur Chunder*, (1872) 17 W. R. 375.

⁴ *Obhaya Churn v. Rajendro*, (1874) 22 W. R. 406.

⁵ *Enuf Ali v. Shib Shunker*, W. R. 1864, 394.

⁶ *Nobin Chunder v. Jatadhari*, (1865) 2 W. R. 239.

⁷ *Neel Madhub v. Radha Mohun*, (1865) 3 W. R. 205.

⁸ *Sharada Moyee v. Nobin Chunder*, (1869) 11 W. R. 255.

⁹ *Mahomed Ausur v. Prokash Chunder*, (1867) 8 W. R. 8; *Woodoy Tara v. Abdool Gunee*, (1869) 12 W. R. 16.

¹⁰ *Dilbasse v. Gunga Pershad*, (1836) 5 Cal. 276.

¹¹ *Judomath Singh v. Kaleo*, (1870) 14 W. R. 373; *Brandibun Chunder v. Tara-chand*, (1873) 20 W. R. 114.

¹² *Mohesh Chunder v. Chandra Monee*, (1869) 9 W. R. 486.

¹³ *Cooverji Hirji v. Dewsey Bhoja*, (1893) 17 Bom. 718.

¹⁴ *Sarat Chandra Biau v. Tarini Prosad Pal*, (1907) 11 Calc. W. N. 487.

¹⁵ *Krishnaji v. Kashibai*, (1906) 30 Bom. 115.

¹⁶ *Kaleo Dass v. Hironath*, (1865) 3 W. R. 5.

r. 96 have been taken; and any subsequent act of resistance is not the resistance or obstruction referred to in this rule.¹ Delivery of symbolical possession under r. 96 does not give the person in actual possession a right to apply under the rule.² Symbolical possession does not amount to dispossession.³

Revision—An order under this rule is liable to revision under s. 115;⁴ but the order should not be set aside if there has been great delay.⁵ In a suit for sale upon a mortgage the plaintiff having obtained a decree assigned the same, and the assignee brought the property decreed to be sold to sale and purchased it himself and obtained possession. A usufructuary mortgagee of the property who had been a party to the suit and in whose favour the decree was in so far that it declared his right to continue in possession, applied to be restored to possession and obtained an order in his favour. Thereupon, the assignee auction-purchaser applied in revision to have the order restoring the usufruct; *held*, that the order in question was under r. 101, and being unappealable, an

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What amounts to dispossession—Planting a bamboo and making proclamation to the occupants of an estate that it has been adjudged to some other, is sufficient dispossession of a landlord to warrant him to apply under this rule.¹¹

Practice.—When an application has been filed under this rule the Court should examine the applicant in order should or should not be admitted,¹² and if defendant, even though he may not have the course of trial,¹³ or that he is still to be rejected. But if it should appear to be as landlord,¹⁴ or as mortgagee, or as

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⁹ *Kishen Soondur v. Fakeerooddeen Mahomed*, W. R., 1864, p. 61.

¹⁰ *to Bombay*, see the case of *Gulabbhai v. Jimabhai*, (1889) 13 Bom. , 213. See also *to r. 102*.

¹¹ *to r. 102* of *Bogra v. Krishna Imra*, (1868) 2 B. L. R. , A. C. , 301; 11 W. R. ,

¹² *to r. 102* of *Rajendro Coomar*, (1871) 16 W. R. , 238.

¹³ *to r. 102* of *Joorno Chunder*, (1869) 12 W. R. , 475; *Huroo Kishore v. Kaleo*, (1899) 8 W. R. , 114.

¹⁴ *to r. 102* of *Gain v. Protap Chunder*, (1869) 12 W. R. , 231; *Ruttun Koor v. Tass*, (1874) 22 W. R. , 103.

Bayrub Sircar
Lall, (1874),

¹⁵ 15 W. R. , 70; *Banco Mathub v. Nand*

possession,¹ or in actual possession as mortgagee of the defendant² and has been dispossessed under the decree or under colour of it, this is sufficient. If the parties are agreed that the applicant has been dispossessed by the defendant in execution, the application should not be rejected on the ground that he has not;³ nor on the ground that the applicant had not originally obtained possession in a strictly legal manner.⁴ An objector who is not in possession, but whose sole ground of intervention is that he holds a *bona fide* title derived from the defendant, is not entitled to be heard under this rule;⁵ nor a person claiming a right of way over land taken possession of in execution of a decree can intervene under this rule, but he must bring a regular suit to establish his right.⁶ To entitle a party to come in under this rule, he must prove that he was in possession of the land in suit, and was dispossessed by another party, alleging the land to form part of land decreed to him.⁷

Several applications—If there are several applications, each application should be tried separately so as to prevent this rule from being made a means of disposing of disputes between several claimants.⁸

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Joint Hindu family—A member of a joint Hindu family cannot say that he is in possession of any particular portion of the joint property on his own account. His possession is the possession of the family.¹³

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An application for removal of obstruction stops the time for adverse possession from running.¹⁵

Jurisdiction—If, while a case under this rule is pending, the Court is deprived of jurisdiction, through the land which is the subject-matter of the suit being transferred to another district, the case should not be dismissed, but the record ought to be transferred to the other district.¹⁶

¹ *Asgur Ali v. Asgur*, (1873) 20 W. R., 373.

² *Shafuddin v. Lochan*, (1879) 2 All., 91; see also *Hassun v. Ahmed*, (1869) 11 W. R., 146.

³ *Jadoo Kapalee v. Issur Chunder*, (1872) 17 W. R., 375.

⁴ *Obhoya Churn v. Rajendro*, (1874) 22 W. R., 406.

⁵ *Eusuf Ali v. Shub Shunker*, W. R., 1861, 341.

⁶ *Nolon Chunder v. Jatalhari*, (1865) 2 W. R., 299.

⁷ *Neel Madhub v. Radha Mohun*, (1865) 3 W. R., 205.

⁸ *Sharoda Moyee v. Nolin Chunder*, (1869) 11 W. R., 255.

⁹ *Mahomed Ausur v. Prokash Chunder*, (1867) 8 W. R., 8; *Woodoy Tara v. Abdool Gunee*, (1869) 12 W. R., 16.

¹⁰ *Dilbassee v. Gunga Pershad*, (1886) 5 Cal., 278.

¹¹ *Judoonath Singh v. Kalee*, (1870) 14 W. R., 349; *Brindaban Chunder v. Tara-chand*, (1873) 20 W. R., 114.

¹² *Mohesh Chunder v. Chandra Monee*, (1869) 9 W. R., 486.

¹³ *Cooverji Hirji v. Dewsey Bhoja*, (1893) 17 Bom., 718.

¹⁴ *Sirat Chandra Bena v. Tarni Prasad Pal*, (1907) 11 Cal. W. N., 487.

¹⁵ *Krishnaji v. Kashibai*, (1906) 30 Bom., 115.

¹⁶ *Kalee Doss v. Hironath*, (1865) 3 W. R., 5.

ORDER XXII.

Death, Marriage and Insolvency of Parties.

No abatement by party's death, if right to sue survives

1. The death of a plaintiff or defendant shall not cause the suit to abate if the right to sue survives.

Act XIV of 1882, sect 361

This rule applies to H. C and Prov. S. C. C.

The following *illustrations* were given to the exactly similar provision in the former Code.

(a) A covenants with B and C to pay an annuity to B during C's life B and C sue A to compel payment. B dies before the decree, the right to sue survives to C, and the suit does not abate.

(b) In the same case, all the parties die before decree. The right to sue survives to the representative of the survivor of B and C, and he may continue the suit against A's representative.

(c) A sues B for libel. A dies. The right to sue does not survive, and the suit abates.

(d) A, a member of a Hindu joint family under the Mitakshara law, institutes a suit for partition of the family property. A dies leaving B, a minor son, his heir. The right to sue survives to B, and the suit does not abate.

Before decree : Illustration (a)—After judgment the action does not abate, but the benefit of the judgment goes to the legal representative of the person obtaining it.¹

Illustration (c)—In a suit for defamation plaintiff obtained a decree for damages. The defendant appealed but died before hearing. *Held*, that the suit

and does not survive on the death of the plaintiff.²

Illustration (d)—See the case of *Padavath Singh v Rajaram*.³ Upon partition, D was allotted a one-third share of certain premises as a Hindu mother. She sued to restrain the defendant from encroaching on her share. The suit was compromised by the defendant agreeing to purchase her share. The question of the value of her share was referred to arbitration. D then died, leaving two sons, but before decree was passed on the award of the arbitrators. *Held*, that the suit did not abate and that the right of action on the award survived to the sons.⁴

¹ *Muhammad Husain v. Khushalo*, (1887) 9 All., 131.

² *Gopal v. Ram Chandra*, (1902) 26 Bom., 537. So also in second appeal—*Paramen Chetty v. Sundara Raja*, (1903) 26 Mad., 499.

³ *Krishna Behary v. Corporation of Calcutta*, (1904) 31 Cal., 406.

⁴ *Sakjahan Inglo Rao v. Bhavani Bazi*, (1904) 27 Mad., 588.

⁵ *Padarath Singh v. Raja Ram*, (1932) 4 All., 235.

⁶ *Denomoyee Dassee v. Chooney Money Dassee*, (1899) 4 Cal. W. N., 280.

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Death, Marriage and Insolvency of Parties.

No abatement by party's death, if right to sue survives

1. The death of a plaintiff or defendant shall not cause the suit to abate if the right to sue survives.

Act XIV of 1882, sect 361

This rule applies to H. C. and Prov. S. C. C.

The following *illustrations* were given to the exactly similar provision in the former Code

(a) A covenants with B and C to pay an annuity to B during C's life. B and C sue A to compel payment. B dies before the decree; the right to sue survives to C, and the suit does not abate.

(b) In the same case, all the parties die before decree. The right to sue survives to the representative of the survivor of B and C, and he may continue the suit against A's representative.

(c) A sues B for libel. A dies. The right to sue does not survive, and the suit abates.

(d) A, a member of a Hindu joint family under the Mitakshara law, institutes a suit for partition of the family property. A dies leaving B, a minor son, his heir. The right to sue survives to B, and the suit does not abate.

Before decree: Illustration (a)—After judgment the action does not abate, but the benefit of the judgment goes to the legal representative of the person obtaining it.¹

and does not survive on the death of the plaintiff.²

Illustration (d)—See the case of *Padarath Singh v. Rajaram*.³ Upon partition, D was allotted a one-third share of certain premises as a Hindu mother. She sued to restrain the defendant from encroaching on her share. The suit was compromised by the defendant agreeing to purchase her share. The question of the value of her share was referred to arbitration. D then died, leaving two sons, but before decree was passed on the award of the arbitrators. *Held*, that the suit did not abate and that the right of action on the award survived to the sons.⁴

¹ *Muhammad Husain v. Khushalo*, (1887) 9 All., 131.

² *Gopal v. Ram Chandra*, (1902) 26 Bom., 597. So also in second appeal—*Paramen Chetty v. Sundara Raja*, (1903) 26 Mad., 499.

³ *Krishna Behary v. Corporation of Calcutta*, (1904) 31 Cal., 406.

⁴ *Sakyahani Ingle Rao v. Bhavani Bozi*, (1901) 27 Mad., 588.

⁵ *Padarath Singh v. Raja Ram*, (1882) 4 All., 215.

⁶ *Denomoyee Dassee v. Chooney Money Dassee*, (1899) 4 Cal. W. N., 280.

shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.

(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.

(3) Where within the time limited by law no application is made under sub-rule (1), the suit shall abate as against the deceased defendant.

Act XIV of 1882, sect. 368.

This rule applies to H. C. and to Prov. S. C. C.

Applications under this rule are not confined to plaintiffs or appellants. If there are two claimants the Court should decide between them and not place both on the record.¹

Suit shall abate—An order of abatement under this rule is absolute,² but an application to set aside an order of abatement may be made under r. 9 *post*. Where one of four respondents died, and no application was made within six months to put the legal representatives on the record, *held*, that the appeal was one in which the right to appeal did not survive against the surviving respondents, but against them and the representatives of the respondent who had died, and that the proper order was to direct the suit to abate.³ The plaintiff filed an appeal. It was heard two years afterwards, when it appeared that two of the respondents had died and their legal representatives had not been brought on the record. The Court ordered the appeal to abate as against all the respondents, *held* that the appeal should abate only as against the respondents who had died.⁴ In a second appeal two respondents died and no representatives were placed on the record. *Held*, that the appeal did not abate.⁵

after death to have the names of the heirs struck off and those of the executors substituted, *held*, that the application was not barred, as there was sufficient cause for the delay in applying for substitution.⁶ When a defendant in a suit dies and the plaintiff under this rule brings a person on the record whom he alleges to be the legal representative of the deceased defendant, such person sufficiently represents the estate of the deceased for the purpose of the suit, and the decree passed will bind the estate.⁷ Where the litigation can proceed without the representative of a deceased party there is no abatement.⁸

The provisions of this rule are applicable in appeal.⁹

When two defendants against whom a decree had been passed appealed and one of them died and the representative of the deceased defendant was not brought on the record, but the appeal was proceeded with by the surviving

¹ Muhammad v. Khushalo, (1888) 10 All., 223.

² See Davis J, in Paru v. Vaniangattil, (1905) 28 Mad., 359.

³ Hem Kunwar v. Amba Prasad, (1900) 22 All., 430.

⁴ Bai Full v. Adesang, (1902) 26 Bom., 203.

⁵ Al. ... v. ... (1896) 3; Ram ... v. ... (1896) 393.

⁶ Hossein Ali v. Abdur Rahim, 7 Calc. W. N., 529.

⁷ Kadir Mohideen v. Mathu Krishan Ayyar, (1903) 26 Mad., 230.

⁸ Srinivasa v. Gnanaprakasa, (1907) 30 Mad., 67.

⁹ Raj Chunder v. Ganga Das, (1901) 31 Calc., 487; 8 Calc. W. N., 442; L. R., 31 L. A., 71.

with to judgment, and, where the decree is against a female defendant, it may be executed against her alone.

(2) Where the husband is by law liable for the debts of his wife, the decree may, with the permission of the Court, be executed against the husband also; and, in case of judgment for the wife, execution of the decree may, with such permission, be issued upon the application of the husband, where the husband is by law entitled to the subject-matter of the decree.

Act XIV of 1882, s. 369, C. L. P. Act, 1852, s. 141. Rules of Supreme Court, 1883, O. 17, r. 2.

This rule applies to H. C. and Prov. S. C. C.

is wife was brought on
affirmed on appeal.
It was held that the

This rule applies equally to appeals.*

8. (1) The insolvency of a plaintiff in any suit which the assignee or receiver might maintain for the benefit of his creditors, shall not cause the suit to abate, unless such assignee or receiver declines to continue the suit or (unless for any special reason the Court otherwise directs) to give security for the costs thereof within such time as the Court may direct.

When plaintiff's insolvency bars suit.

(2) Where the assignee or receiver neglects or refuses to continue the suit and to give such security within the time so ordered, the defendant may apply for the dismissal of the suit on the ground of the plaintiff's insolvency, and the Court may make an order dismissing the suit and awarding to the defendant the costs which he has incurred in defending the same to be proved as a debt against the plaintiff's estate.

Act XIV of 1882, s. 370; C. L. P. Act, 1852, s. 142. Rules of Supreme Court, 1883, O. 17, r. 2.

This rule applies to H. C. and Prov. S. C. C.

This rule does not declare that the assignee shall be made a party to the suit, as the Act does, in the case of persons representing a party deceased. The practice in India has been to add or substitute the assignee's name, and he may be called on to deposit the costs of an appeal.¹ Defendant cannot plead the abatement without giving the Official Assignee an opportunity of prosecuting the

¹ Bindaban Chunder v. Marikantosh, (1868) 9 W. R., 412.

² Madhuban v. Narain, (1907) 29 All., 535.

³ Heeralall Seal v. Carapiet, (1870) 13 W. R., 431; Ibrahim v. Abdur Rahiman, (1875) 12 Bom. H. C., 257.

bankrupt or an insolvent³

Form of order—*Lekhraj v. Shamlat*⁴

9. (1) Where a suit abates or is dismissed⁵ the plaintiff or the person claiming to be the plaintiff or the receiver in the case of an insolvent plaintiff may apply for an order to set aside the abatement or dismissal; and if it is proved that he was prevented by any sufficient cause from continuing the suit, the Court shall set aside the abatement or dismissal upon such terms as to costs or otherwise as it thinks fit.

(3) The provisions of section 5 of the Indian Limitation Act, XV of 1877, shall apply to applications under sub-rule (2).

Act XIV of 1882, sects. 371 and 372 A

This rule applies to H. C. and Prov. S. C. C.

Object of the rule—This rule only refers to orders passed under r. 4 and 8.⁶ The cause of action in the original and revived suit must be the same; no fresh cause of action can be imported into the revived suit.⁷

Practice—A judge can make an order under r. 3, coupled with an order under this rule.⁸

When plaintiff dies testate, and there is difficulty in obtaining probate of his will, mere neglect to apply for limited administration will not be a bar to obtaining an order under this rule.⁹ When an application for abatement and an application for revival of a suit were set down for hearing together, *held*, that the proper order to pass was to declare the suit to have abated and then at once to pass an order under this rule.¹⁰

Limitation—An application under this rule or under this rule and r. 11, to revive must be made within sixty days from the order of abatement or dismissal.¹¹

Appeal:—Lies from an order refusing to set aside the abatement of a suit see O. XLIII, r. 1(k).

¹ 237.

² 4 Cal. W. N., 291.

³ *Shani Chand Giri v. Bhayaram Panday*, (1895) 22 Cal., 92.

⁴ *Fulvahu v. Goculdas*, (1885) 9 Bom., 275.

⁵ *Bhojrub Doss v. Doman*, (1879) 4 C. L. R., 374; 5 Cal., 139; see also, *Fulvahu v. Goculdas* (1885) 9 Bom., 275.

⁶ *Ram Pratap v. Lal Chand*, (1904) 9 Cal. W. N., 369.

⁷ Act VII of 1888, s. 66; art. 171, Sched. II, Act XV of 1877.

10 (1) In other cases of an assignment, creation or devolution of any interest during the pendency of a suit, the suit may, by leave of the Court, be continued by or against the person to or upon whom such interest has come or devolved.

(2) The attachment of a decree pending an appeal therefrom shall be deemed to be an interest entitling the person who procured such attachment to the benefit of sub-rule (1).

Act XIV of 1882, sect. 372 Rules of the Supreme Court, 1883, O. 17, r. 3.

This rule applies to H. C. and Prov. S. C. C

"Other Cases."—That is, cases other than those mentioned in the preceding rules;¹ died;² decided of the appellant assignor, where assignor.³

Official Assignee.—The Official Assignee in insolvency proceedings

result of a suit should apply to make him a party to the suit *

Pendency of a suit—These words relate to a suit in which no final order has been made,⁷ and apply to a suit in which directions to make an account have been given.⁸ Where, in a suit respecting a will, there was a decree that a scheme should be settled, but that decree was not proceeded with, no scheme was settled, and no final order made, the suit was treated as pending.⁹ The Court may revive without consent or notice, when the parties who ought to give consent or get notice are dead.¹⁰ This rule does not apply to any assignment, creation or devolution of any interest after the passing of the decree. It does not apply to execution-proceedings A attached 24 Bank shares as the property

¹ Benode Mohini v. Sharat Chunder, (1882) 8 Cal., 837; Bhugwan Das v. Nilkanta Ganguli, (1901) 9 Cal. W. N., 171; (compare, Jannadas v. Sorabji, (1892) 16 Bom., 27).

² Rajaram v. Jibai, (1885) 9 Bom., 151; but see, Moreshwar Dapuji v. Kushaba, (1878) 2 Bom., 248.

³ Radha Prasad v. Rajendra, (1883) 5 All., 209. For a case in which a champertor of the plaintiff was made a party defendant on his own application, see, Rajarane Das v. Debendra Nath, (1899) 3 Cal. W. N., 751.

⁴ Miller v. Budh Singh, (1891) 18 Cal., 43.

⁵ Fatima v. Fatima, (1892) 16 Bom., 452.

⁶ Punithavelu v. Bhashyam Ayyangar, (1902) 25 Mad., 406.

⁷ Gocool Chunder v. Administrator General, (1889) 5 Cal., 731.

⁸ Surendra Keshub v. Khetter Krishno, (1903) 30 Cal., 609; 7 Cal. W. N., 517.

⁹ Gocool Chunder v. Administrator, (1879) 5 C. L. R., 569; 5 Cal., 726; Govind Chunder v. Ranganmoney, (1891) 6 Cal., 60.

¹⁰ Gocool Chunder v. Administrator General, (1879) 5 C. L. R., 569; 5 Cal., 726.

of B C sued A for them as his own property, and obtained possession of the shares and sold them to D. On appeal, A succeeded, *held*, he was not entitled to put D on the record of the execution-case and enforce restitution against him.¹ This rule does not apply when the devolution of interest occurs between the passing of a decree and the time of the filing of an appeal from that decree.² A Court is not bound to admit the assignee of a decree to execute it;³ but when a decree is sold, and the sale is admitted, the judgment-debtor cannot contest the right of the purchaser to execute it.⁴ An Assignee or purchaser of a decree takes it subject to the right of the judgment-debtor to set-off his cross decree,⁵ as also subject to the lien for costs due to the assignor or to his attorney.⁶ When a decree under s. 88 of the Transfer of Property Act is assigned before any order absolute is made, the assignee takes subject to all the liabilities resulting from the application of *his pendens*.⁷

A Hindu widow sold a portion of her interest in a suit to A and died after decree. *held*, A only bought her life-interest and could not execute the decree.⁸ But the purchaser of the rights and interests of a patnidar during the pendency of the suit acquires his privilege to carry on the suit.⁹ So also the assignee of an *ex parte* decree for rent can carry on the suit after it is set aside on the application of the defendant.¹⁰ The words "devolution of interest" do not mean only devolution by death, but are applicable to a case in which pending a suit instituted by a manager of an encumbered estate, the estate is released and restored to the owners.¹¹

Limitation.—The right to apply in a pending suit, *i.e.*, a suit in which no final order has been made, accrues from day to day, and the periods of limitation provided in arts. 171, 171 A, and 178, Sched. II, Act XV of 1877, do not apply in an application to revive a suit.¹²

Appeals.—This rule applies to appeals.¹³ An application was made by an appellant to substitute for the name of the person originally named as respondent to the appeal the name of a person to whom the decree had been assigned before the filing of the appeal, than two years after notice of the assignment person whose name was so sought to be to being placed on the record of the appeal proposed respondent should not be placed on the record. *Semble*, that this rule does not apply to a case when the devolution of interest occurs between the time of passing of a decree and the time of filing of an appeal from

¹ *Raynor v. Mussoorie Bank*, (1895) 7 All., 681; *Goodall v. Mussoorie Bank*, (1898) 10 All., 97.

² *Collector of Muzaffanagar v. Husain Begum*, (1890) 18 All., 86. But see, *Narendra Nath Pahari v. Bhupendra Narain Roy*, (1896) 23 Cal., 391; *Troyluckhanath v. Brindaban Chunder*, (1872) 18 W. R., 438; see also, *Harish Chandra Tewary v. Chandpore Co., Ltd.*, (1903) 30 Cal., 90.

³ *Bishtoo Chura v. Kishen Gopal*, (1870) 13 W. R., 207.

⁴ *Sunnooburnissa v. Meher Chand*, W. R., (1861) p. 313.

⁵ *Opendra Mohun v. Poorno Chunder*, (1873) 19 W. R., 85; *Ram Ali v. Luckhy Kant*, (1868) 10 W. R., P. B., 32.

⁶ *Khetter Nath v. Manick Lal*, (1900) 5 Cal. W. N., exenti.

⁷ *Chunni Lal v. Abdul Ati*, (1901) 23 All., 331, *refd.* to in, *Ramjoy v. Shamlhu* (1903) 9 Cal. W. N., 883.

⁸ *Gohind Narain v. Gour Mowee*, (1872) 17 W. R., 20.

⁹ *Wilson v. Government*, (1869) 12 W. R., 122.

¹⁰ *Binode Beharee v. Beer Narain*, (1866) 5 W. R., Act X, 52.

¹¹ *Sourindra Mohun Tagore v. Siromoni Dobi*, (1901) 28 Cal., 171; 5 Cal. W. N., 397.

¹² *Kedarnath v. Harachand*, (1882) 8 Cal., 420; followed, *Chalavadi v. Polori*, (1908) 31 Mad., 71; *Ram Nath v. Uma Charan*, (1899) 3 Cal. W. N., 756; *Surendra Keshub v. Khetter Krishno*, (1903) 30 Cal., 609; 7 Cal. W. N., 517.

¹³ *Rajaram v. Jibai*, (1885) 9 Bom., 151, and r. 11.

that decree.¹ S. 372, former Code, applied as well to the case of a devolution of interest pending an appeal, as to the case of a devolution of interest pending a suit. A person may under (s. 372, former Code,) O. XXII, r 10 be added or substituted as a party either on his own application or on the application of one of the parties to the suit. An application by a respondent to an appeal, whose interest has at one time been represented by an official receiver, to replace upon the record of the appeal as a party respondent the name of such official receiver, which had been struck off owing to a misrepresentation of fact, may be treated as an application for review of the order striking off the name of the receiver.² A creditor of a decree-holder, who has attached the decree pending an appeal against it, is not entitled to be made a party respondent to the appeal.³ This rule applies to appeals in cases of assignment, creation or devolution of any interest pending the appeal otherwise than by death, marriage or insolvency.⁴ When certain assignees who had not been brought on the record filed a memorandum of appeal, and the Court treating it as an application under this rule dismissed it, *held*, that it was subject to appeal as from a decree.⁵

Appeal—Orders disallowing objections are open to appeal under O. XLIII, r 1 (6).

such order being one under s 47 and therefore a decree within the meaning of this rule, rejecting the assignee of a

11. In the application of this Order to appeals, so far as may be, the word "plaintiff" shall be held to include an appellant, the word "defendant" a respondent, and the word "suit" an appeal.

12 Nothing in rules 3, 4 and 8 shall apply to proceedings in execution of a decree or order.

These rules apply to H. C. and Prov. S. C. C.

They confirm the rulings under the former Code.

¹ Collector of Muzaffarnagar v. Husaini Begam, (1893) 18 All., 86.

² Sarat Chandra Singh, in *the matter of*, (1900) 18 All., 235; Durga Prasad, in *the matter of*, (1900) 22 All., 231.

³ Chail Behari v. Rahmal Das, (1893) 20 All., 39.

⁴ Durga Prasad, in *the matter of* (1900) 22 All., 231.

⁵ Moti Ram v. Kundan Lal, (1900) 22 All., 380.

⁶ Lalit Mohan v. Shebock Chand, (1899) 4 Calc. W. N., 403.

⁷ Indo Mati v. Gaya Prasad, (1897) 19 All., 142.

⁸ Lalit Mohan Roy v. Shebock Chand Chowdhry, (1899) 4 Calc. W. N., 403
Tej Singh v. Chaleh Ram, (1902) 21 All., 312.

⁹ Jamna Bibi v. Jhesu, (1902) 21 All., 532.

ORDER XXIII.

Withdrawal and Adjustment of Suits.

1. (1) At any time after the institution of a suit the plaintiff may, as against all or any of the defendants, withdraw his suit or abandon part of his claim.

Withdrawal of suit
or abandonment of part
of claim.

(2) Where the Court is satisfied—

(a) that a suit must fail by reason of some formal defect, or

(b) that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim,

it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or abandon such part of a claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of a claim.

(3) Where the plaintiff withdraws from a suit, or abandons part of a claim, without the permission referred to in sub-rule (2), he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim.

(4) Nothing in this rule shall be deemed to authorize the Court to permit one of several plaintiffs to withdraw without the consent of the others.

Act XIV of 1882, s. 373

This rule applies to H. C. and Prov. S. C. C.

"The rule says that any time after the institution of the suit" would mean . . .

costs of the first suit, the institution of a second suit without payment of the costs is not necessarily bad. Subsequent payment cures the irregularity.³

¹ Sukh Lal v. Bhukht, (1889) 11 All., 187.

² Gauri Shankar v. Maide Koer, (1904) 31 Cal., 516.

³ Abdul Aziz v. Ibrahim Molla, (1904) 31 Cal., 965.

may think fit,¹ and where the suit was dismissed with liberty to bring a fresh suit, the decision was set aside on appeal.²

Where an appellate Court, instead of deciding upon an appeal, referred the appellant to a new suit, the order, whether right or wrong, if accepted by the parties, is binding on them.³

Effect of order.—Where a suit was withdrawn in order to bring a fresh suit which would include a portion of the claim arising out of the cause of action, but not included in the suit withdrawn, it was held that the additional portion of the claim was not barred under s. 7, Act VIII of 1859.⁴ Where a suit was brought to establish a right to sell a certain property in execution of a decree, and the suit was withdrawn without leave to bring a fresh suit, it was held that a second suit to sell the same property in execution of another decree was not barred, as the second suit was not a fresh suit for the same subject-matter.⁵ Where a suit is withdrawn with permission, the effect is to leave the parties in the same position as that in which they would have been, if the suit had never been brought. A plaintiff who has obtained an order under this rule will not be debarred by O. XI, r. 2 from claiming in a subsequent suit a relief the suit, which he was permitted the plaintiff's concession acquired the plaintiff cannot annul these

The effect of withdrawing an appeal, no matter what the terms of the compromise may be, is that the decision of the lower Court is *res judicata* on the points raised in it,⁶ and the only decree that can be executed is that passed by the original Court,⁷ but the statement of facts stated in the compromise cannot be impugned save for fraud or the like.¹⁰ An application under this rule to withdraw a pending proceeding for execution and to institute another at some future time is not a step in aid of execution.¹¹

Practice.—No order should be passed without notice to the opposite party.¹² As a rule of practice, the other side should be served with due notice of the application for leave when it is made after the notice of the day fixed for hearing has been issued.¹³

Tenancy Act.—The provisions of this rule are not affected by s. 37 of Act VIII of 1885.

Stamp on application.—See *Reference*, 8 Mad., 15.

¹ *Doucett v. Wise*, (1861) 1 W. R., 322; and see the form in *Gregory v. Dooley Chand*, (1870) 14 W. R., O. J., App., 17.

² *Banwari Das v. Muhammad*, (1887) 9 All., 690.

³ *Rajib Sarkhel v. Nilmonce Sing Deo*, (1873) 20 W. R., 410.

⁴ *Hali Baksh v. Inam Baksh*, (1876) 1 All., 324. See also, *London, Bombay and Mediterranean Bank v. Burjorji*, (1885) 9 Bom., 316.

⁵ *Kamini Kant Roy v. Ram Nath Chuckerbutty*, (1891) 21 Cal., 263; *Gopal Chandra v. Purna Chandra*, (1899) 4 Cal. W. N., 110.

⁶ *Behari Lal v. Biran Mai*, (1895) 17 All., 53.

⁷ *Satyabhamabai v. Ganesh*, (1905) 29 Bom., 13.

⁸ *Vythilinga v. Vijayathammak*, (1893) 6 Mad., 42.

⁹ *Patloji v. Ganu*, (1891) 15 Bom., 370; *Chudasama v. Mahani*, (1891) 16 Bom., 243.

¹⁰ *Nilakandan v. Padmanabhai*, (1891) 14 Mad., 153; affirmed in, *Chera Kunnoth v. Vengunat*, (1891) 18 Mad., 1.

¹¹ *Tarak Chunder Sen v. Gyanada Sundari*, (1896) 23 Cal., 817.

¹² *Kalra Singh v. Lekhraj Singh*, (1884) 6 All., 211; *Master Dehee Pershad v. Baldeo*, (1873) 5 All. H. C., 116.

¹³ *Kareem Bee v. Begum*, (1866) 3 Mad. H. C., 363.

Limitation—Where an appeal is allowed to be withdrawn after the respondent has filed objection, this by itself is not a substituted rule of limitation for the period of appeal in favour of the respondent desisting to appeal.

2. In any fresh suit instituted on permission granted under the last preceding rule, the plaintiff shall be bound by the law of limitation in the same manner as if the first suit had not been instituted.

Act XIV of 1882, sect. 374

This rule applies to H. C. and Prov. S. C. C.

This rule applies to execution-proceedings,* not suit.

The parties to a suit executed a written agreement, which was duly recorded, whereby the plaintiff agreed to withdraw the suit and accept, by way of purchase, the property of the defendant specified in the agreement, in adjustment of the suit. The agreement was not recorded. Plaintiff proceeded with his suit, obtained a decree, and sold the property and more in execution. Defendant appealed, but his appeal was not a final adjudge. Defendant proceeded with Defendant dismissed under s. 2 of 1 of the sale of the property not mentioned in the agreement and it was held that he was entitled to recover.⁹

The result of the rule is that limitation applies as if the second suit were the first.⁹

1. *See also* 10 All. 211, *Jogeshindoo v. Jee Thakur v. Niranjan Chatterji*, *Chandhi*, (1891) 10 All. 191. It does lie *Ganga Ram v. Ramsthanee Satyabhatmal v.*

- * *Abul Hasan v. Kashi Sahu*, (1899) 4 Cal. W. N. 11. See also *Chunder Chunder v. Thakoor Dass*, (1876) 23 W. R. 215; *Ham Kanyo v. Haras Chander*, 17 W. R. 229; *Aladal Hassan v. Kasi Sahu*, (1901) 27 Cal. 302.
- * *Dick v. Dick*, (1893) 15 All. 169.
- * *Tirupati v. Muttu*, (1888) 11 Mad. 322.
- * *Gour Hari v. Pran Nath*, (1892) 12 C. L. R. 305.
- * *Sarju Prasad v. Sita Ram*, (1888) 10 All. 71.
- * *Tarachand Megraj v. Kashinath*, (1886) 10 Bom. 62.
- * *Thota Venkatachellamasami u. Kristnasawmy*, (1874) 8 Mad. H. C., 1.
- * *Varajlal v. Shameshwar*, (1903) 29 Bom. 219; 7 Bom. L. R., 90.

3. Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the suit.

Act XIV of 1882, sect. 375.

This rule applies to H. C. and Prov. S. C.

Where it is proved—These words are new and recognize the power of the Court to inquire into and record a disputed compromise.¹

Mortgage—This rule cannot be extended to proceedings held under s. 83 of Act IV of 1882.² This rule is intended to meet cases where the parties having agreed to compromise subsequently fall out. The original Court has power to frame an additional issue to decide whether a lawful compromise has been effected between the parties subsequent to the institution of the suit.³

Bengal Tenancy Act—This rule does not apply to an application under Sect. 93 of this act, and a manager cannot be appointed by consent without the Court finding that it is necessary.⁴

Indian Divorce Act—As to compromise in a suit for dissolution of marriage under the Indian Divorce Act, IV of 1869, see.⁵

Probate.—No grant of probate can be made merely on the consent of parties.⁶

When complete—The *Sudder Dewany* held that, before deeds of adjustment, withdrawal of claim, or the like, which may have been filed in Court by a

whether the question is decided on motion or in a suit, the order is not void.¹¹ When the parties referred the division of certain properties to arbitrators and an award was made by them, but without a reference to them by the Court, *held*, that an award could be recorded

¹ *Samibai v. Premji Pragji*, (1896) 20 Bom., 504.

² *Tatayya v. Pichayya*, (1890) 13 Mad., 316.

³ *Appasami Nayakan v. Varadachari*, (1896) 19 Mad., 419.

⁴ *Kali v. Parbati*, (1906) 4 Calc. L. J., 561.

⁵ *Culley v. Culley*, (1888) 10 All., 559.

⁶ *Moumohini Gulia v. Banga Chandra Das*, (1903) 8 Calc. W. N., 197.

⁷ *Mehmedo Alee Khan, S. D., Sum. Decis.*, May 22nd, 1851, p. 381.

⁸ *Harnundari v. Kumar Dinkhnessur*, (1885) 11 Calc., 250; and see, *Bandhu Bhogat v. Shah Muhammad*, (1892) 14 All., 330.

⁹ *Ruttonsey Lalji v. Poribai*, (1883) 7 Bom., 501; *Goculdas Manufacturing Coy. v. Scott*, (1892) 16 Bom., 202; *Karuppin v. Ramasami*, (1885) 8 Mad., 492; *Appasami v. Mankam*, (1886) 9 Mad., 103.

¹⁰ *Profodurlal v. Smdia v. Ramanath Ghose*, (1897) 21 Calc., 608; 1 Calc. W. N. 597.

¹¹ *Gilbert v. Indian*, (1879) 9 C. D., 239.

and acted on under this rule as an agreement adjusting the suit, provided it was a lawful one.¹

Terms of rule imperative—The terms of the rule are imperative and a Court cannot refuse to record a lawful agreement of compromise and to pass a decree in accordance therewith, merely because in its view it is too favourable to one of the parties.²

How carried out—When a suit is compromised, the compromise ought to be carried out by proper deeds, and filed in Court, especially where infants are concerned, so as to have the assent of the Court at the time.³ The Court will then pass a decree so far as it relates to the suit, and such decree will be final, and must be set aside before any suit can be brought on the original cause of action. Even a compromise out of Court must be considered as superseding all former rights of suit, and to establish the deed of compromise as the only basis of right for the future.⁴ and a compromise may be specifically enforced, there being nothing in s. 22 of the Specific Relief Act which may stand in the way.⁵ Once entered in the decree, the remedy is by execution, and not by a new suit;⁶ and the parties cannot revert to their original right by the non-performance of its terms.⁷ But the decree must be in accordance with the compromise.⁸ When the parties to a suit entered into a compromise not only with regard to the property in dispute, but with regard to another property, it was held that there was nothing to prevent the compromise being enforced in a fresh suit.⁹ A consent decree upon a compromise will not be granted unless the suit be entered in the cause list of the Court.¹⁰

By consent of the parties and the leave of the Court, a suit may be amended to cover an increased claim, and there is nothing in the law which prevents the parties to a suit enlarging by consent or compromise the original claim, and getting or allowing a decree for a greater amount of money or land than that originally asked for.¹¹

Whole or any part—Where the compromise is single, and embodies a new contract much wider in its scope than the adjustment of the claim in suit, the Judge is not bound to enforce it under this rule.¹²

agreement to be recorded and make a decree in accordance therewith, even if one of the parties to the agreement object.¹⁴

¹ *Lakshimanna Chetti v Chinnathambi Chetti*, (1901) 24 Mad., 326; *Pragdas v. Girdhardas*, (1902) 26 Bom., 76.

² *Motiram v. Yesu*, (1898) 22 Bom., 238.

³ *Abdool Ali v. Mozuffet Hossein*, (1871) 16 W. R., (P. C.), 22.

⁴ *Ameer Begum v. Noor Begum*, (1866) 1 Agra, F. B., 1; *Bishnu Coomar v. Joy Harish*, (1865) 2 W. R., 209.

⁵ *Shib Lal v. Collector of Bareilly*, (1894) 16 All., 423.

⁶ *Luckee Narain v. Ram Mohun Doss*, (1870) 13 W. R., 151; 4 B. L. R., A. C., 207.

⁷ *Ram Sihal v. Dhunook Dharee*, (1861) 1 W. R., 266.

⁸ *Mulleeka v. Jameela*, 14 R., I. A., Sup. Vol., 144; (1873) 11 B. L. R., 375.

⁹ *Gupta Narain Das v. Bijai Sandara Debba*, (1898) 2 Cal. W. N., 663. Followed in *Parsanni v. Narain* (1905) A. W. N., 123.

¹⁰ *Pell v. Valetta*, (1879) 5 C. L. R., 464.

¹¹ *Mohibullah v. Imami*, (1887) 9 All., 229.

¹² *Fajileh Ali v. Kimsrudha*, (1886) 13 Cal., 170. See, however, the case of *Appasani v. Minskim*, (1886) 9 Mad., 103, and "COMPROMISE SHOULD NOT DEAL WITH MATTERS OUTSIDE SUIT," p. 847, *infra*.

¹³ *Sankaravadivammal v. Kumarasamy*, (1885) 8 Mad., 473.

¹⁴ *Brojodurlabh v. Ramanath Ghose*, (1897) 24 Cal., 908; 1 Cal. W. N., 597.

decree is set aside on the ground of fraud and collusion, the parties are not relegated to their original position.¹ But the effect of setting aside a compromise is to remit both parties to their original rights.²

Principle:—For principles upon which the Court acts in setting aside a compromise, see ³

Interpretation of compromise.⁴—It must be such an agreement as a Court can pass a decree upon and there is nothing more to be done.⁵ When in a suit relating to the validity of an adoption a compromise was made that the plaintiff should succeed to the joint estate in a suit as the adopted son of the elder of the two brothers, and that the younger brother should continue to enjoy two specified villages previously allotted for his maintenance, *held*, that this compromise did not effect a partition so as to alter the course of descent.⁶ The auction purchaser of a holding was held liable for rent under the terms of the *saleenath* executed by the judgment debtor irrespective of any question as to whether the quantity of land there mentioned was correct or not.⁷ Where a consent decree was made in a mortgage suit and it provided that on failure of the defendants to pay a certain sum of money by a certain date, the plaintiff would be entitled to the entire amount claimed, and that the plaintiff would appraise the value of any portion of the mortgaged properties which might be necessary for the defendant to sell in order to raise the fixed amount agreed upon by him it was held that, as plaintiff did not appraise the properties when required by the defendants to do so, he was debarred from claiming more than the amount the defendants agreed to pay within the fixed date.⁸ When a decree is passed by consent of parties, the question whether the compromise-decree was valid, cannot be gone into in an appeal against that decree.⁹

Registration.—An agreement of union not having been registered, its stipulations were held to be ineffectual to create in favour of the appellant any right, title or interest to the lands in dispute, but a *razinama* in so far as it was submitted to and acted upon judicially by the Court was in itself a step of judicial procedure not requiring registration, and any order pronounced in terms of it constituted *res judicata* binding both parties to the appeal.¹⁰

Compromise should not deal with matters outside the suit.—In a suit for the partition of a zamindari, the parties effected a compromise in writing which provided *inter alia* for certain reliefs which would only have been given by the Court in a suit based upon a different cause of action. The compromise was presented in Court, and decree was passed embodying the whole of its terms, *held*, (1) that an appeal lay against the decree; (2) that the decree should have been passed in the terms of such of the provisions agreed upon as related to the relief which the Court had given in the suit.¹¹ A decree should not be passed in terms of a compromise where the latter does not give to the plaintiff any of the reliefs claimed in the suit and deals with matters not forming the subject-matter of the suit. Upon such a compromise being presented, the Court should inform the parties that its terms cannot be embodied

¹ *Bhimaji v. Rakhmabai*, (1886) 10 Bom., 339.

² *Khajooroonmessa v. Rowshan Jehan*, (1877) 2 Cal., 134; 26 W. R., 36; L. R., 3 I. A., 201.

³ *Ram Niranjan v. Prayag Singh*, (1882) 8 Cal., 138.

⁴ *Chowdhry Chintaman v. Nowlukho*, (1874) L. R., 2 I. A., 273.

⁵ *Muhammad v. Cheda*, (1892) 14 All., 141.

⁶ *Viravara Thodhramal v. Surja Narayana*, (1894) L. R., 21 I. A., 118.

⁷ *Satyendra Nath v. Nilkantha*, (1894) 21 Cal., 383.

⁸ *Harendra Lal v. Moharam Das*, (1900) 5 Cal. W. N., 536.

⁹ *Biraj Mohini v. Chintamani*, (1900) 5 Cal. W. N., 877.

¹⁰ *Pranil Ance v. Lakshmi Ance*, (1898) 3 Cal. W. N., 485; 22 Mad., 503; L. R., 26 I. A., 101.

¹¹ *Venkatappa v. Thimma Nayanam*, (1895) 18 Mad., 410. See also, *Purna v.*

in a decree, and if it appears that the compromise was arrived at conditionally upon its being incorporated in the decree, the suit should be proceeded with ;¹ but a decree passed on a compromise cannot be regarded as *ultra vires*, simply because it goes beyond the subject-matter of the suit and contains other conditions. The other conditions, if they are the subject-matter of the suit, must be independent of it, they may be regarde

the parties, and community that the effect of the decree be enforced by a fresh suit decree²

Appeal—An appeal lies against an order of a District Judge passed on a dispute as to whether a compromise had in fact been arrived at.⁴

Proceedings in execution of decrees not affected

4. Nothing in this Order shall apply to any proceedings in execution of a decree or order.

Act XIV of 1882, sect. 375A.

This rule applies to H. C. and Prov S. C. C.

¹ *Raghunatha Udayana v. Thyndavaraya*, (1899) 22 Mad., 214.

² *Puroa Chandra v. Nil Madhub*, (1900) 3 Cal. W. N., 483.

³ *Hari Raghunath v. Krishnaji*, (1897) 19 Bom. 510. See "How carried out," p. 813, *supra*.

⁴ *Siddhartha Sourayajpal v. Parasurathan Sourayajpal*, (1900) 23 Mad., 101.

ORDER XXIV.

Payment into Court.

1. The defendant in any suit to recover a debt or damages may, at any stage of the suit, deposit in Court such sum of money as he considers a satisfaction in full of his claim.

Deposit by defendant of amount in satisfaction of claim.

Act XIV of 1882, sect 375

This rule applies to H. C. and Prov. S. C. C.

In regard to denying the plaintiff's cause of action and pleading payment into Court, see ¹

As to when a Court will, in a suit for account, direct payment into Court, see ²

Payment into Court — As to what amounts to such a payment, see ³

2 Notice of the deposit shall be given through the Court by the defendant to the plaintiff, and the amount of the deposit shall (unless the Court otherwise directs) be paid to the plaintiff on his application.

Notice of deposit.

Act XIV of 1882, sect 377

This rule applies to H. C. and Prov. S. C. C.

For form, see App. H, No 5

It would appear as if the money should be paid to the plaintiff's agent or pleader, unless the Court requires his attendance in person.

When there are conflicting claims, an order under this rule is necessary ⁴. A plaintiff is entitled to draw out the deposit and prosecute his suit for the balance ⁵.

Effect of deposit money being paid to a third person. — In execution of a decree against the defendant, an order was made directing the defendant to pay into Court a certain sum of money. Both parties appealed against this order, but pending the appeals the defendant paid the amount into Court. The plaintiff refused to take this amount and the Court subsequently ordered the money to be returned to the defendant. But before this could be done, the money was attached by a third person in execution of a decree against the defendant and was paid to him. The plaintiff's appeal being dismissed, he executed the former order, and the Court directed the defendant to pay the amount. *Held*, that the order was wrong. The plaintiff's refusal to receive the money out of Court did not justify it in treating the money as defendant's.

¹ *Bardan v. Greenwood*, (1878) 3 E.C. D., 251.

² *London Hydraulic v. Lord*, (1878) 3 E.C. D., 84.

³ *Gajdhur Paur v. Nook Paur*, (1882) 8 Cal. 525; *Chinnappa v. S. S.* (1884) 7 Mad., 211.

⁴ *Abdul v. Noor Mahomed*, (1892) 16 Bom., 141.

⁵ *Drachman v. Lord*, (1898) 2 Cal. W. N., 101; 25 Cal. 2d 437.

in a decree, and if it appears that the compromise was arrived at conditionally upon its being incorporated in the decree, the suit should be proceeded with;¹ but a decree passed on a compromise cannot be regarded as *ultra vires*, simply because it goes beyond the subject-matter of the suit and contains other conditions. The other conditions, if they are the consideration for the compromise of the subject-matter of the suit, must be incorporated in the decree, but if they are independent of it, they may be regarded as surplusage.² A decree for partition having been compromised by an agreement made by the parties, and communicated to the Court which passed the decree, *held*, that the effect of the decree was extinguished by the agreement which could only be enforced by a fresh suit and not by an application for execution of the former decree.³

Appeal—An appeal lies against an order of a District Judge passed on a dispute as to whether a compromise had in fact been arrived at.⁴

Proceedings in execution of decrees not affected.

4. Nothing in this Order shall apply to any proceedings in execution of a decree or order.

Act XIV of 1883, sect. 375A.

This rule applies to H. C. and Prov S C C

¹ *Raghunatha Udayana v. Thindavaraya*, (1899) 22 Mad., 214.

² *Purna Chandra v. Nil Madhuk*, (1950) 5 Cal. W. N., 493.

³ *Hari Raghunath v. Krishnasji*, (1897) 19 Bom. 310. See "How carried out," p. 815, *supra*.

⁴ *Sindharani Sourayajipal v. Paramathan Sourayajipal*, (1900) 23 Mad., 101.

and the Court shall pronounce judgment accordingly; and, in directing by whom the costs of each party are to be paid, the Court shall consider which of the parties is most to blame for the litigation.

Illustrations.

(a) A owes B Rs 100 B sues A for the amount, having made no demand for payment and having no reason to believe that the delay caused by making a demand would place him at a disadvantage. On the plaint being filed, A pays the money into Court. B accepts it in full satisfaction of his claim, but the Court should not allow him any costs, the litigation being presumably groundless on his part.

(b) B sues A under the circumstances mentioned in illustration (a) *On the plaint being filed, A disputes the claim. Afterwards A pays the money into Court.* B accepts it in full satisfaction of his claim. The Court should also give B his costs of suit, A's conduct having shown that the litigation was necessary.

(c) A owes B Rs 100, and is willing to pay him that sum without suit. B claims Rs. 150 and sues A for that amount. On the plaint being filed A pays Rs 100 into Court and disputes only his liability to pay the remaining Rs. 50 B accepts the Rs 100 in full satisfaction of his claim. The Court should order him to pay A's costs

Act XIV of 1882, sect. 379.

This rule applies to H. C. and Prov S. C. C.

In an action to recover Rs 25,378, defendants tendered Rs. 14,619 and on settlement of issues paid in by leave of the Court Rs. 17,645 which the plaintiff accepted. *held*, plaintiff was entitled to his costs down to the settlement of issues.¹ In a suit which the plaintiff brought to restrain the defendant from obstructing his ancient windows and for damages, the defendant paid Rs. 200 into Court as damages. The Court held the plaintiffs' windows to be ancient and the payment of damages sufficient. It, therefore, ordered the defendant to pay all the plaintiffs' costs up to date of payment, and three-fourths of their subsequent costs, while the plaintiffs were to pay one-fourth of the defendants' subsequent costs. The defendant appealed. *Held*, that the suit not being one to recover a debt or damages, this rule did not apply and that the Court had discretion to apportion the costs, and the appellate Court would not interfere.²

¹ Ardesir Limji v. Sorabji, (1862) 1 Bom. H. C., 70.

² Luxumon Nana Patil v. Moroba Ramerishna, (1907) 21 Bom., 502. See also note to r. 2, *ante*.

ORDER XXV.

Security for Costs.

1. (1) Where, at any stage of a suit, it appears to the Court that a sole plaintiff is, or (when there are more plaintiffs than one) that all the plaintiffs are, residing out of British India, and that such plaintiff does not, or that no one of such plaintiffs does, possess any sufficient immovable property within British India other than the property in suit, the Court may, either of its own motion or on the application of any defendant, order the plaintiff or plaintiffs, within a time fixed by it, to give security for the payment of all costs incurred and likely to be incurred by any defendant.

(2) Whoever leaves British India under such circumstances as to afford reasonable probability that he will not be forthcoming when he may be called upon to pay costs shall be deemed to be residing out of British India within the meaning of rule (1).

(3) On the application of any defendant in a suit for the payment of money, in which the plaintiff is a woman, the Court may at any stage of the suit make a like order if satisfied that such plaintiff does not possess any sufficient immovable property within British India.

Act XIV of 1882, sects. 380, 382.

This rule applies to H. C. and Prov. S. C. C.

"May."—The exercise of the power conferred on the Court by discretionary.¹

Immovable property.—Leasehold is immovable property within the meaning of this rule.²

Suit for money.—A suit for possession of ornaments and other articles in the alternative their value is within the rule.³

Pauper.—No security should be taken from a pauper within the

¹ *Degumbari Debi v. Aushootosh Banerjee*, (1890) 17 Cal., 613; *P. the goods of*, (1891) 21 Cal., 832; *Shama Sundary v. Rash B.* 3 Cal. W. N., 753. See, *Bibi Fatima v. Aga Mahomed*, (1905) 14 Cal., 495.

² *Ullman v. Justices of the Peace*, (1871) 7 D. L. R., App., 60.

³ *Degumbari Debi v. Aushootosh Banerjee*, (1890) 17 Cal., 610.

⁴ *Musammil Hafizau v. Abdul Karim*, (1903) 7 Cal. L. J., 312.

The mere presence in British territory at the time of suit will not get rid of the liability to give security, and in one case a residence of four months, with a statement that the residence was intended to be permanent, was considered insufficient.¹

Foreign territory—The inhabitant of a foreign territory, such as Hill Tipperah must give security, even though the defendant is also a resident in foreign territory.²

Where an appellant in bankruptcy failed to give security for costs, and the respondent, without previously writing to appellant's solicitors, gave notice of motion to dismiss the appeal, and subsequently the security was given, it was held that the appellant was liable for the costs of the motion.³

If plaintiff is suing for another, and is not the real party, he can be called on to give security for costs.⁴ The heirs of a Hindu testator suing the trustees of a religious trust created by the testator, but in which the heirs have no interest should give security for costs.⁵ When the plaintiff was alleged to be an undischarged insolvent, the Court ordered him to give security for the defendants' costs.⁶

For the proper mode of proceeding on a security bond, see *Poyner Bibee v. Nujjo*.⁷ Except in exceptional cases neither an infant female plaintiff nor her next friend should be called on to give security for costs.⁸

Letters Patent appeal—An order under this rule requiring a plaintiff to give security for the costs of suit, is a judgment within the meaning of s. 13 of the Letters Patent, and an appeal lies therefrom.⁹

British India—See note to sect. 1 and Act X of 1897, s. 3 (7).

When a plaintiff leaves British India before the case is decided, the defendant should apply to the Court under this rule to take security for costs,¹⁰ and then, unless there is a reasonable probability that he will be forthcoming whenever he may be called on to pay costs, or, that he has sufficient immoveable property in British India to meet them, he must give security.

As to security in appeals, see O XLI, r. 10.

2 (1) In the event of such security not being furnished within the time fixed, the Court shall make an order dismissing the suit unless the plaintiff or plaintiffs are permitted to withdraw therefrom.

(2) Where a suit is dismissed under this rule, the plaintiff may apply for an order to set the dismissal aside, and, if it is proved to the satisfaction of the Court that he

¹ *Mahomed Shudli v. Laklin*, (1879) 3 Bom., 227; compare, *Goswami v. Govardhan-hiji*, (1890) 14 Bom., 341.

² *Koroona Moyee v. Ooms Churn*, (1869) 12 W. R., 463.

³ *Isacs, ex parte*, 111 C. D. 1; and see *Cartippra Mining Coy., in re*, (1881) 19 C. D. 437; as to the case of a trustee in bankruptcy, see *Looley v. Trustee v. Whetham*, (1881) 23 C. D. 42.

⁴ *Assenoola v. Solomon*, (1881) 14 Cal., 333.

⁵ *Brojomohun Dass v. Harrolokl Dass*, (1880) 6 C. L. R., 58.

⁶ *Bominji v. Nusservanji*, (1903) 27 Bom., 100.

⁷ *Poyner Bibee v. Nujjo*, (1880) 5 Cal., 437.

⁸ *Porebai v. Devji Meghji*, (1899) 23 Bom., 100.

⁹ *Seshagori Row v. A-kur Jung*, (1903) 26 Mad., 512.

¹⁰ *Cal.*, and *S. E. Ry. Co., in re*, (1867) 3 W. R., 217.

ORDER XXV.

Security for Costs.

1. (1) Where, at any stage of a suit, it appears to the

When security for costs may be required from plaintiff.

Court that a sole plaintiff is, or (when there are more plaintiffs than one) that all the plaintiffs are, residing out of British India, and that such plaintiff does not, or that no one of such plaintiffs does, possess any sufficient immoveable property within British India other than the property in suit, the Court may, either of its own motion or on the application of any defendant, order the plaintiff or plaintiffs, within a time fixed by it, to give security for the payment of all costs incurred and likely to be incurred by any defendant.

(2) Whoever leaves British India under such circum-

Residence out of British India. stances as to afford reasonable probability that he will not be forthcoming when-

over he may be called upon to pay costs shall be deemed to be residing out of British India within the meaning of sub-rule (1).

(3) On the application of any defendant in a suit for the payment of money, in which the plaintiff is a woman, the Court may at any stage of the suit make a like order if it is satisfied that such plaintiff does not possess any sufficient immoveable property within British India.

Act XIV of 1882, sects 380, 382.

This rule applies to H. C. and Prov S. C. C.

"May"—The exercise of the power conferred on the Court by this rule is discretionary.¹

Immoveable property—Leasehold is immoveable property within the meaning of this rule.²

Suit for money.—A suit for possession of ornaments and other things or in the alternative their value is within the rule.³

Pauper—No security should be taken from a pauper within O. XXXIII.⁴

¹ Begumbari Datta v. Aushootosh Banerjee, (1890) 17 Cal., 613; Prem Chand, in the goods of, (1891) 21 Cal., 832; Shama Sundary v. Rash Behary, (1893) 3 Cal. W. N., 753. See, Bibi Fatima v. Aga Mahomed, (1905) 7 Bom. L. R., 495.

² Ullman v. Justices of the Peace, (1871) 7 B. L. R., App., 60.

³ Begumbari Datta v. Aushootosh Banerjee, (1890) 17 Cal., 610.

⁴ Muhammad Hassan v. Abdul Karim, (1908) 7 Cal. L. J., 312.

The mere presence in British territory at the time of suit will not get rid of the liability to give security, and in one case a residence of four months, with a statement that the residence was intended to be permanent, was considered insufficient.¹

Foreign territory—The inhabitant of a foreign territory, such as Hill Tipperah must give security, even though the defendant is also a resident in foreign territory.²

Where an appellant in bankruptcy failed to give security for costs, and the respondent, without previously writing to appellant's solicitors, gave notice of motion to dismiss the appeal, and subsequently the security was given, it was held that the appellant was liable for the costs of the motion.³

If plaintiff is suing for another, and is not the real party, he can be called on to give security for costs.⁴ The heirs of a Hindu testator suing the trustees such the heirs have no interest was alleged to be an undisputed fact, and the plaintiff was ordered to give security for the defendants' costs.⁵

For the proper mode of proceeding on a security bond, see, *Paynor Bibee v. Nujoo*.⁷ Except in exceptional cases neither an infant female plaintiff nor her next friend should be called on to give security for costs.⁶

Letters Patent appeal—An order under this rule requiring a plaintiff to give security for the costs of suit, is a judgment within the meaning of s. 15 of the Letters Patent, and an appeal lies therefrom.⁸

British India—See note to sect. 1 and Act X of 1897, s. 3 (7).

When a plaintiff leaves British India before the case is decided, the defendant should apply to the Court under this rule to take security for costs,¹⁰ and then, unless there is a reasonable probability that he will be forthcoming whenever he may be called on to pay costs, or, that he has sufficient immoveable property in British India to meet them, he must give security.

As to security in appeals, see O. XLI, r. 10.

2 (1) In the event of such security not being furnished within the time fixed, the Court shall make an order dismissing the suit unless the plaintiff or plaintiffs are permitted to withdraw therefrom.

(2) Where a suit is dismissed under this rule, the plaintiff may apply for an order to set the dismissal aside, and, if it is proved to the satisfaction of the Court that he

¹ *Mahomed Shuffli v. Laldin*, (1879) 3 Bom., 227; compare, *Goswami v. Govardhanlalji*, (1890) 14 Bom., 541.

² *Koroona Moyce v. Ooma Chorn*, (1869) 12 W. R., 463.

³ *Isaacs, ex parte*, 10 C. D., 1; and see *Cartapara Mining Coy., in re*, (1881) 19 C. D., 437, as to the case of a trustee in bankruptcy, see *Booley's Trustee v. Whetham*, (1884) 23 C. D., 42.

⁴ *Assenoolia v. Solomon*, (1881) 14 Calc., 333.

⁵ *Brojomohun Dass v. Hurnololl Dass*, (1880) 6 C. L. R., 53.

⁶ *Bomanji v. Nusserwanji*, (1903) 27 Bom., 100.

⁷ *Paynor Bibee v. Nujoo*, (1880) 5 Calc., 437.

⁸ *Porebai v. Devji Meghy*, (1899) 23 Bom., 100.

⁹ *Seshagori Row v. Askur Jung*, (1903) 26 Mad., 302.

¹⁰ Calc. and S. E. Ry. Co., *in re*, (1867) 3 W. R., 217.

ORDER XXV.

Security for Costs.

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- (2) Whoever leaves British India under such circumstances as to afford reasonable probability that he will not be forthcoming when-
Residence out of British India.
 over he may be called upon to pay costs shall be deemed to be residing out of British India.
 rule (1) -----

¹ *Immun v. Deva Rai*, (1882) 5 Mad., 265.

² *Soorj Mukhi, ex re*, (1877) 2 Cal., 272; *Barjore v. Bhagana*, (1883) 10 Cal., 557; L. R., 11 I. A., 7.

³ *Rungray v. Sidhi Mahomed*, (1882) 6 Bom., 482.

⁴ *Hariram v. Lalbal*, (1902) 26 Bom., 637, See O. IX, r. 9.

⁵ *Williams v. Brown*, (1886) 8 All., 108.

The mere presence in British territory at the time of suit will not get rid of the liability to give security, and in one case a residence of four months, with a statement that the residence was intended to be permanent, was considered insufficient.¹

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Where an appellant in bankruptcy failed to give security for costs, and the respondent, without previously writing to appellant's solicitors, gave notice of motion to dismiss the appeal, and subsequently the security was given, it was held that the appellant was liable for the costs of the motion.³

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British India—See note to sect. 1 and Act X of 1897, s. 3 (7)

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When and where not granted—A commission will be granted as a matter of course to examine a material witness, if any way ill or infirm;⁸ even if the cause is on the peremptory board of the day, if the issuing of it is not calculated to prejudice the defendants or subject them to loss or inconvenience;⁹ and the costs are generally costs in the cause;⁷ but a commission will not issue to examine a party at his own instance and

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of witnesses residing beyond the British territories taken under a commission failed owing to circumstances beyond his control, a subsequent application to

¹ *Burney v. Eyre*, (1862-3) 1 Hydr. 69; see also, *Akikunnissa v. Rup Lal*, (1894) 25 Calc. 807; 2 Calc. W. N., 566.

² *Huree Dass v. Meer Moazzum*, (1871) 15 W. R. 447; 8 B. L. R., App., 16. See also, *Mowji v. Nemchand*, (1899) 21 Bom. 626.

³ *Binodini v. Kalachand*, (1901) 5 Calc. W. N., 1003.

⁴ *Mohesh Chunder v. Manick Lal*, (1893) 23 Calc. 639; 3 Calc. W. N., 751.

⁵ *Huree Dass v. Meer Moazzum*, (1871) 15 W. R. 417.

⁶ *Janssen v. Dundas*, (1862-3) 1 Hydr. 269.

⁷ *Gahan v. Owen*, Coryt, 11.

⁸ *Doucett v. Wiss*, (1864) 1 W. R., 322.

⁹ *Nusrat Banoo v. Mahomed*, (1872) 18 W. R., 230; (see *parda la lies*,) p. 621, ante.

¹⁰ *Beenodeen*, in re, 2 Hydr. 152.

¹¹ *Marshall v. Chienc*, 2 Tay and Bell, 191.

ORDER XXV

Security for Costs.

1. (1) Where, at any stage of a suit, it appears to the Court that a sole plaintiff is, or (when there are more plaintiffs than one) that all the plaintiffs are, residing out of British India, and that such plaintiff does not, or that no one of such plaintiffs does, possess any sufficient immovable property within British India other than the property in suit, the Court may, either of its own motion or on the application of any defendant, order the plaintiff or plaintiffs, within a time fixed by it, to give security for the payment of all costs incurred and likely to be incurred by any defendant.

(2) Whoever leaves British India under such circumstances as to afford reasonable probability that he will not be forthcoming whenever he may be called upon to pay costs shall be deemed to be residing out of British India.

When security for costs may be required from plaintiff.

(a) any person resident beyond the local limits of its jurisdiction ;

(b) any person who is about to leave such limits before the date on which he is required to be examined in Court ; and

(c) any civil or military officer of the Government who cannot, in the opinion of the Court, attend without detriment to the public service.

(2) Such commission may be issued to any Court, not being a High Court, within the local limits of whose

* *Mullak Ali v. Meher Banno*, (1867) 8 W. R. 448. As to the inherent jurisdiction of a Court of Equity in India to issue a commission to take evidence *de bene esse*, see *Edwards v. Muller*, note, (1870) 5 B. L. R., 253.

* *Veerabudran v. Nataraja* (1905) 24 Mad., 24 ; and see, *Somasundram v. Manicka* (1908) 31 Mad. 60.

* *Gopal Chunder v. Kurnoolhar*, (1867) 7 W. R., 319.

* *Rabibhai v. Rahimbi* (1905) 7 Bom. L. R., 569.

* *Tarucknath v. Gouree Churn* (1865) 3 W. R., 147.

ORDER XXVI.

COMMISSIONS.

Commissions to examine witnesses

1 Any Court may in any suit issue a commission for the examination on interrogatories or otherwise of any person resident within the local limits of its jurisdiction who is exempted under this Code from attending the Court or who is from sickness or infirmity unable to attend it.

Cases in which Court may issue commission to examine witness

Act XIV of 1882, s 383

This rule applies to H. C. and Prov. S. C. C.

For form, see App. H, No. 7.

Discretion—The Court has a discretion to grant or refuse a commission, and the question is whether a sufficient case has been made out;¹ but it is not a fair exercise of that discretion to refuse because the Judge does not exactly see the useful end that might be obtained by examining the witnesses.² A *pardanishin* lady ought to be examined on commission, even though an allegation of immorality is made against her;³ or although she may have appeared in public before.⁴

Refusal, and where not granted—A commission will be granted almost apply to the High Court examine a material witness if any want of information.⁵ High Court, General Letter, No. 2, February 27th, 1901.

5. Where any Court to which application is made for the issue of a commission for the examination of a person residing at any place not within British India is satisfied that the evidence of such person is necessary, the Court may issue such commission or a letter of request.

Commission or Request to examine witness not within British India

Act XIV of 1882, section 387, cf. R. S. O. 37, r. 6a

This rule applies to H. C. and Prov. S. C. C.⁷

If witnesses are examined under oath or affirmation, as required by the commission, the evidence will be admissible without the consent of the parties upon proof being given of the facts required by r. 8 to be proved in order to

¹ *Burney v Eyre*, (1862 3) 1 Hyde, 63.

² *Hurco Dass v. Meer Moazzun*, (1871) 15 W. R., 447.

³ *Amrith Nath v. Dhunput Singh*, (1873) 20 W. R., 233.

⁴ *Doucett v. Wise*, (1866) 1 Ind. Jur., N. S., 337.

⁵ *Tarnacknath v. Oonree Churn*, (1865) 3 W. R., 137.

⁶ *Gopal Chunder v. Kurnodhar*, (1867) 7 W. R., 349.

⁷ *Kadambhul Dass v. Kurnudhul Dass*, (1903) 30 Cal., 934; 7 Cal.

Remand.—In appeal, the District Judge reversed the decision of the Subordinate Judge, remanded the case and ordered a fresh local enquiry by the Munsif, but as he was unable to go, the Judge appointed his Serishtadar. The Subordinate Judge acted on his report. On appeal to the Judge the plaintiff objected to the report on the ground of partiality. It was held he could not afterwards object to the report on the ground that the judge had no authority to remand the case.¹

Ameens.—The Civil Court Ameens Act, XII of 1856, has been repealed by Act II of 1899, B. C.

10. (1) The Commissioner, after such local inspection as he deems necessary and after reducing to writing the evidence taken by him, shall return such evidence, together with his report in writing signed by him, to the Court.

(2) The report of the Commissioner and the evidence taken by him (but not the evidence without the report) shall be evidence in the suit and shall form part of the record; but the Court or, with the permission of the Court, any of the parties to the suit, may examine the Commissioner personally in open Court touching any of the matters referred to him or mentioned in his report, or as to his report, or as to the manner in which he has made the investigation.

(3) Where the Court is for any reason dissatisfied with the proceedings of the Commissioner, it may direct such further inquiry to be made as it shall think fit.

Act XIV of 1832, sect. 393.

This rule applies to H. C. and Prov. S. C. C.

A day should be fixed for return of the Ameen's report and then for hearing objections to it.²

Evidence.—An Ameen's report, if the investigation has been completed,³ is evidence upon whatever materials it is based;⁴ without any specific documents corroborating his finding;⁵ in the suit in which it is made;⁶ but in it only;⁷ though the depositions are not attached;⁸ or, if attached, have been partly rejected as not taken on oath;⁹ or the commission has been granted without

¹ *Mahomed Anjob v. Gouripershad*, (1866) 6 W. R., 62.

² *Ram Narain v. Gobardhan Lall*, (1874) 21 W. R., 2.

³ *Kaler Dass v. Deb Narain*, (1870) 13 W. R., 412.

⁴ *Chunder Coomar Dutt v. Joy Chunder Dutt*, (1873) 19 W. R., 213; *Jannabee Chowdhran v. Collector of Mymensingh*, (1867) 9 W. R., 287; *Sheo Narain v. Bhodeh Singh*, (1869) 11 W. R., 424.

⁵ *Eshan Chunder v. Hurree Churn*, (1865) 2 W. R., 273.

⁶ *Savit Chandra v. C. Tector of Chittagong*, (1868) 2 D. L. R., App., 3.

⁷ *Dendubundhu v. Nistarini*, (1882) 12 C. L. R., 50.

⁸ *Chander Menon v. Nilambur*, (1867) 7 W. R., 43.

⁹ *Dale Gobind v. Channo* (1868) 19 W. R., 212; else, they also are admissible.—*Abdul Gannee v. Eshston*, (1874) 22 W. R., 350.

sufficient reason,¹ or irregularly,² or improperly,³ otherwise, if the Ameen has held the enquiry beyond it,⁴ or reported on a point not officers with regard to a right suit as to a right of way to prepar evidence⁵

Form part of the record—The report and deposition are to be taken as evidence in the case—not conclusive evidence—and form part of the record;⁷ and must be taken into consideration by the appellate Court;⁸ and unless any objection is raised to the report in the first Court or in the grounds of appeal, it should not be listened to.⁹

The value of the report depends upon the evidence on which it is founded.¹⁰ A Court may reject part and accept part.¹¹ If believed, it is sufficient to found a decree on,¹² unless the onus of proving possession within 12 years of the date of suit is on the plaintiff, in which case it is by itself insufficient to prove his possession.¹³ A Munsif's report of a local investigation, if not shown to be incorrect, should carry the greatest weight.¹⁴

Agreement—If the servants of all the parties present point out the same boundaries or starting point, these must be taken to be correct.¹⁵

Appeal: power of appellate Court—An appellate Court should not interfere with the result of a local enquiry except on clearly defined and sufficient grounds, which must be stated in its judgment;¹⁶ especially if it has been accepted by the first Court. Nor should a Court of first instance question the correctness of a map attached to a report, which is not impugned by either party;¹⁷ and the Ameen's report may be looked at to explain a map.¹⁸ If the Court finds the report deficient in any point, it can send for the Commissioner and examine him.¹⁹ On the other hand, the report should not be made the basis of a judgment to the total disregard of the other evidence on the record.²⁰

¹ *Shah Nulhoo v. Ghunessam*, (1867) 8 W. R., 267.

² *Umibica Churn v. Goluck Chunder*, (1868) 9 W. R., 596; *Rajnath v. Doorga*, (1869) 12 W. R., 136.

³ *Ramechurn v. Surahyt*, (1868) 9 W. R., 494; but see, *Ram Dhan v. Ram Monee*, (1874) 21 W. R., 280.

⁴ *Nidhoo Sircar v. Philippe*, (1869) 10 W. R., 153.

⁵ *Abdool Ali v. Mullick Sudder Joddeen*, (1870) 14 W. R., 493; *Doorga Churn v. Neem Chand*, (1875) 24 W. R., 203.

⁶ *Shitawa v. Bhimappa*, (1900) 24 Bom., 43.

⁷ *Azim v. Alumooldeen*, (1872) 17 W. R., 270; see also, *Ram Rukha v. Gobind Das*, (1871) 15 W. R., 291; but depositions without the report are inadmissible—*Deb Narain v. Kali Das*, (1870) 6 B. L. R., App. 70; 14 W. R., 397.

⁸ *Rajnath v. Doorga*, (1869) 12 W. R., 136.

⁹ *Seth Gujmul v. Chanhee*, (1874) L. R., 2 L. A., 34; but see, *Tweddie v. Poorno Chunder*, (1869) 12 W. R., 133.

¹⁰ *Issur Chunder v. Joogul Kishore*, (1874) 21 W. R., 281.

¹¹ *Poreash Nauth Mookerjee v. Martin*, (1864) 1 W. R., 93.

¹² *Sectaram v. Ram Narain*, (1866) 6 W. R., 51.

¹³ *Ameenuddeen v. Asgur Ah*, (1867) 8 W. R., 464.

¹⁴ *Wise v. Ameeroonnissa*, (1865) 3 W. R., 219.

¹⁵ *Hemmuni Singh v. Cauty*, (1890) 17 Cal., 304.

¹⁶ *Surut Soonduree v. Prosunno Coomar*, (1891) 15 W. R., P. C., 20; 6 B. L. R., 677; 13 Moo. L. A., 607; but see, *Protab Chunder v. Sarnomoyee*, (1873) 19 W. R., 361.

¹⁷ *Brijonath v. Lall Meah*, (1870) 14 W. R., 391.

¹⁸ *Mahomed Anwar v. Raj Chunder*, (1872) 17 W. R., 522.

¹⁹ *Sheo Dyal v. Hodgkinson*, (1875) 24 W. R., 342.

²⁰ *Bustee Sahoo v. Joo Narain*, (1875) 24 W. R., 339.

Remand—In appeal, the District Judge reversed the decision of the Subordinate Munsif, but the Subordinate objected to afterwards object to the report on the ground that the judge had no authority to remand the case.¹

Ameens—The Civil Court Ameens Act, XII of 1856, has been repealed by Act II of 1899, B. C.

10. (1) The Commissioner, after such local inspection as he deems necessary and after reducing to writing the evidence taken by him, shall return such evidence, together with his report in writing signed by him, to the Court.

(2) The report of the Commissioner and the evidence taken by him (but not the evidence without the report) shall be evidence in the suit and shall form part of the record; but the Court or, with the permission of the Court, any of the parties to the suit, may examine the Commissioner personally in open Court touching any of the matters referred to him or mentioned in his report, or as examined in person to his report, or as to the manner in which he has made the investigation.

(3) Where the Court is for any reason dissatisfied with the proceedings of the Commissioner, it may direct such further inquiry to be made as it shall think fit.

Act XIV of 1882, sect. 393

This rule applies to H. C. and Prov. S. C. C.

A day should be fixed for return of the Ameen's report and then for hearing objections to it.²

Evidence.—An Ameen's report, if the investigation has been completed,³ is evidence upon whatever materials it is based;⁴ without any specific documents corroborating his finding;⁵ in the suit in which it is made;⁶ but in it only;⁷ though the depositions are not attached;⁸ or, if attached, have been partly rejected as not taken on oath;⁹ or the commission has been granted without

¹ Mahomed Anjob v. Gourpershaud, (1868) 6 W. R., 62.

² Ram Narain v. Gobardhan Lal, (1874) 21 W. R., 2.

³ Kulee Dass v. Deb Narain, (1870) 13 W. R., 412.

⁴ Chunder Coomar Dutt v. Jny Chunder Dutt, (1873) 19 W. R., 213; Jannobee Chowdhrair v. Collector of Mymensingh, (1867) 8 W. R., 287; Sheo Narain v. Lakhoo Singh, (1869) 11 W. R., 424.

⁵ Fulan Chunder v. Hurree Churn, (1865) 2 W. R., 278.

⁶ Sarat Chandra v. Collector of Chittagong, (1868) 2 D. L. R., App., 3.

⁷ Benobandhu v. Nistarini, (1852) 12 C. L. R., 50.

⁸ Chunder Monce v. Nilambar, (1867) 7 W. R., 43.

⁹ Dada Gobind v. Chameo, (1864) 10 W. R., 312; else, they also are admissible.—Allool Gunnee v. Blutton, (1871) 22 W. R., 229.

sufficient reason,¹ or irregularly,² or improperly,³ otherwise, if the Ameen has held the enquiry beyond the territorial jurisdiction of the Court directing it,⁴ or reported on a point not referred to him.⁵ The statements of village officers with regard to a right of way made to a Commissioner, appointed in a suit as to a right of way to prepare a map of the locality, are inadmissible in evidence.⁶

Form part of the record—The report and deposition are to be taken as evidence in the case—not conclusive evidence—and form part of the record;⁷ and must be taken into consideration by the appellate Court,⁸ and unless any objection is raised to the report in the first Court or in the grounds of appeal, it should not be listened to.⁹

The value of the report depends upon the evidence on which it is founded.¹⁰ A Court may reject part and accept the rest,¹¹ unless the onus of suit is on the plaintiff, in which case the report of a local investigation, if not shown to be incorrect, should carry the greatest weight.¹²

Agreement—If the servants of all the parties present point out the same boundaries or starting point, these must be taken to be correct.¹³

Appeal: power of appellate Court—An appellate Court should not interfere with the result of a local enquiry except on clearly defined and sufficient grounds, which must be stated in its judgment;¹⁴ especially if it has been accepted by the first Court. Nor should a Court of first instance question the correctness of a map attached to a report, which is not impugned by either party;¹⁵ and the Ameen's report may be looked at to explain a map.¹⁶ If the Court finds the report deficient in any point, it can send for the Commissioner and examine him.¹⁷ On the other hand, the report should not be made the basis of a judgment to the total disregard of the other evidence on the record.¹⁸

¹ *Shah Nuthoo v Ghunessam*, (1867) 8 W. R., 207.

² *Umhiea Churn v. Goluck Chunder*, (1869) 9 W. R., 596; *Rajnath v. Doorga*, (1869) 12 W. R., 136.

³ *Ramechurn v. Surahjit*, (1869) 9 W. R., 491; but see, *Ram Dhan v. Ram Monee*, (1874) 21 W. R., 280.

⁴ *Nidhoo Sircar v. Philippe*, (1869) 10 W. R., 153.

⁵ *Abdool Ali v. Mullick Snider Joddeen*, (1870) 14 W. R., 493; *Doorga Churn v. Neem Chand*, (1875) 24 W. R., 203.

⁶ *Shitawa v. Bhimappa*, (1900) 21 Bom., 43.

⁷ *Azim v. Alimooldeen*, (1872) 17 W. R., 270; see also, *Ram Rukha v. Gobind Das*, (1871) 15 W. R., 291; but depositions without the report are inadmissible—*Deb Narain v. Kali Das*, (1870) 6 B. L. R., App., 70; 14 W. R., 397.

⁸ *Rajnath v. Doorga*, (1869) 12 W. R., 136.

⁹ *Seth Gujmul v. Chanhee*, (1874) L. R., 2 I. A., 34; but see, *Tweedie v. Poorno Chunder*, (1869) 12 W. R., 138.

¹⁰ *Issur Chunder v. Joogul Kishore*, (1874) 21 W. R., 281.

¹¹ *Poresh Nauth Mookerjee v. Martin*, (1864) 1 W. R., 93.

¹² *Sectaram v. Ram Narain*, (1866) 6 W. R., 61.

¹³ *Ameenuddeen v. Asgur Ali*, (1867) 8 W. R., 464.

¹⁴ *Wise v. Amecroonissa*, (1865) 3 W. R., 219.

¹⁵ *Hemmani Singh v. Cauty*, (1890) 17 Cal., 301.

¹⁶ *Surnt Soonduree v. Prosunno Coommar*, (1891) 15 W. R., P. C., 20; 6 B. L. R., 677; 13 Moo. I. A., 607; but see, *Protas Chunder v. Surnomojee*, (1873) 19 W. R., 301.

¹⁷ *Brijonath v. Lal Meah*, (1870) 14 W. R., 391.

¹⁸ *Mahomed Anwar v. Raj Chunder*, (1873) 17 W. R., 523.

¹⁹ *Sheo Dyal v. Hodgkinson*, (1875) 24 W. R., 342.

²⁰ *Bustee Sahoo v. Jee Narain*, (1875) 24 W. R., 333.

In an appeal from a judgment an order confirming the report of a Commissioner appointed under r. 11, it is open to the appellate Court to deal with the report on matters of fact, and its powers are not limited to questions of principle.¹

Practice—On the return of the Commissioner's report, a day should be fixed to hear objections and notice given to the parties,² and the objections should be enquired into, if taken within a reasonable time, even when the case has been struck off the file.³ The report cannot be rejected because the Ameen's remuneration has not been paid.⁴

Extension of time—See *Hormusji v. Bomonji*.⁵

Right to adduce evidence after report—There is no absolute right in any party to a local investigation to adduce evidence before the Court after a Commissioner's report, and the question of adducing further evidence must be decided on general principles according to the facts of each case.⁶

Commissions to examine accounts.

11. In any suit in which an examination or adjustment of accounts is necessary, the Court may issue a commission to such person as it thinks fit directing him to make such examination or adjustment.

Act XIV of 1882, sect 394.

This rule applies to H. C., and Prov. S. C. C.

For Form, see, App H, No. 9

A Court may issue a commission under this rule without the consent of parties.⁷

Appeal—A decree directing the defendant to account is a final decree, and as such appealable to the Privy Council.⁸ An order of a Judge confirming the report of the Commissioner was not appealable under Act VIII of 1859.⁹

Where a decree has been passed referring the matter to the Commissioner's office to have accounts taken and properly sold, the Court has still power to add a party to the suit.¹⁰

A suit cannot be dismissed for non-payment of the remuneration of a Commissioner appointed under this rule.¹¹

As to the procedure in taking accounts, see the under-noted cases.¹²

¹ *Chetty v. Mahomed Essa*, (1901) 5 Cal. W. N., 692.

² *Bam Narain v. Goburldhun*, (1874) 21 W. R., 2.

³ *Jesur Chunder v. Syam Khan*, (1869) 11 W. R., 95.

⁴ *Jagat Kishore v. Dins Nath*, (1894) 17 Cal., 291.

⁵ *Hormusji v. Bomonji*, (1883) 9 Bom., 230.

⁶ *Grish Chander v. Shashi Shikharaswar*, (1900) 27 Cal., 931, p. 966; 4 Cal. W. N., 631.

⁷ *Watson v. Aga Mehsin*, (1873) L. R., 1 L. A., 361.

⁸ *Kahundboy v. Turner*, (1891) 15 Bom., 155; L. R., 18 L. A., 6.

⁹ *Rastogi v. Kesurji*, (1884) 8 Bom., 287—now under Act XIV of 1882 see, *O'Keefe v. C. P. C.*, 6th Ed. p. 669.

¹⁰ *Vaky Vind v. The Advocate General*, (1871) 8 Bom. H. C., O. C. J., 96.

¹¹ *Ragava v. Vedanta*, (1878) 3 Mal., 239.

¹² *Dagadher Moramir v. Kallynath*, (1881) 7 Cal., 651; *Annals Persal v. Deshmukh*, (1881) 6 Cal., 534; *Ali Akmal v. Nasibun*, (1875) 24 W. R., 70.

12. (1) The Court shall furnish the Commissioner with such part of the proceedings and such instructions as appear necessary, and the instructions shall distinctly specify whether the Commissioner is merely to transmit the proceedings which he may hold on the inquiry, or also to report his own opinion on the point referred for his examination

Court to give Commissioner necessary instructions.

(2) The proceedings and report (if any) of the Commissioner shall be evidence in the suit, but where the Court has reason to be dissatisfied with them, it may direct such further inquiry as it shall think fit.

Proceedings and report to be evidence. Court may direct further inquiry

Act XIV of 1882, sect 395

This rule applies to H. C. and Prov. S. C. C.

As to the nature of the certificate or report made by the Commissioner, what it should contain and how far the Court can deal on motion with matters before him, see the case of *Rustomji v. Kessowji* ¹

The Commissioners under this rule need not be sworn or affirmed ²

Practice—In Madras, Appellate Courts do not enter into the details of an account taken by a Commissioner and discussed in the first Court, especially if no particular items are objected to; they only decide the principle upon which the account should be taken; ³ and where a Commissioner was appointed to investigate the state of accounts between the parties, and the judgment was founded on his report, the High Court, on regular appeal, refused to take a fresh account ⁴. Although a Commissioner's report should have very great weight, it is not absolutely binding ⁵. In Bombay, the opposite opinion prevails, and there the appellate Courts, if dissatisfied for any reason, direct further enquiry ⁶.

Where an Ameen was directed by an order of Court to adjust an account, and no objection was taken to his proceedings by the plaintiff in whose presence the account was taken: *held*, the account should not have been disturbed by the appellate Court ⁷.

Plaintiff sued his mohurrir, the defendant, for an account of such sums as he would be found to have misappropriated (estimating it at 2,500 rupees) and filed his account-books in Court without alleging that they had been tampered with. *held*, that he should have made up the account himself, and should not have been allowed an Ameen. ⁸

Consent—In a suit for account it was ordered, by consent of parties, that the cause should be referred to a Commissioner to take accounts, who in taking

¹ (1879) 3 Bom., 161.

² *Nursing v. Narain*, (1871) 3 All. H. C., 217.

³ *Venkata Reddi v. Venkataramayya*, (1880) 1 Mad., 418; *Sarapu Venkadesan v. Malai Isvaraiyya*, (1862) 1 Mad. H. C., 1.

⁴ *Sarapu Venkadesan v. Malai Isvaraiyya*, (1862) 1 Mad. H. C., 1.

⁵ *Kankatala v. Poleshetta*, (1883) 6 Mad., 36.

⁶ *Ahmed v. Khassaji*, (1869) 6 Bom. H. C., 149. As to the mode in which the report is to be discharged or varied in Bombay, see *Sumar Ahmed v. Ismail Haji*, (1875) 1 Bom., 159; and in Calcutta, see, *Lutchmee Narain v. Royjannauth*, (1897) 24 Cal., 437; 2 Cal. W. N., 57.

⁷ *Kantee Chunder v. Gopee Madhub*, (1869) 11 W. R., 3.

⁸ *Chand Ram v. Brojo Gobind*, (1873) 19 W. R., 14.

... off at ... questions of law to the Court.
reference under s. 181,
the Court could re-open a
Commissioner.¹

Extension of time—See *Horusji v. Romaji*.²

Costs: regular suit. Where the costs of a Commissioner were not prepaid, and though defendant was ordered in the decree to pay costs of the suit, the amount was not entered in it held, the Commissioner could sue the party who moved the Court to appoint him for work and labour, but not the party made liable for costs.³

Limitation.—As to mutual open and current accounts, see, *Lakshmyya v. Jagannatham*.⁴ Limitation commences from the day when the agency ceases.⁵

Commissioners to make partitions

13. Where a preliminary decree for partition has been passed, the Court may, in any case not provided for by section 54, issue a commission to such person as it thinks fit to make the partition or separation according to the rights as declared in such decree.

14. (1) The Commissioner shall, after such inquiry as may be necessary, divide the property in as many shares as may be directed by the order under which the commission was issued, and shall allot such shares to the parties, and may, if authorized thereto by the said order, award sums to be paid for the purpose of equalizing the value of the shares.

(2) The Commissioner shall then prepare and sign a report or the Commissioners (where the commission was issued to more than one person and they cannot agree) shall prepare and sign separate reports appointing the share of each party and distinguishing each share (if so directed by the said order) by notes and bounds. Such report or reports shall be annexed to the commission and transmitted to the Court; and the Court, after hearing any objections which the parties may make to the report or reports, shall confirm, vary or set aside the same.

(3) Where the Court confirms the report or reports it shall pronounce the same as

¹ *Waterman v. Agn Holm*, 1851.

² *Horusji v. Romaji* (1883) 9.

³ *Deputy Commissioner v. Bapji*.

⁴ *Lakshmyya v. Jagannatham*.

⁵ *Horusji v. Romaji*.

under this rule the principle is that if a property can be partitioned without destroying the intrinsic value of the whole property or of the shares, such partition ought to be made, but where partition cannot be made without destroying the intrinsic value of the property, then a money-compensation should be given.¹

General Provisions.

15. Before issuing any commission under this order the Court may order such sum (if any) as it thinks reasonable for the expenses of the commission to be, within a time to be fixed, paid into Court by the party at whose instance or for whose benefit the commission is issued.

Expenses of commission to be paid into Court.

Act XIV of 1882, sect 397

This rule applies to H. C. and Prov. S. C. C.

In a suit for partition, the costs of a commission to examine a lady issued at her own request were made costs in the suit.²

A suit should not be dismissed on refusal or failure of a party to deposit the amount ordered under this rule.³ Payment of any additional sum which is afterwards required can only be enforced by making it costs in the suit and entering it in the decree.⁴

Court-fees Act -- A commission issued to an Ameen is not a process within the meaning of cl. 1 of s 20 of the Court fees Act.⁵

16 Any Commissioner appointed under this Order may, unless otherwise directed by the order of appointment, —

Powers of Commissioners

(a) examine the parties themselves and any witness whom they or any of them may produce, and any other person whom the Commissioner thinks proper to call upon to give evidence in the matter referred to him;

(b) call for and examine documents and other things relevant to the subject of inquiry;

(c) at any reasonable time enter upon or into any land or building mentioned in the order.

Act XIV of 1882, sect. 398.

This rule applies to H. C. and Prov. S. C. C.⁶

Authority — Instructions to a Commissioner should issue in the presence of the parties, and if they do not object, they cannot afterwards complain if the

¹ *Ashanullah v. Kahi Kinkor*, (1881) 10 Cal., 67.

² *Munimuddin v. Bawaer, Shoohee Bhowan*, (1880) 5 Cal., 465.

³ *Ragava v. Vedanta*, (1875) 3 M.L., 239.

⁴ *Tadhin v. Sarlar*, (1895) 10 Cal. W. N., 231.

⁵ *Jagankubore v. Dhanpath*, (1880) 17 Cal., 231.

⁶ *Raghuath v. Rajkrisna*, (1881) 11 L. R. & N., 11; and *Bindabann Chunder v. Nabin Chunder* (1872) 17 W. R., 292.

Commissioner carries out his instructions.¹ Unless limited by the wording of the commission,² he has the widest power and discretion to enquire into the matters referred to him for investigation,³ but he cannot go beyond his order.⁴ Thus, if he is directed to make an enquiry into mesne profits, he should not enquire into the date of dispossessing, which should have been fixed by the decree.⁵ So, he should not record evidence, if expressly restricted to a comparison of the disputed land with a *chitta*.⁶ So, where an Ameen asked leave to enquire into the title by inspecting documents, and was refused, it was held that he could not investigate at all the title or possession.⁷

In Bombay on the original side, an attachment will issue to compel a party to a suit to obey an order made by a Commissioner taking accounts, upon the certificate of the Commissioner that such order has been made and disobeyed, without in the first instance making such order a rule of Court.⁸

Where his duty is to prepare an account showing the result of Books of Account he may take evidence to elucidate entries in the accounts.⁹

17. (1) The provisions of this Code relating to the summoning, attendance and examination of witnesses, and to the remuneration of, and penalties to be imposed upon, witnesses, shall apply to persons required to give evidence or to produce documents under this Order whether the commission in execution of which they are so required has been issued by a Court situate within or by a Court situate beyond the limits of British India, and for the purposes of this rule the Commissioner shall be deemed to be a Civil Court.

(2) A Commissioner may apply to any Court (not being a High Court) within the local limits of whose jurisdiction a witness resides for the issue of any process which he may find it necessary to issue to or against such witness, and such Court may, in its discretion, issue such process as it considers reasonable and proper.

Act XIV of 1882, sect 399

This rule applies to H. C. and Prov. S. C. C.

A person attending before an arbitration appointed by order of Court to take a reference is protected from arrest.¹⁰ In a case in which a private Commissioner experienced difficulty in enforcing the attendance of witnesses before

¹ Bissessar v Kanchun, (1867) 11 W. R., 155.

² Shilo Soonduree v. Ram Chunder, (1872) 17 W. R., 469.

³ Mohun Lall v. Urupoorua, (1868) 9 W. R., 556.

⁴ Ram Nhun v. Ram Monee, (1874) 21 W. R., 230; Bustee Sahoo v. Jee Narain, (1875) 24 W. R., 338.

⁵ Bijoy Gobind v. Kaleo Prasunno, (1871) 16 W. R., 294.

⁶ Doorga Churn v. Neem Chand, (1875) 24 W. R., 203.

⁷ Shilo Soonduree v. Ram Chunder, (1872) 17 W. R., 469.

⁸ Dhurandhardas v. Bhau Govind, (1873) 10 Bom. H. C., 4.

⁹ Tincowry v. Sattya (1907) 6 Cal. L. J., 105.

¹⁰ Juggessur Roy, in the matter of, (1879) 5 C. L. R., 170.

him, the Calcutta High Court directed the return of the commission and sent it to the Civil Court within whose jurisdiction the witnesses resided ¹

18 (1) Where a commission is issued under this Order, the Court shall direct that the Parties to appear before the Commissioner parties to the suit shall appear before the Commissioner in person or by their agents or pleaders.

(2) Where all or any of the parties do not so appear, the Commissioner may proceed in their absence.

Act XIV of 1882, sect 400

This rule applies to H. C. and Prov. S. C. C.

A party refusing to appear before an Ameen is not at liberty afterwards to take any objection to his report ² The evidence given in the absence of the other side is not enough to make the deposition of a witness taken on commission inadmissible ³

Where a plaintiff fails to appear before a Commissioner and the defendant appears, the plaintiff is liable to have his suit dismissed with costs ⁴

Charges against Ameen should be quickly inquired into ⁵

¹ Mahomed Ali v. Waril Ali, (1896) 23 Cal., 401. As to the difference between Commissioners appointed by Court and arbitrators, see, Rajendra Mati Lal v. Ram Narain, (1899) 3 B. L. R., App., 3.

² Ramn Das v. Prof. Kishore, (1866) 6 W. R., 170.

³ Ramchand v. Karsenee, (1864) 10 W. R., 236.

⁴ Mahomed Toque v. Jool Nath, (1871) 16 W. R., P. C., 24.

⁵ Abdul Kureem v. Campbell, (1862) 8 W. R., 172.

ORDER XXVII.

Suits by or against the Government or Public Officers in their official capacity.

1. In any suit by or against the Secretary of State for India in Council, the plaint or written statement shall be signed by such person as the Government may, by general or special order, appoint in this behalf, and shall be verified by any person whom the Government may so appoint and who is acquainted with the facts of the case.

This is a new rule, see notes to section 79 *ante*.

2. Persons being ex-officio or otherwise authorized to act for the Government in respect of any judicial proceeding shall be deemed to be the recognized agents by whom appearances, acts and applications under this Code may be made or done on behalf of the Government.

Act XIV of 1882, sect. 417.

This rule applies to H. C. and Prov. S. C. C.

3. In suits by or against the Secretary of State for India in Council, instead of inserting in the plaint the name and description and place of residence of the plaintiff or defendant, it shall be sufficient to insert the words "The Secretary of State for India in Council."

4. The Government pleader in any Court, or such other person as the Local Government may for any Court appoint in this behalf, shall be the agent of the Government for the purpose of receiving processes against the Secretary of State for India in Council issued by such Court.

5. The Court, in fixing the day for the Secretary of State for India in Council to answer to the plaint, shall allow a reasonable time for the necessary communication with the Government through the proper channel, and for the issue

him, the Calcutta High Court directed the return of the commission and sent it to the Civil Court within whose jurisdiction the witnesses resided.¹

18 (1) Where a commission is issued under this

Parties to appear before Commissioner Order, the Court shall direct that the parties to the suit shall appear before the Commissioner in person or by their agents or pleaders.

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A party refusing to appear before an Ameen is not at liberty afterwards to take any objection to his report.² The evidence given in the absence of the other side is not enough to make the deposition of a witness taken on commission inadmissible.³

Where a plaintiff fails to appear before a Commissioner and the defendant appears, the plaintiff is liable to have his suit dismissed with costs.⁴

Charges against Ameens should be quickly inquired into ⁵

¹ Mahomed Ali v. Wazid Ali, (1896) 23 Cal., 404. As to the difference between Commissioners appointed by Court and arbitrators, see, Rajendra Matil Lal v. Ram Narain, (1860) 3 B. L. R., App., 3.

v. Ram Narain, (1966) 2 S. C. 217, 41 F.T.R. 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913,

236.

W. R., P. O., 28.

² *Abdool Kureem v. Campbell*, (1869) 8 W. R., 172.

ORDER XXVII.

Suits by or against the Government or Public Officers in their official capacity

1. In any suit by or against the Secretary of State for India in Council, the plaintiff or written statement shall be signed by such person as the Government may, by general or special order, appoint in this behalf, and shall be verified by any person whom the Government may so appoint and who is acquainted with the facts of the case.

This is a new rule, see notes to section 79 *ante*.

2 Persons being ex-officio or otherwise authorized to act for the Government in respect of any judicial proceeding shall be deemed to be the recognized agents by whom appearances, acts and applications under this Code may be made or done on behalf of the Government.

Act XIV of 1882, sect 417

This rule applies to H. C. and Prov. S C C.

3 In suits by or against the Secretary of State for India in Council, instead of inserting in the plaintiff's name and description and place of residence of the plaintiff or defendant, it shall be sufficient to insert the words "The Secretary of State for India in Council."

4 The Government pleader in any Court, or such other person as the Local Government may for any Court appoint in this behalf, shall be the agent of the Government for the purpose of receiving processes against the Secretary of State for India in Council issued by such Court.

5 The Court, in fixing the day for the Secretary of State for India in Council to answer to the plaintiff, shall allow a reasonable time for the necessary communication with the Government through the proper channel, and for the issue

of instructions to the Government pleader to appear and answer on behalf of the said Secretary of State for India in Council or the Government, and may extend the time at its discretion.

Act XIV of 1883, sects. 418, 419, 420.

This rule applies to H. C. and Prov. S. C. C.

6. The Court may also, in any case in which the Government pleader is not accompanied by any person on the part of the Secretary of State for India in Council, who may be able to answer any material questions relating to the suit, direct the attendance of such a person.

Attendance of person able to answer questions relating to suit against Government.

Act XIV of 1883, sect. 421.

This rule applies to H. C. and Prov. S. C. C.

7. Where the defendant is a public officer and, on receiving the summons, considers it proper to make a reference to the Government before answering the plaint, he may apply to the Court to grant such extension of the time fixed in the summons as may be necessary to enable him to make such reference and to receive orders thereon through the proper channel.

Extension of time to enable public officer to make reference to Government.

(2) Upon such application the Court shall extend the time for so long as appears to it to be necessary.

Act XIV of 1883, sect. 423.

This rule applies to H. C. and Prov. S. C. C.

This application should be made by the officer on his own behalf. It should not be made in the name of Government.¹

8. (1) Where the Government undertakes the defence of a suit against a public officer, the Government pleader, upon being furnished with authority to appear and answer the plaint, shall apply to the Court, and upon such application the Court shall cause a note of his authority to be entered in the register of civil suits.

Procedure in suits against public officer.

(2) Where no application under sub-rule (1) is made by the Government pleader on or before the day fixed in the notice for the defendant to appear and answer, the case shall proceed as in a suit between private parties.

Provided that the defendant shall not be liable to arrest, nor his property to attachment, otherwise than in execution of a decree.

Act XIV of 1882, s. 426, 427.

This rule applies to H. C. and Prov. S. C. C.

When Government has undertaken the defence, the Government Pleader, in lieu of vakalatnama, files a memorandum on unstamped paper.¹

This does not change the nature of the suit, which will continue as before. The suit is against the officer and against him, the decree, if any, must be passed.

¹ Cir. Civ. O. No 23, Calcutta, 1871.

ORDER XXVIII.

Suits by or against Military Men.

1. (1) Where any officer or soldier actually serving the Government in a military capacity is a party to a suit, and cannot obtain leave of absence for the purpose of prosecuting or defending the suit in person, Officers or soldiers who cannot obtain leave may authorize any person to sue or defend for them. he may authorize any person to sue or defend in his stead.

(2) The authority shall be in writing and shall be signed by the officer or soldier in the presence of (a) his commanding officer, or the next subordinate officer, if the party is himself the commanding officer, or (b) where the officer or soldier is serving in military staff employment, the head or other superior officer of the office in which he is employed. Such commanding or other officer shall countersign the authority which shall be filed in Court.

(3) When so filed the countersignature shall be sufficient proof that the authority was duly executed, and that the officer or soldier by whom it was granted could not obtain leave of absence for the purpose of prosecuting or defending the suit in person.

Explanation.—In this Order the expression “commanding officer” means the officer in actual command for the time being of any regiment, corps, detachment or depot to which the officer or soldier belongs.

Act XIV of 1882, sect. 465.

This rule applies to H. C. and Prov. S. C. C.

A copy of a summons was sent to Secunderabad by post to the commanding officer where the defendant was stationed, and it was returned with the defendant's acknowledgment endorsed on it and with a certificate that it had been duly served, but there was no affidavit of service: *held*, that service was sufficiently proved.¹

S. 170 of the Army Act, (44 and 45 Vict., c. 58), provides that every proceeding, civil and criminal, against any person for any act done in the execution or intended execution of that Statute, or in respect of any alleged default in the execution thereof, must be commenced within six months. Such actions can be brought in India only in the highest Court of appeal and revision in the province. Art. 184 of the Indian Articles of War, (Act V of 1869) provides that when a native officer or soldier obtains leave of absence for the purpose of prosecuting or defending a suit, the Court shall on application made to it and supported by a certificate from the proper military authorities arrange, as far

¹ *Harrison v. Hope*, (1871) 9 B. L. R., App., 43.

as possible for the hearing and final disposal of the matter within the period of the leave granted. No fee whatever is payable on any application for priority of hearing.

2. Any person authorized by an officer or a soldier to prosecute or defend a suit in his stead may act personally or appoint a pleader. the same manner as the officer or soldier could do if present; or he may appoint a pleader to prosecute or defend the suit on behalf of such officer or soldier.

3. Processes served upon any person authorized by an officer or a soldier under rule 1 or upon any pleader appointed as aforesaid by such person shall be as effectual as if they had been served on the party in person.

Act XIV of 1882, sects. 466, 467.

These rules apply to H. C. and to Prov. S. C. C.

ORDER XXVIII.

Suits by or against Military Men.

1. (1) Where any officer or soldier actually serving the Government in a military capacity is a party to a suit, and cannot obtain leave of absence for the purpose of prosecuting or defending the suit in person, Officers or soldiers who cannot obtain leave may authorize any person to sue or defend for them. he may authorize any person to sue or defend in his stead.

(2) The authority shall be in writing and shall be signed by the officer or soldier in the presence of (a) his commanding officer, or the next subordinate officer, if the party is himself the commanding officer, or (b) where the officer or soldier is serving in military staff employment, the head or other superior officer of the office in which he is employed. Such commanding or other officer shall countersign the authority which shall be filed in Court.

(3) When so filed the countersignature shall be sufficient proof that the authority was duly executed, and that the officer or soldier by whom it was granted could not obtain leave of absence for the purpose of prosecuting or defending the suit in person.

Explanation.—In this Order the expression “commanding officer” means the officer in actual command for the time being of any regiment, corps, detachment or depot to which the officer or soldier belongs.

Act XIV of 1882, sect. 465.

This rule applies to H. C. and Prov. S. C. C.

A copy of a summons was sent to Secunderabad by post to the commanding officer where the defendant was stationed, and it was returned with the defendant's acknowledgment endorsed on it and with a certificate that it had been duly served, but there was no affidavit of service: *held*, that service was sufficiently proved.¹

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¹ Harrison v. Hope, (1871) 9 B. L. R., App., 43

as possible for the hearing and final disposal of the matter within the period of the leave granted. No fee whatever is payable on any application for priority of hearing.

2. Any person authorized by an officer or a soldier to prosecute or defend a suit in his stead may act personally or appoint pleader. may prosecute or defend it in person in the same manner as the officer or soldier could do if present; or he may appoint a pleader to prosecute or defend the suit on behalf of such officer or soldier.

3. Processes served upon any person authorized by an officer or a soldier under rule 1 or upon any pleader appointed as aforesaid by such person shall be as effectual as if they had been served on the party in person.

Act XIV of 1882, sects. 466, 467.

These rules apply to H. C. and to Prov. S. C. C.

ORDER XXIX.

Suits by or against Corporation.

1. In suits by or against a corporation, any pleading may be signed and verified on behalf of the corporation by the secretary or by any director or other principal officer of the corporation who is able to depose to the facts of the case.

Subscription and verification of pleading

Act XIV of 1882, sect. 435.

This rule applies to H. C. and Prov. S. C. C.

Plaints—The words "authorized to sue and be sued" are omitted from this rule, a fact which clears away a considerable difficulty. But the corporation itself must be the ostensible plaintiff or defendant. It cannot be sued through its agent.¹ A plaint in a suit by a bank in liquidation in which the plaintiff was described as "The Official Liquidator, Himalaya Bank, Limited, in liquidation" and which was also subscribed and verified in the same terms, was held not to be a valid plaint.²

Corporation.—This word assumes an incorporation of some kind either by Charter or Statute etc. In cases of an unincorporated or unregistered Company, the names of individuals must presumably be given unless O. XXX can be applied to the case.³ Such a Company cannot sue in its own name by its own secretary.⁴

The corporation contemplated by the Code of Civil Procedure is a corporation as known in English Law, that is, a corporation created with the express consent of the sovereign or of such antiquity that the consent of the sovereign may be presumed.⁵

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Verification—A petition by the Bank of Bengal verified by the Officiating Inspector of Branches, Bank of Bengal, is properly verified.⁶

Written statement.—When a written statement of a Railway Company was verified by a person described as "agent of the defendant Company," who was not said to be the principal officer of the defendant company and able to

¹ Nubeen Chunder v. Stephenson, (1871) 15 W. R., 534; Campbell v. Jackson, (1866) 12 Cal., 41.

² Ghulam Muhammad v. Himalaya Bank, (1895) 17 All., 292.

³ Koylas Chunder v. Ellis, (1867) 8 W. R., 45, and see, Panchaiti Akhara v. Gauri Kuar, (1893) 20 All., 167; Cantonment Committee v. Barjorji, (1890) 14 Bom., 286, p. 289.

⁴ Mhd. Association v. Bakhshi Ram, (1884) 6 All., 284.

⁵ Panchaiti Akhara v. Gauri Kuar, (1893) 20 All., 167. See, Ganesha Singh v. Mundi Forest Co., (1899) 21 All., 346.

⁶ Wilson v. Church, (1878) 9 C. D., 552.

⁷ Delhi Bank v. Oldham, (1894) 21 Cal., 60; L. R., 20 I. A., 132.

⁸ Anu Komal Salia v. Bank of Bengal, (1900) 5 Cal. W. N., 91.

depose to the facts of the case, it was held that such evidence should be supplied by affidavit before the written statements could be admitted, unless the plaintiff waived the objection to the sufficiency of the verification.¹

2 Subject to any statutory provision regulating service on corporation. service of process, where the suit is against a corporation, the summons may be served—

(a) on the secretary, or on any director, or other principal officer of the corporation, or

(b) by leaving it or sending it by post addressed to the corporation at the registered office, or if there is no registered office then at the place where the corporation carries on business.

3. The Court may, at any stage of the suit, require the personal appearance of the secretary or of any director, or other principal officer of the corporation who may be able to answer material questions relating to the suit.

Act XIV of 1882, sect. 436.

These rules apply to H. C. and to Prov. S. C. C.

An executive engineer of a Railway Company is not an officer within para. (a), rule 2, on whom service may be made.²

Service by post.—An useful innovation is effected by rule 2, inasmuch as service can now be effected by post on all companies and corporations having a registered office.

¹ Sreenath Banerjee v. East Indian Railway Co., (1893) 22 Calc., 268.

² Hanlon v. India Branch Railway Company, (1262 3) 1 Hyde., 197.

ORDER XXX.

Suits by or against Firms and Persons carrying on business in names other than their own.

1. (1) Any two or more persons claiming or being liable as partners and carrying on business in British India may sue or be sued in the name of the firm (if any) of which such persons were partners at the time of the accruing of the cause of action, and any party to a suit may in such case apply to the Court for a statement of the names and addresses of the persons who were, at the time of the accruing of the cause of action, partners in such firm, to be furnished and verified in such manner as the Court may direct.

(2) Where persons sue or are sued as partners in the name of their firm under sub-rule (1), it shall, in the case of any pleading or other document required by or under this Code to be signed, verified or certified by the plaintiff or the defendant, suffice if such pleading or other document is signed, verified or certified by any one of such persons.

This Order is taken almost *verbatim* from the Rules of the Supreme Court R. S. Order, 48a, and effects a much needed improvement in procedure in commercial and other suits in which partnership firms are interested.

For disclosure of partner's names, see r. 2, *infra* .—

Service on partners :—r. 3 and 5 ; right of suit on death of partner :—r. 4 ; appearance :—r. 6 ; no appearance except by partner :—r. 7 ; appearance under protest :—r. 8 ; suits between co-partners :—r. 9.

Liable as partners.—The liability of partners is joint, and hitherto it has been essential that all defendant partners should be brought before the Court; under this rule a suit may be filed without first ascertaining the names of all the partners.¹ That information can be obtained under clause (2).

Minor.—Where one or more partners is or are infants their minority cannot be utilized to defer payment of the firm's debts;² the judgment should be framed to exclude the infant partner, and the adult partners can insist that the partnership assets should be first applied in payment of the firm's debts.³

Carrying on businesses in British India.—The English authorities under this provision lay down the rule that carrying on business means the possession of a place of business held in the firm name, where business is carried on behalf of the firm. The partners themselves may or may not reside in

¹ Pollock on Partnership, p. 109 ; Ann. Prac., 1908, i, 649.

² Harrie v. Beauchamp Bros., (1923) 2 Q. B., 531.

³ Lovell v. Beauchamp, (1891) A. C., 607.

British India, it is sufficient if the business is managed on their behalf by some person in their pay¹

There must be a place of business in British India and it is not sufficient that partners come regularly to this country and employ an agent here to buy and ship goods to the firm abroad²

For Indian rulings on the interpretation of these words see notes to section 19, *ante*.

2. (1) Where a suit is instituted by partners in the name of their firm, the plaintiffs or their pleader shall, on demand in writing by or on behalf of any defendant, forthwith declare in writing the names and places of residence of all the persons constituting the firm on whose behalf the suit is instituted.

(2) Where the plaintiffs or their pleader fail to comply with any demand made under sub-rule (1), all proceedings in the suit may, upon an application for that purpose, be stayed upon such terms as the Court may direct.

(3) Where the names of the partners are declared in the manner referred to in sub-rule (1), the suit shall proceed in the same manner, and the same consequences in all respects shall follow, as if they had been named as plaintiffs in the plaint:

Provided that all the proceedings shall nevertheless continue in the name of the firm.

R. S. O. 48a, r. 2.

All subsequent proceedings—The judgment should be against the firm except in the case of infant partners, see r. 1, note, *supra*.

3. Where persons are sued as partners in the name of their firm, the summons shall be served either—

- (a) upon any one or more of the partners, or
- (b) at the principal place at which the partnership business is carried on within British India upon any person having, at the time of service, the control or management of the partnership business there,

as the Court may direct; and such service shall be deemed good service upon the firm so sued, whether all or any of the partners are within or without British India:

¹ Worcester City Banking Co. v. Firkbank Co., (1894) 1 Q. B., 784; Shepherd v. Hirsch Prichard Co. 45. C. D., 21; Lysaght v. Clark, (1891) 1 Q. B., 552, cited in Ann. Prac., 1908, i, 650.

² Singleton v. Roberts Co. 70 L. T. 687. See also, Heinemann v. Hale Co., (1891) 2 Q. B., 83; Ann. Prac., 1908, i, 650.

ORDER XXX.

Suits by or against Firms and Persons carrying on business in names other than their own.

1. (1) Any two or more persons claiming or being
 Suing of partners in name of firm liable as partners and carrying on business in British India may sue or be sued in the name of the firm (if any) of which such persons were partners at the time of the accruing of the cause of action, and any party to a suit may in such case apply to the Court for a statement of the names and addresses of the persons who were, at the time of the accruing of the cause of action, partners in such firm, to be furnished and verified in such manner as the Court may direct.

(2) Where persons sue or are sued as partners in the name of their firm under sub-rule (1), it shall, in the case of any pleading or other document required by or under this Code to be signed, verified or certified by the plaintiff or the defendant, suffice if such pleading or other document is signed, verified or certified by any one of such persons.

This Order is taken almost *verbatim* from the Rules of the Supreme Court R. S. Order, 48a, and effects a much needed improvement in procedure in commercial and other suits in which partnership firms are interested.

For disclosure of partner's names, see r. 2, *infra* :—

Service on partners :—rr. 3 and 5 ; right of suit on death of partner :—r. 4 ; appearance :—r. 6 ; no appearance except by partner :—r. 7 ; appearance under protest :—r. 8 ; suits between co-partners :—r. 9.

Liable as partners.—The liability of partners is joint, and hitherto it has been essential that all defendant partners should be brought before the Court; under this rule a suit may be filed without first ascertaining the names of all the partners¹ That information can be obtained under clause (2).

Minor.—Where one or more partners is or are infants their minority cannot be utilized to defer payment of the firm's debts;² the judgment should be framed to exclude the infant partner, and the adult partners can insist that the partnership assets should be first applied in payment of the firm's debts³

Carrying on business in British India—The English authorities under this provision lay down the rule that carrying on business means the possession of a place of business held in the firm name, where business is carried on behalf of the firm. The partners themselves may or may not reside in

¹ Pollock on Partnership, p. 109 ; Ann. Prac. 1908, 1, 649.

² Harrie v. Beauchamp Bros, (1893) 2 Q. B., 534.

³ Lovell v. Beauchamp, (1891) A. C., 607.

British India, it is sufficient if the business is managed on their behalf by some person in their pay.¹

There must be a place of business in British India and it is not sufficient that partners come regularly to this country and employ an agent here to buy and ship goods to the firm abroad.*

For Indian rulings on the interpretation of these words see notes to section 19, *ante*.

2. (1) Where a suit is instituted by partners in the name of their firm, the plaintiffs or their pleader shall, on demand in writing by or on behalf of any defendant, forthwith declare in writing the names and places of residence of all the persons constituting the firm on whose behalf the suit is instituted.

(2) Where the plaintiffs or their pleader fail to comply with any demand made under sub-rule (1), all proceedings in the suit may, upon an application for that purpose, be stayed upon such terms as the Court may direct.

(3) Where the names of the partners are declared in the manner referred to in sub-rule (1), the suit shall proceed in the same manner, and the same consequences in all respects shall follow, as if they had been named as plaintiffs in the plaint:

Provided that all the proceedings shall nevertheless continue in the name of the firm.

R. S. O. 48a, r. 2.

All subsequent proceedings.—The judgment should be against the firm except in the case of infant partners, see r. 1, note, *supra*.

3. Where persons are sued as partners in the name of their firm, the summons shall be served either—

Service.

- (a) upon any one or more of the partners, or
- (b) at the principal place at which the partnership business is carried on within British India upon any person having, at the time of service, the control or management of the partnership business there,

as the Court may direct; and such service shall be deemed good service upon the firm so sued, whether all or any of the partners are within or without British India:

¹ Worcester City Banking Co. v. Firbank Co., (1894) 1 Q. B., 784; Shepherd v. Hirsch Prichard Co., 45 C. D., 21; Lysaght v. Clark, (1891) 1 Q. B., 552, cited in Ann. Prac., 1908, i, 650.

² Singleton v. Roberts Co. 70 L. T. 637. See also, Heinemann v. Hale Co., (1891) 2 Q. B., 83; Ann. Prac., 1908, i, 650.

ORDER XXX.

Suits by or against Firms and Persons carrying on business in names other than their own.

1. (1) Any two or more persons claiming or being Suing of partners in name of firm liable as partners and carrying on business in British India may sue or be sued in the name of the firm (if any) of which such persons were partners at the time of the accruing of the cause of action, and any party to a suit may in such case apply to the Court for a statement of the names and addresses of the persons who were, at the time of the accruing of the cause of action, partners in such firm, to be furnished and verified in such manner as the Court may direct.

(2) Where persons sue or are sued as partners in the name of their firm under sub-rule (1), it shall, in the case of any pleading or other document required by or under this Code to be signed, verified or certified by the plaintiff or the defendant, suffice if such pleading or other document is signed, verified or certified by any one of such persons.

This Order is taken almost *verbatim* from the Rules of the Supreme Court R. S. Order, 48a, and effects a much needed improvement in procedure in commercial and other suits in which partnership firms are interested.

For disclosure of partner's names, see r. 2, *infra* :—

Service on partners :—rr. 3 and 5 ; right of suit on death of partner :—r. 4 ; appearance :—r. 6 ; no appearance except by partner :—r. 7 ; appearance under protest :—r. 8 ; suits between co-partners :—r. 9.

Minor.—Where one or more partners is or are infants their minority cannot be utilized to defer payment of the firm's debts ;¹ the judgment should be framed to exclude the infant partner, and the adult partners can insist that the partnership assets should be first applied in payment of the firm's debts.²

Carrying on business in British India.—The English authorities under this provision lay down the rule that carrying on business means the possession of a place of business held in the firm name, where business is carried on behalf of the firm. The partners themselves may or may not reside in

¹ Pollock on Partnership, p. 103 ; Ann. Prac., 1908, 1, 649.

² Harrio v. Beauchamp Bros., (1893) 2 Q. B., 531.

v. Beauchamp, (1891) A. C., 607.

British India, it is sufficient if the business is managed on their behalf by some person in their pay¹

There must be a place of business in British India and it is not sufficient that partners come regularly to this country and employ an agent here to buy and ship goods to the firm abroad²

For Indian rulings on the interpretation of these words see notes to section 19, *ante*.

2. (1) Where a suit is instituted by partners in the name of their firm, the plaintiffs or their pleader shall, on demand in writing by or on behalf of any defendant, forthwith declare in writing the names and places of residence of all the persons constituting the firm on whose behalf the suit is instituted.

(2) Where the plaintiffs or their pleader fail to comply with any demand made under sub-rule (1), all proceedings in the suit may, upon an application for that purpose, be stayed upon such terms as the Court may direct.

(3) Where the names of the partners are declared in the manner referred to in sub-rule (1), the suit shall proceed in the same manner, and the same consequences in all respects shall follow, as if they had been named as plaintiffs in the plaint:

Provided that all the proceedings shall nevertheless continue in the name of the firm.

R. S. O. 48a, r. 2.

All subsequent proceedings.—The judgment should be against the firm except in the case of infant partners, see r. 1, note, *supra*.

3. Where persons are sued as partners in the name of their firm, the summons shall be served either—

(a) upon any one or more of the partners, or

(b) at the principal place at which the partnership business is carried on within British India upon any person having, at the time of service, the control or management of the partnership business there,

as the Court may direct; and such service shall be deemed good service upon the firm so sued, whether all or any of the partners are within or without British India:

¹ Worcester City Banking Co. v. Fribank Co., (1891) 1 Q. B., 784; Shepherd v. Hirsch Pritchard Co., 45, C. D., 21; Lysaght v. Clark, (1891) 1 Q. B., 552, cited in Ann. Prac., 1903, i, 650.

² Singleton v. Roberts Co 70 L. T. 687. See also, Heinemann v. Hale Co., (1891) 2 Q. B., 83; Ann. Prac., 1903, i, 650.

Provided that, in the case of a partnership which has been dissolved to the knowledge of the plaintiff before the institution of the suit, the summons shall be served upon every person within British India whom it is sought to make liable.

R. S. O. 48a, r. 3

Principal Place—This must be a place where the business of the firm is carried on in the firm's name by a partner or by some person in the pay of the firm; the office of an Agent of the firm is not included; see r. 1, *supra*, "*Carrying on business*," p. 878.

Control or management.—Again this must be a partner or paid servant. A Receiver and Manager appointed by the Court is a servant of the Court and cannot be served under this rule.¹

Proviso—Where there has been a dissolution prior to the suit of which the plaintiff has knowledge, he cannot make an outgoing partner liable without serving him separately.²

4. (1) Notwithstanding anything contained in section 45 of the Indian Contract Act, 1872, where two or more persons may sue or be sued in the name of a firm under the foregoing provisions and any of such persons dies, whether before the institution or during the pendency of any suit, it shall not be necessary to join the legal representative of the deceased as a party to the suit.

(2) Nothing in sub-rule (1) shall limit or otherwise affect any right which the legal representative of the deceased may have—

(a) to apply to be made a party to the suit, or

(b) to enforce any claim against the survivor or survivors.

This rule cannot alter anything in the substantive law on this point as contained in section 45 of the Indian Contract Act, IX of 1872.

It merely states that a suit may be continued without adding the representative of a deceased partner. The rule is permissive only, and presumably, if a plaintiff desires the additional security of the deceased partner's estate he will be at liberty to apply to join his legal representatives as defendants.

Unless they are joined the private estate of the deceased partner will not be liable in execution, and the judgment will be enforceable only against the surviving partners and the partnership assets.³

The estate of a deceased partner is not liable for goods ordered before but delivered after his death.⁴

¹ *Re, Flowers Co*, 65 L. J., Q. B., 679. Ann. Prac. (1908), i, 657.

² The non liability of an outgoing partner for subsequent debts is considered in *Re, Fraser*, (1892) 2 Q. B., 633.

³ *Ellis v. Wadman*, (1899) 1 Q. B., 74.

⁴ *Bagel v. Miller*, (1903) 2 K. B., 212; cited Ann. Prac., 1908, i, 649.

It is expressly provided (2) *supra* that the legal representatives may themselves apply to be made parties, and nothing in this rule can affect the rights of partners *inter se*.

5. Where a summons is issued to a firm and is served

Notice in what capacity served in the manner provided by rule 3, every person upon whom it is served shall be informed by notice in writing given at the time of such service, whether he is served as a partner or as a person having the control or management of the partnership business, or in both characters, and, in default of such notice, the person served shall be deemed to be served as a partner.

R. S. O. 481, r. 4.

Served as a partner—The effect of this rule is to dispense with a notice in cases where a partner is served personally, but to render it essential where service is effected on a manager or servant in charge. In the latter case if no notice is served, the person served can appear under protest (*vide r. 8 infra*) and escape liability by denying partnership. Generally see *Ann. Pract.*, 1908, notes to O. 481, r. 4.

6. Where persons are sued as partners in the name

Appearance of partners. of their firm, they shall appear individually in their own names, but all subsequent proceedings shall, nevertheless, continue in the name of the firm.

R. S. O. 481, r. 5.

Sued as partners—See r. 1, *supra*, "Carrying on business," p. 878.

nership.

In entering appearance he must state that he is a partner, or that he was a partner when the alleged cause of action arose, or that he has been served as a partner and denies the partnership or lastly that he denies the partnership at the time when the alleged cause of action arose.

Authority.—An authority given by the managing partner of a firm to defend a suit is a good authority to an attorney to enter appearance for all the partners in the firm.¹

7. Where a summons is served in the manner provid-

No appearance except by partners. ed by rule 3 upon a person having the control or management of the partnership business, no appearance by him shall be necessary unless he is a partner of the firm sued.

R. S. O. 481, r. 6.

See next rule—Such a person should enter appearance under rule 8.

8. Any person served with summons as a partner

Appearance under protest. under rule 3 may appear under protest, denying that he is a partner, but such

¹ *Tomlinson v. Broadsmith*, (1896) 1 Q. B., 380.

Provided that, in the case of a partnership which has been dissolved to the knowledge of the plaintiff before the institution of the suit, the summons shall be served upon every person within British India whom it is sought to make liable.

R. S O 48a, r. 3

Principal Place.—This must be a place where the business of the firm is carried on in the firm's name by a partner or by some person in the pay of the firm; the office of an Agent of the firm is not included; see r. 1, *supra*, "*Carrying on business*," p. 878.

Control or management.—Again this must be a partner or paid servant. A Receiver and Manager appointed by the Court is a servant of the Court and cannot be served under this rule.¹

Proviso.—Where there has been a dissolution prior to the suit of which the plaintiff has knowledge, he cannot make an outgoing partner liable without serving him separately.²

4. (1) Notwithstanding anything contained in section

Right of suit on 45 of the Indian Contract Act, 1872,
death of partner. where two or more persons may sue or be
sued in the name of a firm under the foregoing provisions
and any of such persons dies, whether before the institution
or during the pendency of any suit, it shall not be necessary
to join the legal representative of the deceased as a party to
the suit.

(2) Nothing in sub-rule (1) shall limit or otherwise
affect any right which the legal representative of the deceased
may have—

(a) to apply to be made a party to the suit, or

(b) to enforce any claim against the survivor or survivors.

This rule cannot alter anything in the substantive law on this point as contained in section 45 of the Indian Contract Act, 1X of 1872

It merely states that a suit may be continued without adding the represen-

... ..

Unless they are joined the private estate of the deceased partner will not be liable in execution, and the judgment will be enforceable only against the surviving partners and the partnership assets.³

The estate of a deceased partner is not liable for goods ordered before but delivered after his death.⁴

¹ *Re. Flowers Co.*, 65 L. J., Q. B., 679. Ann. Prac. (1908), i, 653.

² The non liability of an outgoing partner for subsequent debts is considered in *Re. Fraser*, (1892) 2 Q. B., 633.

³ *Yellie v. Wadsworth*, (1893) 1 Q. B., 74.

⁴ *Re. Miller*, (1903) 2 K. B., 212; cited Ann. Prac., 1908, i, 649.

It is expressly provided (2) *supra* that the legal representatives may themselves apply to be made parties, and nothing in this rule can affect the rights of partners *inter se*.

5 Where a summons is issued to a firm and is served in the manner provided by rule 3, every person upon whom it is served shall be informed by notice in writing given at the time of such service, whether he is served as a partner or as a person having the control or management of the partnership business, or in both characters, and, in default of such notice, the person served shall be deemed to be served as a partner.

R. S. O. 48a, r. 4.

Served as a partner.—The effect of this rule is to dispense with a notice in cases where a partner is served personally, but to render it essential where service is effected on a manager or servant in charge. In the latter case if no notice is served, the person served can appear under protest (*vide* 1 *infra*) and escape liability by denying partnership. Generally see. *Ann. Prac.*, 1908, notes to O. 48a, r. 4.

6. Where persons are sued as partners in the name of their firm, they shall appear individually in their own names, but all subsequent proceedings shall, nevertheless, continue in the name of the firm.

R. S. O. 48a, r. 5.

Sued as partners—See r. 1, *supra*, "Carrying on business," p. 878.

nership

In entering appearance he must state that he is a partner, or that he was a partner when the alleged cause of action arose, or that he has been served as a partner and denies the partnership or lastly that he denies the partnership at the time when the alleged cause of action arose.

Authority.—An authority given by the managing partner of a firm to defend a suit is a good authority to an attorney to enter appearance for all the partners in the firm.¹

7. Where a summons is served in the manner provided by rule 3 upon a person having the control or management of the partnership business, no appearance by him shall be necessary unless he is a partner of the firm sued.

R. S. O. 48a, r. 6.

See next rule—Such a person should enter appearance under rule 8

8. Any person served with summons as a partner under rule 3 may appear under protest, denying that he is a partner, but such

¹ *Tomlinson v. Broadsmith*, (1896) 1 Q. B., 380.

appearance shall not preclude the plaintiff from otherwise serving a summons on the firm and obtaining a decree against the firm in the default of appearance where no partner has appeared.

R. S. O. 48a, r. 7

Under Protest.—The following is the English form for entering appearance under this rule ¹

"For A. B. having been served as a partner, but who denies that he is a partner in the defendant firm of C. and Co., or who denies that he was a partner in the defendant firm of C. and Co., at the time the alleged cause of action arose"

Contesting the Protest.—In England when the plaintiff wishes to contest the denial of partnership the practice is to apply by summons to strike out the appearance under protest upon the ground that the party appearing is or was a partner as the case may be, or in the alternative to strike out of the appearance the denial of partnership

The alternative course for the plaintiff to pursue in such a case is to ignore the appearance altogether, and to serve the firm again under rule 3, *supra*, and proceed to judgment. On obtaining judgment against the firm, he can then apply under O. XXI, r. 50, to execute the decree against the person who appeared under protest ²

9. This Order shall apply to suits between a firm and one or more of the partners therein and to suits between firms having one or more partners in common; but no execution shall be issued in such suits except by leave of the Court, and, on an application for leave to issue such execution, all such accounts and inquiries may be directed to be taken and made and directions given as may be just.

R. S. O. 48a, r. 10.

Execution.—See, O. XXI, r. 50 *ante*.

10. Any person carrying on business in a name or style other than his own name may be sued in such name or style as if it were a firm name; and, so far as the nature of the case will permit, all rules under this Order shall apply.

R. S. O. 48a, r. 11.

Firm name.—It is immaterial whether the name purports to be that of a firm or of an individual. A man named P. C. Dey, and trading as B. B. Dey, may be sued under this rule, but in such a case where the plaintiff knows the circumstances the practice in England is to insert in the writ of summons the words "(trading name)".³

May be sued.—There is no provision to enable a plaintiff to *sue* in such a firm name and in England such a suit has been declared to be bad ⁴

¹ See App. Form 10a & 10b

⁴ 48a, rr. 4, 7 and 8.

ORDER XXXI

Suits by or against Trustees, Executors and Administrators.

1. In all suits concerning property vested in a trustee, executor or administrator, where the contention is between the persons beneficially interested in such property and a third person, the trustee, executor or administrator shall represent the persons so interested, and it shall not ordinarily be necessary to make them parties to the suit. But the Court may, if it thinks fit, order them or any of them to be made parties.

Representation of beneficiaries in suits concerning property vested in trustees, etc.

Act XIV of 1882, sect. 437.

Rules of the Supreme Court, 1883, O. 16, r. 8.

This rule applies to H. C. and Prov. S. C. C.

Probate—Probate is necessary to complete the title of a rightful executor, and until it is actually taken out a person intermeddling with the assets constitutes himself executor *de son tort*.¹

And a third person.—If beneficiaries are added, a few of them may be made to represent the whole body,² and when the names of the beneficiaries

When a decree for foreclosure was obtained against S, who was the executor of his father's estate, and subsequently A, a brother of S, and M, a purchaser of some of the mortgaged properties from A, made an application to be made parties and to redeem, *held*, that they were not entitled to be made parties.³

¹ Navazbai v. Pestonji, (1897) 21 Bom., 400. As to the necessity for taking out probate in the case of Mahomedans after the Probate and Administration Act, V of 1881, came into force, see Fatma v. Eesa, (1883) 7 Bom., 266; Moosa v. Eesa, (1884) 8 Bom., 241.

² Gas Light & Coke Co. v. Towse, 35 C. D., 519, p. 526.

³ Janhabai Chowdhurani v. Brojomohini, (1902) 7 Calc. W. N., 817.

⁴ Hamond v. Walker, 3 Jur., 686.

⁵ Mohananda Chatterjee v. Akhoy Kumar Barari, (1901) 6 Calc. W. N., 488.

⁶ Culley, *ex parte*, (1878) 9 C. D., 307.

⁷ Mills v. Jennings, (1880) 13 C. D., 639; see however, Ardesir v. Hirabai, (1884) 8 Bom., 474.

appearance shall not preclude the plaintiff from otherwise serving a summons on the firm and obtaining a decree against the firm in the default of appearance where no partner has appeared

R. S. O. 48a, r. 7.

Under Protest.—The following is the English form for entering appearance under this rule.¹

"For A. B. having been served as a partner, but who denies that he is a partner in the defendant firm of C. and Co., or who denies that he was a partner in the defendant firm of C. and Co. at the time the alleged cause of action arose"

Contesting the Protest.—In England when the plaintiff wishes to contest the denial of partnership the practice is to apply by summons to strike out the appearance under protest upon the ground that the party appearing is or was a partner as the case may be, or in the alternative to strike out of the appearance the denial of partnership.

The alternative course for the plaintiff to pursue in such a case is to ignore the appearance altogether, and to serve the firm again under rule 3, *supra*, and proceed to judgment. On obtaining judgment against the firm, he can then apply under O. XXI, r. 50, to execute the decree against the person who appeared under protest.²

9. This Order shall apply to suits between a firm and one or more of the partners therein and to suits between firms having one or more partners in common; but no execution shall be issued in such suits except by leave of the Court, and, on an application for leave to issue such execution, all such accounts and inquiries may be directed to be taken and made and directions given as may be just.

R. S. O. 48a, r. 10

Execution.—See O. XXI, r. 50 *ante*.

10. Any person carrying on business in a name or style other than his own name may be sued in such name or style as if it were a firm name; and, so far as the nature of the case will permit, all rules under this Order shall apply.

R. S. O. 48a, r. 11.

Firm name.—It is immaterial whether the name purports to be that of a firm or of an individual. A man named P. C. Dey, and trading as B. B. Dey, may be sued under this rule, but in such a case where the plaintiff knows the circumstances the practice in England is to insert in the writ of summons the words "(trading name)".³

May be sued.—There is no provision to enable a plaintiff to sue in such a firm name and in England such a suit has been declared to be bad.⁴

¹ See Ann. Prac., 1908, i, 657.

² See generally Ann. Prac., notes to R. S. O. 48a, rr. 4, 7 and 8.

³ Ann. Prac., 1908, i, 662.

⁴ *Stawson v. Moggridge*, 8 Times Rep., 805.

ORDER XXXI.

Suits by or against Trustees, Executors and Administrators

1. In all suits concerning property vested in a trustee, executor or administrator, where the contention is between the persons beneficially interested in such property and a third person, the trustee, executor or administrator shall represent the persons so interested, and it shall not ordinarily be necessary to make them parties to the suit. But the Court may, if it thinks fit, order them or any of them to be made parties.

Act XIV of 1882, sect. 437.

Rules of the Supreme Court, 1883, O. 16, r. 8

This rule applies to H. C. and Prov. S. C. C.

Probate—Probate is necessary to complete the title of a rightful executor, and until it is actually taken out a person intermeddling with the assets constitutes himself executor *de son tort*.¹

And a third person—If beneficiaries are added, a few of them may be made to represent the whole body,² and when the names of the beneficiaries

When a decree for foreclosure was obtained against S, who was the executor of his father's estate, and subsequently A, a brother of S, and M, a purchaser of some of the mortgaged properties from A, made an application to be made parties and to redeem, *held*, that they were not entitled to be made parties.³

¹ Navazbai v. Pestonji, (1897) 21 Bom., 400. As to the necessity for taking out probate in the case of Mahomedans after the Probate and Administration Act, V of 1881, came into force, see Fatma v. Essa, (1883) 7 Bom., 266; Moosa v. Essa, (1884) 8 Bom., 241.

² Gas Light & Coke Co. v. Towse, 35 C. D., 519, p. 526.

³ Janhabai Chowdhurani v. Brojomohini, (1902) 7 Calc. W. N., 817.

⁴ Hamond v. Walker, 3 Jur., 686.

⁵ Mohananda Chatterjee v. Akhoy Kumar Barari, (1901) 6 Calc. W. N., 488.

⁶ Culley, *ex parte*, (1878) 9 C. D., 307.

⁷ Mills v. Jennings, (1880) 13 C. D., 639: see however, Ardesir v. Hirabai, (1884) 8 Bom., 474.

beneficially interested,¹ so in a case for partition,² or for sale and partition.³ In a suit against a *Mitakshara* father in a mortgage of ancestral property executed by him alone, the son is a necessary party where the mortgagee has notice of his interest, and he cannot be represented by his father.⁴

As to the position of executors to a Hindu, before the Hindu Wills Act, XXI of 1870, see *Lallubhai v. Mankuwarbai*.⁵

If one or more trustees will not or cannot sue, they should be made defendants.⁶

Beneficiaries—The parties beneficially interested should always be made parties in the cause, when the executors or trustees are wholly uninterested in the matter,⁷ or they have from any cause an interest adverse to that of the beneficial owner,⁸ or refuse to sue,⁹ and where one trustee sued another to realize a mortgage security, the beneficial owners were made parties.¹⁰ It has been held that the heirs of a Hindu may sue trustees in respect of a breach of a charitable or religious trust, though they have no interest in the trust.¹¹

The beneficial owner can sue to get the benefit of a decree obtained by his trustee,¹² but he is not a necessary party to a proceeding for setting aside an execution-sale.¹³

Assets—A plaintiff is entitled to sue the legal representative of his deceased debtor and to obtain a decree against him without proving that assets have come into his hands. It is sufficient if there are assets of which he may become possessed.¹⁴

Sale without sanction of Judge—A sale by Mahomedan trustees of a mosque without the sanction of the Judge is not merely voidable but void.¹⁵

Debts paid by trustee—Unless a trustee loses his right of indemnity through neglect or default, he is entitled to be indemnified out of the trust estate for all debts incurred for the benefit of the trust estate and on failure by him to pay such debts, creditors are entitled to stand in his shoes.¹⁶

2. Where there are several trustees, executors or administrators, they shall all be made parties to a suit against one or more of them:

Joinder of trustees, executors and administrators.

¹ *Mills v. Jennings*, (1840) 13 C. D., 679.

² *Simpson v. Denny*, (1878) 10 C. D., 28.

³ *Stace v. Gage*, (1878) 8 C. D., 431, the trustee is sufficient; see also *Bulley v. Bulley*, (1878) 8 C. D., 479, p. 199.

⁴ *Suraj Prasad v. Golab Chand*, (1900) 5 Cal. W. N., 640; 28 Cal., 517.

⁵ *Lallubhai v. Mankuwarbai* (1878) 2 Bom., 388.

⁶ *Lake v. South Kensington Hotel Co.*, (1879) 11 C. D., 121.

⁷ *Clegg v. Bonland*, (1866) L. R., 3 B., 373.

⁸ *Payne v. Parker*, (1866) 1 Ch. App., 327; *Bentford v. Ramasubba*, (1889) 13 Mad., 197.

⁹ *Meldrum v. Deane*, 56 L. T. Rep., 473; but see *Merry v. Poona*, (1898) 1 Ch., p. 312.

¹⁰ *Father v. Butler*, (1877) 7 C. D., p. 120.

¹¹ *Brojo Mohun v. Harrohill*, (1880) 6 C. L. R., 59.

¹² *Jaggobhulloo Comal v. Nil Comal*, W. R., (1861) p. 190.

¹³ *Birala Kant v. Chander Kant*, (1912) 29 Cal., 682.

¹⁴ *Girdharilal v. Paj Shriv*, (1881) 8 Bom., 309.

¹⁵ *Shama Chura v. Abdul Kabeer*, (1894) 3 Cal. W. N., 158.

¹⁶ *Mallik v. Bridge*, (1903) 9 Cal. W. N., 9.

Provided that the executors who have not proved their testator's will, and trustees, executors and administrators outside British India, need not be made parties

Act XIV of 1882, sect. 438

This rule applies to H. C. and Prov. S. C. C.

When a Mahomedan testator had by his will appointed three executors only one of whom had acted and got possession of the estate, a suit by the testator's widow for administration of the estate was held sufficiently well constituted for the purpose of a motion for a decree, although only the executor who had acted was made defendant¹

Where a defendant asks the Court to dismiss the suit for non joinder of another trustee etc., he must prove that the latter resides within British India²

3. Unless the Court directs otherwise, the husband of a married trustee, administratrix or executrix shall not as such be a party to a suit by or against her.

Act XIV of 1882, sec. 439

This rule applies to H. C. and Prov. S. C. C.

¹ Hafizabai v. Abdul Karim, (1893) 19 Bom., 83

² Kumar v. Dhirendra, (1903) 2 Calo L. J., 491.

Description—The plaint should describe the minor plaintiff as "A B, a minor inhabitant of X, by his next friend C D, inhabitant of Y, sues E F, &c.," and the minor defendant as "A B, a minor, of whom C D, inhabitant of Y, is guardian for the suit."¹

Next friend—It has been held that if the suit has been commenced and defendant appears and makes no objection, the irregularity cannot be raised after judgment.²

A person cannot be made next friend of a plaintiff without his express consent.³ He is not a party to the suit, nor can he appeal in his own name;⁴ and his duty ends with final judgment—the object of his appointment being to have some person before the Court liable for costs he incurs no greater responsibility;⁵ and no other decree can be given against him personally;⁶ nor can he execute a decree after the minor's decease.⁷

Mamlatdar's Court.—A minor may sue for possession in a Mamlatdar's Court by his next friend, although the Mamlatdars' Act (Bomb. Act III of 1876) makes no provision for such a suit.⁸ He may be sued, if represented by properly appointed guardian.⁹

Suit by major as minor—When a suit is instituted by a person alleging himself to be a minor through a next friend, and when it is found that the plaintiff was not at the date of the institution of the suit in fact a minor, the

Misdescription.—Where a mother sued for the property of her minor son in her own name, not even saying she was guardian, and the first Court allowed the suit, but did not expressly sanction it, the Court in appeal could not reverse the decision on the ground that it was not properly laid. Such an objection was considered "as in no way affecting the merits of the case,"¹⁰ for if a plaintiff minor has a cause of action, no objection to the authority of his next friend will be admitted in appeal;¹¹ and where a suit was brought by A for herself and as guardian of B, and the error did not affect the merits of the case, an objection to the form was not listened to in special appeal.¹²

¹ *Mongula Dossie v. Shastri*, (1873) 20 W. R., 48; 12 B. L. R., App. 2.

² *Brooklebank, in re*, (1877) 6 C. D., 358; *Kunhammad v. Kutti*, (1889) 12 Mad., 90.

³ See O. I, r. 10, (3).

⁴ *Bhobotarini v. Sree Ram*, (1883) 9 Cal., 629.

⁵ *Geereeballa v. Chunder Kant*, (1885) 11 Cal., 213.

⁶ *Brinjo Mohun v. Roodronath*, (1871) 15 W. R., 192.

⁷ *Hulolhur Roy v. Judoonath*, (1870) 14 W. R., 162.

⁸ *Dattatraya v. Vaman*, (1897) 21 Bom., 83.

⁹ *Saifull v. Haji Miya*, (1900) 24 Bom., 233.

¹⁰ *Taqi Jan v. Obudulla*, (1894) 21 Cal., 866.

¹¹ *Shoorania v. Bharat Singh*, (1893) 20 All., 90.

¹² *Goones Monee v. Ram Kumol*, (1872) 17 W. R., 141.

¹³ *Hurdey Narain v. Rooder Perkash*, (1893) L. R., 11 I. A., 26; 10 Cal., 620.

¹⁴ *Alim v. Jhalo*, (1884) 12 Cal., 48; *Surjakant v. Hemanta Kumari*, (1893) 20 Cal., 498; L. R., 20 I. A., 25.

If a minor has been sued, the suit will not be set aside for a mere misdescription.² In other cases, the Courts have set aside a judgment, even in special appeal, if not properly laid against the minor,³ and held that a decree passed under other circumstances would not bind him,⁴ and the purchaser with notice would be compelled to deliver up possession,⁵ and this view was to a certain extent upheld by the members of the Judicial Committee of the Privy Council, who decided that a suit against a father in his own right and as guardian of his minor son is not a suit against the minor,⁶ and that the manager of an estate is not the guardian of an infant co-proprietor so as to bind him by a decree.⁷ But where a Hindu widow during the course of a litigation adopted a son, but did not put him on the record, it was held that she was justified in pursuing the litigation *Ami filii* for his benefit, and he was bound by the decree.⁸ And a *guardian ad litem* may be appointed by implication.

Costs.—When a next friend retains an attorney to act for the infant, no contract is created between the attorney and the infant upon which the attorney can sue the infant for costs.⁹ The next friend is responsible to the solicitor for costs which are in the nature of necessities.¹⁰

The next friend may be ordered to pay costs.¹¹ Whenever it is possible, the Courts will allow his costs out of the infant's estate for any proceeding instituted for the infant's benefit, although unsuccessful, provided he appears to have acted *Ami filii*,¹² but not otherwise,¹³ and where a guardian is personally held liable for costs, it should be stated in the decree or order of Court; since ordinarily he is only liable in his representative capacity.¹⁴

... the name of a married woman by her
not produce his authority; *held*, that
be paid by the solicitors of the next
friend.¹⁵

Matha Pershad v. Secretary
Jugut, (1887) 14 Cal., 204;
Mad., 481; *Ilari Saran v.*
A., 103; *Kedar Prasanno v.*

Miruti, (1874) 11 Bom. H. C., 182.

Mayi Dahi v. Jogochandri, (1880) 6 Cal., 450; followed in *Vishnu v. Chandra*, (1887) 11 Bom., 130; *Isar Chander v. Naba Kristo*, (1880) 7 B., 407; *Duff Bimal v. Dhirafram*, (1893) 12 Bom., 18; *Ganga Prosad Jhola*, (1887) 14 Cal., 754.

All v. Shant Lal, (1873) 20 W. R., 120.

Titter v. Kishan Soondery, (1873) 11 B. L. R., (P. C.), 171, 191;
et v. Monoram Mandal, (1882) 11 C. L. R., 15; and see *Gurn Churn v. Kali Kisen*, (1883) 11 Cal., 402; *Ganga Prosad v. Umbhoi*, (1887) 14 Cal., 754.

* *Durga Prasad v. Kesho*, (1881) L. R., 9 L. A., 27; 8 Cal., 658; see also, *Debi Dut v. Subash*, (1877) 2 Cal., 283.

* *H* ... 40; L. R., 15 L. A., 195. And a
application, *Krishna v. Gosta*, (1907)

* *Deekhai v. Jefferson*, (1880) 10 Bom., 248.

* *Branson v. Appasami*, (1891) 17 Mad., 257; see, however, *Watkins v. Phumoo*, (1881) 7 Cal., 148.

10 *Deekhai v. Jefferson*, (1880) 10 Bom., 248.

11 *Stalder v. Malhot*, Mad., 319; *Cross v. Cross*, (1843) 8 Beav., 455.

12 *Chowdhalla v. Chander Kant*, (1883) 11 Cal., 213; *Deekhai v. Jefferson*, (1880) 10 Bom., 248.

13 *Komal Chander v. Sarabhai*, (1870) 21 W. R., 208; *Omroo Sing v. Prem Anan Singh*, (1871) 21 W. R., 214.

Saffert v. Saffert, (1881) 19 C. R., 91. See "Coker or Wares," p. 891, post.

Minority of English subjects — If not diminished in India is 21 years.¹

Minority if guardian appointed — Where a guardian has been appointed before the age of 18, duration extends to the age of 21.²

Testamentary guardian — A guardian appointed by a will of which probate is taken is not one appointed by a 'Court of Justice' within the meaning of cl. 1, s. 3 of Act IX of 1874 and consequently the minor attains majority on his completing the age of 18 years.³

Evidence of minority — The appearance of the alleged minor may be taken into consideration in deciding the question of minority,⁴ but it is not evidence of the highest order.⁵ When the question of minority is in issue, a certificate of guardianship⁶ or a marriage,⁷ is not evidence of minority.

Where the defendant contended that the suit could not be carried on without a guardian, because the plaintiff was a minor, and the plaintiff failed to prove his majority, and the suit was dismissed. *Held*, that the Court should have appointed a next friend.⁸ A decision based upon evidence of minority taken by a subordinate Court is illegal.⁹ The uncle of a minor Muhammadin purporting, though without authority, to act as the minor's guardian made a mortgage of certain property belonging to the minor, and subsequently took a lease of the mortgaged property in favour of the minor. The minor having made default in payment, the mortgagee sued to recover rent. *Held*, that the mortgagee was not entitled to recover, although, had the minor sued the mortgagee to avoid the mortgage, he might not have been able to succeed without paying compensation to the mortgagee to the extent to which he or his property had been benefited by the money advanced on the security of the mortgage.¹⁰

Limitation. A suit by a minor is governed by the provisions of the Limitation Act, 1877, and does not remove this minority a guardian may be appointed during the interval between the death of the father and the bringing of the suit to set aside a sale under Madras Act II of 1864, was a minor, was held not sufficient to save limitation under s. 59 of that Act, when an alleged fraud affecting the sale came to light.¹¹

¹ *Rohilkhand and Kumoun Bank v. Row*, (1897) 7 All., 490.

² *Act IX of 1874, s. 3*. See *Act of 1892, s. 3*. *Bholanath*, (1890) 12 Cal., 104; *Rajenmar v. Alfazulin*, (1890) 17 Cal., 944; *Das*, (1897) 21 Bom., 281; *adho v. Muchhar* (1907).

³ *A. W. A.*, 210.

⁴ *Jogesh Chunder v. Umataz*, (1877) 2 C. L. R., 577.

⁵ *Khetter Mohan Ghose v. Ramessur*, W. R., (1861), p. 301.

⁶ *Kaleo Haldar v. Sreeram Ghose*, W. R., (1861), p. 360.

⁷ *Ganjra Kaur v. Ablakh Pando*, (1893) 18 All., 478.

⁸ *Satish Chander v. Mohemiro*, (1909) 17 Cal., 849. But see, *Goundan v. Goundan*, (1901) 17 Mad., 131.

⁹ *Moorles Dhar v. Nathonee Mahtoon*, (1876) 25 W. R., 181.

¹⁰ *Ganesh Vithal v. Kusbal*, (1899) 23 Bom., 693.

¹¹ *Nizamuddin v. Ananli Prasad*, (1896) 18 All., 373.

¹² *Khodilux v. Budreo Narain*, (1831) 7 Cal., 137; *Suffaroonisa v. Nooral Hossein*, (1872) 17 W. R., 419; *Jagjivan Anirchand v. Hasan Abraham*, (1893) 7 Bom., 179, and see, *Yeknath v. Waman*, (1886) 10 Bom., 211.

¹³ *Anatharama v. Kuruppinan*, (1882) 4 Mad., 112.

¹⁴ *Rudra Kant v. Nolo Kishore*, (1882) 12 C. L. R., 269; 9 Cal., 693.

¹⁵ *Mon Mohun Bakshee v. Ganga Soondari*, (1832) 11 C. L. R., 34; 9 Cal., 181; *Lohit Mohun Misser v. Janoky Nath Roy*, (1893) 20 Cal., 714. See also *Norendra Nath v. Bhupendra Narain*, (1896) 23 Cal., 374; *Zamir v. Sundar*, (1900) 22 All., 199.

If a minor has been sued, the suit will not be set aside for a mere misdescription¹ In other cases, the Courts have set aside a judgment, even in special appeal, if not properly laid against the minor;² and held that a decree passed under other circumstances would not bind him,³ and the purchaser with notice would be compelled to deliver up possession,⁴ and this view was to a certain extent upheld by the members of the Judicial Committee of the Privy Council, who decided that a suit against a father in his own right and as guardian of his minor son is not a suit against the minor,⁵ and that the manager of an estate is not the guardian of an infant co-proprietor so as to bind him by a decree.⁶ But where a Hindu widow during the course of a litigation adopted a son, but did not put him on the record, it was held that she was justified in pursuing the litigation *bonâ fide* for his benefit, and he was bound by the decree.⁷ And a *guardian ad litem* may be appointed by implication.

Costs—When a next friend retains an attorney to act for the infant, no contract is created between the attorney and the infant upon which the attorney can sue the infant for costs.⁸ The next friend is responsible to the solicitor for costs which are in the nature of necessities.⁹

The next friend may be ordered to pay costs.¹⁰ Whenever it is possible, the Courts will allow his costs out of the infant's estate for any proceeding instituted for the infant's benefit, although unsuccessful, provided he appears to have acted *bonâ fide*,¹¹ but not otherwise,¹² and where a guardian is personally held liable for costs, it should be stated in the decree or order of Court; since ordinarily he is only liable in his representative capacity.¹³

Where an action was commenced in the name of a married woman by her next friend who, when challenged, could not produce his authority; *held*, that the action should be dismissed with costs to be paid by the solicitors of the next friend.¹⁴

J. Mhaba Pershad v. Secretary
Jugut, (1887) 14 Cal., 204;
Ind., 481; Sri Saran v.
A., 103. Procunno v.

* Babaji v. Maruti, (1874) 11 Bom. H. C., 182.

* Minnamoy Debis v. Jogulchuri, (1880) 5 Cal.
Ram Chandra, (1887) 11 Bom., 191; Iswar
C. L. R., 407; Daji Ram v. Dhirajwar
v. Umbles, (1887) 11 Cal., 751.

* Jungoo Lall v. Sham Lall, (1873) 20 W.

* Narain Mitter v. Kishen Soonde
Shoni v. Motoram Mandal, f
Kali Kisson, (1883) 11 Cal.
751.

* Doorga Pershad v. Kesho, (1881) L. R., 9 L. A., 27; 8 Cal., 650; see also, Debi
Dut v. Subadra, (1877) 2 Cal., 243.

* Hari Saran v. Bhubaneswari, (1880) 10 Cal., 40; L. R., 15 L. A., 105. And a
guardian *ad litem* may be appointed by implication, Krishna v. Gosta, (1907)
5 Cal., L. J., 434.

* Derkabal v. Jefferson, (1880) 10 Bom., 248.

* Branson v. Appasami, (1894) 17 Mal., 237; see, however, Watkins v.
Dhannoo, (1881) 7 Cal., 119.

¹⁰ Derkabal v. Jefferson, (1881) 10 Bom., 248.

¹¹ Staines v. Malloy, Mosl., 319; Cross v. Cross, (1813) 8 Beav., 455.

¹² Greenbally v. Chandler Kant, (1883) 11 Cal., 213; Derkabal v. Jefferson,
(1880) 10 Bom., 248.

¹³ Kewal Chunder v. Subbarao Doss, (1874) 21 W. R., 293; Omroo Sing v. Prem
Doss v. Singh, (1871) 21 W. R., 261.

¹⁴ See v. (1881) 12 C. D., 91. See "Court of Wards," p. 820, *post*.

in Vishon v.
do, (1880) 7
Sanga Prasad

11, 171, 191;
urn Churn v.
57) 14 Cal.,

Minority of English subjects — If not domiciled in India is 21 years¹

Minority if guardian appointed — Where a guardian has been appointed before the age of 18, minority extends to the age of 21²

Testamentary guardian — A guardian appointed by a will of which probate is taken is not one appointed by a 'Court of Justice' within the meaning of cl. 1, s. 3 of Act IX of 1875, and consequently the minor attains majority on his completing the age of 18 years³

Evidence of minority — The signature of the alleged minor may be taken into consideration in deciding the question of minority,⁴ but it is not evidence of the highest order⁵. When the question of minority is in issue, a certificate of guardianship⁶ or a bono cop⁷ is not evidence of minority.

Where the defendant contended that the suit could not be carried on without a guardian, because the plaintiff was a minor, and the plaintiff failed to prove his majority, and the suit was dismissed, *held*, that the Court should have appointed a next friend⁸. A decision based upon evidence of minority taken by a subordinate Court is illegal⁹. The uncle of a minor Muhammadian purporting, though without authority, to act as the minor's guardian made a mortgage of certain property belonging to the minor, and subsequently took a lease of the mortgaged property in favour of the minor. The minor having made default in payment, the mortgagee sued to recover rent. *Held*, that the mortgagee was not entitled to recover, although, had the minor sued the mortgagee to avoid the mortgage, he might not have been able to succeed without paying compensation to the mortgagee to the extent to which he or his property had been benefited by the money advanced on the security of the mortgage.¹⁰

in behalf of a minor is governed by minor.¹¹ It does not remove this us, during minority a guardian may however long the interval between them,¹² but the mere fact that one of the plaintiffs in a suit brought to set aside a sale under Madras Act II of 1864, was a minor, was held not sufficient to give limitation under s. 59 of that Act, when an alleged fraud affecting the sale came

¹ *Rahulkhand and Kumari Bank v. Row*, (1897) 7 All., 492

² Act IX of 1875, s. 3, Act VIII of 1893, s. 52—*Radley v. Radley*, (1857) 12 Cal., 612. See also *Girish Chunder v. ...* (1881) 8 C. L. R., 4. *Kharabish Ali v. S. A. W. N.*, 213.

³ *Jogesh Chunder v. Umatare*, (1877) 2 C. L. R., 577.

⁴ *Khetter Mohun Ghose v. Ramnagar*, W. R., (1850), p. 24

⁵ *Kales Hahar v. Sauram Ghose*, W. R., (1861), p. 254

⁶ *Gunja Kuar v. Abdulah Pandi*, (1893) 19 All., 174.

⁷ *Katish Chunder v. Mohender*, (1899) 17 Cal., 849. *Bat v. G. - Chander G. - dan*, (1891) 17 Mad., 131.

⁸ *Moorlee Dhar v. Nathonee Mahloob*, (1876) 25 W. R., 181

⁹ *Ganesh Vithal v. Kusabai*, (1879) 23 Ben., 698

¹⁰ *Nizamuddin v. Anandil Prasad*, (1876) 19 All., 373

¹¹ *Khodabux v. Badree Narain*, (1911) 7 Cal., 137. *Radley v. Radley*, (1857) 12 Cal., 612. *Radley v. Radley*, (1857) 12 Cal., 612. *Radley v. Radley*, (1857) 12 Cal., 612. *Radley v. Radley*, (1857) 12 Cal., 612.

¹² *Anatharam v. Kuruppan*, (1877) 4 Mal., 119.

¹³ *Radra Kant v. Nobi Kishore*, (1872) 12 C. L. R., 2, 119 Cal., 612

¹⁴ *Mon Mohun Baksh v. Ganga Sanyal*, (1872) 12 C. L. R., 2, 119 Cal., 612. *Lalit Mohun Misra v. Janki Nath Roy*, (1872) 12 C. L. R., 2, 119 Cal., 612. *Norendra Nath v. Bhup Nath Narain*, (1872) 12 C. L. R., 2, 119 Cal., 612.

to the knowledge of the other plaintiffs, who were majors and were jointly interested with the minor, more than six months prior to the institution of the suit.¹ The Registration Act, 1877, being a special Act complete in itself, the provisions of the Limitation Act, s. 7, (S. 6, Act IX of 1908), do not apply to suits instituted under s. 77 for a decree directing a document to be registered: *held*, accordingly, that a suit by an infant to enforce the registration of a conveyance having been instituted more than thirty days after refusal on the part of a Registrar to register is barred by limitation.² In a suit for arrears of rent which accrued during minority, the plaintiff is not entitled to a fresh period of limitation.³ Time does not run against a minor, and the circumstance that a minor has been represented by a guardian does not affect the question.⁴ S. 7 of the Limitation Act 1877, (S. 6, Act IX of 1908), applies not only when a minor makes an application after he has attained his majority, but also when an application is made on his behalf during his minority.⁵ A suit by a person to recover possession of land sold by his guardian during his minority without legal necessity is governed by art. 44, Sched. II of the Limitation Act, 1908, and must be brought within 3 years from the attainment of majority.⁶ Where fraud is alleged, the suit must be brought within three years after the minor has attained majority according to s. 6 of the Limitation Act.⁷

Court of Wards—See Act VIII of 1890. A female ward cannot give up her rights in favour of the next heir without the sanction of the Court;⁸ nor can she bind her estate by debt or mortgage.⁹

...wards on behalf of the minor
...who had caused it to be instituted
...it was wrongly brought, and
...Wards, or the minor in person,
and the defendants were made to pay the costs, as they were to blame for allowing it to proceed in an irregular way.¹⁰ Under the general jurisdiction and apart from the Guardian and Wards Act (VIII of 1890), the High Court has power to appoint a guardian of the property of a minor who is a member of a joint Hindu family and where the minor's property is an undivided share in the family property.¹¹

Practice: wrong form.—Where a suit is brought in violation of this rule, the plaint should be returned.¹² When a suit is brought by an alleged

¹ *Narayana v. Damodaran*, [1894] 17 Mad., 189. As to the law when one of the judgment creditors is a minor, see *Suryakumar v. Arunchunder*, (1901) 28 Cal., 465.

² *Veerama v. Abhish*, (1897) 19 Mad., 99.

³ *Girja Nath v. Patani Bilee*, (1899) 17 Cal., 261.

⁴ *Moro Sahasdev v. Vissji*, [1892] 16 Bom., 536.

⁵ *Ganeshwar Singh v. Jagadhatri Persad*, (1893) 3 Cal. W. N., 24.

⁶ *Satish Chunder Guha v. Chandras Kant Pyne*, (1898) 3 Cal. W. N., 278.

⁷ *Chandrasekhar v. Dasappa*, (1895) 12 Bom., 597.

⁸ *Government v. Monohar Das*, (1861) W. R., Sup. Vol. 39.

⁹ *Bal Krishna v. Moxima*, (1883) 5 All., 142; 1 L. R., 9 I. A., 182.

¹⁰ *Chandrasekhar v. Muttie Court of Wards*, [1874] 21 W. R., 312. See, *Krishna v. Ganga* (1897) 5 Cal. L. J., 434.

¹¹ *Mahomed Husein v. Ganga*, (1901) 25 Bom., 353.

¹² *Pandit v. Das v. Poonacha*, (1884) 10 Cal., 102.

¹³ *Tripura v. Ganga*, (1894) 21 Cal., 460.

of 1858 should not have been made a defendant to defend the suit on his behalf.¹ Neither the absence of a guardian *ad litem* for a minor judgment-debtor nor the incorrect description of an adult judgment debtor as a minor, affects the validity of a sale.² Where a minor sued herself without a next friend, but no objection was taken by the defendants until the case came before the Court of first appeal, when the plaintiff had attained majority, *held*, that the irregularity was waived.³ A next friend of an infant is entitled to an order for change of attorney on the same terms as any other litigant *sui juris*.⁴

2 (1) Where a suit is instituted by or on behalf of a minor without a next friend, the defendant may apply to have the plaint taken off the file, with costs to be paid by the pleader or other person by whom it was presented.

Where suit is instituted without next friend, plaint to be taken off the file

(2) Notice of such application shall be given to such person, and the Court, after hearing his objections (if any), may make such order in the matter as it thinks fit

Act XIV of 1852, sect. 412.

This rule applies to H. C. and Prov. S. C. C.

Taken off the file.—See *Chinnia v. Bauban Saib*.⁵

Costs.—The person presenting the plaint is liable for costs when a plaint is filed by a minor without a next friend.⁶

Neither this rule nor r. 5 gives a Court authority to make a minor's estate liable for costs.⁷

Scope of the rule.—This rule refers to a case, where on the face of the plaint, it appeared that it was filed by a person who was a minor. It does not contemplate any enquiry into the question of minority.⁸

Remand.—No objection can be taken as to the minority of a plaintiff after remand by the High Court, unless the point was urged in the appellate Court.⁹

Appeal.—See the case of *Beniram v. Ramall*.¹⁰

3. (1) Where the defendant is a minor, the Court, on being satisfied of the fact of his minority, shall appoint a proper person to be guardian for the suit for such minor.

Guardian for the suit to be appointed by Court for minor defendant.

¹ *Krishna Mangal v. Akbar Jumma*, (1881) 9 C. L. R., 213.

² *Net Lal Sahoo v. Kareem Bux*, (1896) 23 Cal., 686.

³ *Kamalakshi v. Ramasami Chetti*, (1896) 19 Mad., 127.

⁴ *Dinendra Nath Dutt v. Wilson & Co.*, (1901) 5 Cal. W. N., 434; 23 Cal., 264.

⁵ See *Chinnia v. Bauban Saib*, (1869) 5 Mad. H. C., 435; *Rollo v. Smith*, (1868) 1 B. L. R., O. J., 10; *Radha Kristo v. Ram Chander*, (1869) 11 W. R., 300; *Beni Ram v. Ram Lall*, (1896) 13 Cal., 189; *Rottonbar v. Chabildas*, (1899) 13 Bom., 7.

⁶ *Shonal v. Monoram*, (1892) 11 C. L. R., 15.

⁷ *Amichand v. Collector of Sholapur*, (1899) 13 Bom., 231.

⁸ *Beni Ram v. Ram Lall*, (1896) 13 Cal., 189.

⁹ *Beni Ram v. Ram Lall*, (1896) 13 Cal., 189.

¹⁰ *Beni Ram v. Ram Lall*, (1896) 13 Cal., 189.

Specific performance—A suit is maintainable against a Hindu minor whose mother and guardian has entered into a contract for the sale of his land, for specific performance of the contract and for possession.¹⁰ But no decree can be passed unless it is shown that the contract is for the benefit of the minor.¹¹ But a minor in this country cannot maintain a suit for specific per-

¹ Radha Kristo v. Ram Chunder, (1869) 11 W. R., 300; but see Brooklebank, *in re*, 6 C. D., 358.

² Etwaree v. Ram Narain, (1870) 13 W. R., 231.

³ Walian v. Banke Behari, (1903) 7 Cal. W. N., 774; 30 Cal., 1021; L. R., 30 L. A., 182; but see, Hamunji Prasad v. Muhammad Ishaq, (1906) 28 All., 137; and Khurajmal v. Darin, (1901) 32 I. A., 21.

⁴ Dammar v. Pirbhu, (1907) A. W. N., 70. 29 All., 290

⁵ Khem Kiran v. Har Dyal, (1882) 4 All., 37.

⁶ Motiram Rupa Chand, *in re*, (1874) 11 Bom. H. C., 21; see also, Chanvirapa v. Hanava, (1895) 19 Bom., 591.

⁷ Babaji v. Maruti, (1887) 11 Bom., 182; Dhondiba v. Kusa, (1869) 6 Bom., H. C., 219; Issur Chunder v. Nobi Kristo, (1880) 7 C. L. R., 407; Jadov Mulji v. Chhagan, (1881) 5 Bom., 306

⁸ Karakosse v. Seile, (1841) 3 Moo. I. A., 329. As to appointing a Nazir, guardian *ad litem*, see Mohan Ishwar v. Hiku Rupa, (1880) 4 Bom., 638, and see Narayan Das v. Gheeb Hossain, (1883) 12 Bom., 553

⁹ Gopilal v. Agarsinghji, (1904) 28 Bom., 626

¹⁰ Dakeyhar Persad v. Rewat Mahton, (1897) 21 Cal., 25; Bhura Mal v. Har Kishen Das, (1902) 24 All., 383

¹¹ Rakhal Moni Dasi v. Adwyta Prosad Ray, (1903) 30 Cal., 613; 7 Cal. W. N., 419.

¹² Krishnasami v. Sundarappayyar, (1895) 18 Mad., 415; Khairunnessa Bibi v. Lokenath, (1900) 27 Cal., 270

¹³ Jugal Kishori v. Anunda Lall, (1895) 22 Cal., 515.

formance of a contract entered into on his behalf by his guardian¹. The defendant was 19 years appointed by the executor in existence either of his person or his property. *held*, that the defendant at the date of note was still a minor under s. 3 of the Indian Majority Act, (IX of 1875).² A guardian executed a promissory note in favour of a vakil (the plaintiff) as remuneration for his past professional services rendered under oral agreements with him. *Held*, that the suit was barred by ss. 28 and 29 of the Legal Practitioners' Act (XVIII of 1879), and that as there was no such necessity for the proceedings in question as to render the contract binding on the minors, no suit would lie against them.³ A decree for specific performance can be given against a minor when the Court finds that it is for the benefit of the minor that the contract should be performed.⁴

Form of order—The order should run as follows on application made on behalf of the minor under this rule.

On plaintiff's application—"Upon motion, &c, who alleged that the defendant C D is a minor and has been duly served with summons, and has not appeared, although the time for doing so expired upon the, and upon reading an affidavit of and affidavit of notice to A, the person with whom the defendant C D was living at the time of service [if infant not residing with father or guardian] and to the father (or guardian) of the minor, let E be assigned guardian to the said defendant C D by whom he may defend this action."⁵ As to who may be appointed a guardian, see clause (4) *supra*.

On defendant's application—"Let A be assigned guardian of the infant B by whom he may defend this action." Service of summons on minor defendants must be effected on their guardian *ad litem* appointed in the first instance under r. 3.⁶

Effect of decree—A decree passed against an infant properly represented

Satisfied of the fact of his minority⁷—When minority is pleaded as a defence to an action a guardian should be appointed for the defendant and a preliminary issue should be framed and tried as to whether defendant is or is not a minor.⁸

Parsi Marriage Act—In a suit by a husband for divorce under s. 30, Act XV of 1905 (the Parsi Marriage Act), the defendant if under the age of 21, though more than 18, must be deemed a minor, and a guardian for the suit of the defendant must be appointed.⁹

An affidavit is necessary, although the plaintiff does not oppose the application.

The natural guardian should not be passed over when he has no adverse interest and there is no personal imputation against him. A person nominated

¹ *Fatima Bibi v. Dhabhi*, (1893) 20 Cal., 503; dissented from in 18 Mad., 415 and 27 Cal., 276.

² *Gandharvi v. Harilaladas*, (1897) 21 Bom., 231.

³ *Sat Naraya v. Pattanathusami*, (1891) 17 Mad., 306.

⁴ *Kha Runniss v. Lala Nath Pal*, (1901) 27 Cal., 270.

⁵ *Perfection*, 112.

⁶ *Jamnia M. Jiva v. Suresh Boy*, (1880) 26 Cal., 207; 3 Cal. W. N., 201.

⁷ *Chandrasekhar v. Indikarshi*, (1891) 19 Bom., 571.

⁸ *Chander v. Jagat*, (1887) 14 Cal., 201.

⁹ *Kha Bibi v. Khairat*, (1893) 16 Mad., 311.

¹⁰ *Shah v. Cawasji v. Bhabhai*, (1891) 19 Bom., 260.

by certain executors commenced an administration suit against them as next friend of certain infant children. The father of the infant did not become aware that the children were plaintiffs until the decree had been passed, and then applied to be substituted as next friend. *Held*, that as he had no interest adverse to the minor and was otherwise eligible, his name should be substituted.¹

A person cannot be appointed guardian *ad litem* against his will,² but, once appointed, his appointment lasts for the whole of the litigation, or until it is revoked by the Court.³

Notice.—For forms of notice, see App II, No 11.

Revision.—A Civil Court has no power to refuse to admit a person who has obtained a certificate to defend a suit connected with the minor's estate, but an order refusing is apparently not liable to revision under s. 115.⁴

Who may act as next friend or be appointed guardian for the suit.

4. (1) Any person who is of sound mind and has attained majority may act as next friend of a minor or as his guardian for the suit :

Provided that the interest of such person is not adverse to that of the minor and that he is not, in the case of a next friend, a defendant, or, in the case of a guardian for the suit, a plaintiff.

(2) Where a minor has a guardian appointed or declared by competent authority, no person other than such guardian shall act as the next friend of the minor or be appointed his guardian for the suit unless the Court considers, for reasons to be recorded, that it is for the minor's welfare that another person be permitted to act or be appointed, as the case may be.

(3) No person shall without his consent be appointed guardian for the suit.

(4) Where there is no other person fit and willing to act as guardian for the suit, the Court may appoint any of its officers to be such guardian, and may direct that the costs to be incurred by such officer in the performance of his duties as such guardian shall be borne either by the parties or by any one or more of the parties to the suit, or out of any fund in Court in which the minor is interested, and may give directions for the repayment or allowance of such costs as justice and the circumstances of the case may require.

¹ Woolf v. Pemberton, (1877) 6 C. D., 19.

² Jadov Mulji v. Chhagan, (1881) 5 Bom., 306; see r. 4, *infra*.

³ Jwala v. Pirbhu, (1892) 14 All., 35; Venkata v. Alakarajamba, (1899) 22 Mad., 187.

⁴ Baldeo Dass v. Gobind, (1895) 7 All., 914. Compare r. 9, *infra*.

does not apply to guardians whose powers had ceased by reason of their wards having attained majority or otherwise prior to the passing of the Act.¹ The power of the Court of Chancery to appoint guardians to infants, whether they have property or not, is possessed by the High Court.² A person who has been appointed guardian of a minor under a will is not bound to take out probate as a condition precedent to his obtaining a certificate of guardianship under Act VIII of 1890.³

Officer of the Court—Under the former Code the Nazir of the Court might be appointed Guardian, but the express provisions of this clause have been taken from the English rules O 65, r. 13.

Costs.—See *Goatly v Jones* ⁴

5. (1) Every application to the Court on behalf of a minor, other than an application under rule 10, sub-rule (2), shall be made by his next friend or by his guardian for the suit.

Representation of
minor by next friend or
guardian for the suit

(2) Every order made in a suit or on any application, before the Court in or by which a minor is in any way concerned or affected, without such minor being represented by a next friend or guardian for the suit, as the case may be, may be discharged, and, where the pleader of the party at whose instance such order was obtained knew, or might reasonably have known, the fact of such minority, with costs to be paid by such pleader.

Act XIV of 1882, sects 441, 445

This rule applies to H. C. and Prov. S. C. C.

Next friend

dant
infan
costs

This rule enacts that no order by which a minor may in any way be concerned or affected can legally be made without him being represented by a next friend or guardian for the suit.⁵

6 (1) A next friend or guardian for the suit shall not, without the leave of the Court, receive any money or other moveable property on behalf of a minor either—

Receipt by next friend
or guardian for the suit
of property under de-
cree for minor.

(a) by way of compromise before decree or order, or

¹ Vallabhas Hirachand v. Krasnabhai, (1897) 17 Bom., 566.

² Jagannath Ramji, *petitioner*, (1895) 19 Bom., 60.

³ Parthab Ali Khan Bullukhan v. Panibai, (1895) 19 Bom., 832.

⁴ *Goatly v. Jones*, (1907) W. N., 161; and Ann. Prac., 1908, l. 950.

⁵ Jagannath v. Rajkumar, (1882) 16 Cal., 771.

⁶ Parthab v. Daji Meghji, (1897) 23 Bom., 100.

⁷ *Am. Lal v. Collector of Sholapur*, (1887) 13 Bom., 234.

(b) under a decree or order in favour of the minor.

(2) Where the next friend or guardian for the suit has not been appointed or declared by competent authority to be guardian of the property of the minor, or, having been so appointed or declared, is under any disability known to the Court to receive the money or other moveable property, the Court shall, if it grants him leave to receive the property, require such security and give such directions as will, in its opinion, sufficiently protect the property from waste and ensure its proper application.

Act XIV of 1882, s. 461

This rule applies to H. C. and Prov. S. C. C.

The duty of a next friend as guardian for the suit is to control the Receiver and see that the moneys are properly applied, and he cannot be allowed to hold an appointment incompatible with his relation to the minor.¹ The proper course to set aside a decree obtained on a compromise entered into by the guardian of a minor defendant without the leave of the Court is by way of review or by separate suit, but not by an appeal from the compromise decree.²

The managing member of a Mitakshara family who is appointed the guardian *ad litem* of his minor brother may be exempt from the restriction imposed by this rule.³

7. (1) No next friend or guardian for the suit shall, without the leave of the Court, expressly recorded in the proceedings, enter into any agreement or compromise on behalf of a minor with reference to the suit in which he acts as next friend or guardian.

(2) Any such agreement or compromise entered into without the leave of the Court so recorded shall be voidable against all parties other than the minor.

Act XIV of 1882, sect 462.

This rule applies to H. C. and Prov. S. C. C.

¹ *Garland v. Garland*, 2 Ves. 137.

² *Rakhal Mondal v. Adwytia Prasad Roy*, (1903) 30 Calo. 613; 7 Calo. W. N., 419.

³ *Harihar P. Singh v. Mathura Lal*, (1903) 35 Calo., 661; 8 Calo. L. J., 236

⁴ *Chengal v. Venkata*, (1889) 12 Mad., 483.

⁵ *Sheonath Saran v. Sukhlal Singh*, (1900) 27 Calo., 229; 4 Calo. W. N., 327; *Hardeo Sahai v. Gauri Shankar*, (1906) 28 All., 35.

apply to the case of a guardian withdrawing objections under the advice of counsel¹. But an agreement to refer to arbitration in a suit for partition while it is pending and in which a minor is interested falls within this rule². This rule does not apply, when there is neither a guardian for a suit nor a suit.³

Sanction—The sanction must be express, not implied.⁴ No exception is made in the case of a certificated guardian;⁵ a Court by passing a consent decree does not *ipso facto* sanction the compromise on behalf of a minor.⁶ And if it is given under a misrepresentation of a material fact, due either to fraud or culpable and wilful ignorance, it is not binding.⁷

If the guardian cannot do anything for the minor's benefit, he ought to leave

otherwise they must, in order to clear themselves, show that the money was paid to the minor or reached him when he came of age.¹¹ The transactions into which guardians enter on behalf of their wards, must secure to the latter some demonstrable advantage or avert some obvious mischief in order to obtain recognition in the Courts.¹²

A Court should not make a decree by consent against a minor without ascertaining that it is for the benefit of the infant that such a decree should be pronounced,¹³ and if the suit is for immovable property, and the next friend is a person holding a certificate under Act XL of 1858, the consent of the Court granting the certificate is also necessary.¹⁴ A compromise of a doubtful claim made by the adult members of a *kurwad*, *bond fide* and in the interest of the *kurwad* is binding on the minor members.¹⁵ In order to make an agreement or compromise to which this rule applies lawful, it is necessary that the next friend or guardian should ask the Court to consider the proposed terms of the agreement or compromise and before making the agreement or entering into the compromise should obtain permission from the Court. The Court should record the fact that such application was made to it; that the terms of the proposed agreement or compromise were considered by the Court; and that having regard to the interest of the minor, the Court granted leave for the making of the agreement or compromise. From the mere fact that the Court passed the decree in accordance with the compromise, it cannot be inferred that any of those steps preliminary and necessary to the

¹ *Mirali v. Behmoolhoy*, (1891) 15 Bom., 59.

² *Lakshmana Chetti v. Chinnathambi*, (1901) 2.

³ *Vethalax v. Dattaram*, (1902) 26 Bom., 218. Mad., 326.

⁴ *Rajagopal v. Mattupalem*, (1878) 3 Mad., 103.

⁵ (1861) 5 Cal. L. J., 175; 11 Cal. W. N., 173. *Rameswar v. Ram Bahadur Chunder*, (1883) 12 C. L. R., 453; 9 Cal., 819. *Shant Chunder v. Kartick*

⁶ *Maffis Sahai v. Naran Bibi*, (1902) 7 Cal. W. N., 60.

⁷ *Arunachalam v. Sreyappa*, (1894) 21 Mad., 91.

⁸ *Kulom v. Abdul Azeez*, (1891) 6 Cal., 697.

⁹ *Court of Wards v. Nandan Singh*, (1871) 16 W. R., 143.

¹⁰ *Lachmeswar Singh v. Darbhanga Municipality*, (1891) 18 Cal., 99; L. R., 17 L. A., 94.

¹¹ *Arunachalam v. Murugappa*, (1893) 12 Mad., 503.

¹² *Abdul Ali v. Moradpur Hossain*, (1871) 16 W. R., P. C., 22.

¹³ *Dharmji Vaman v. Gurrav Shrinivas*, (1873) 10 Bom. H. C., 311.

¹⁴ *Bhaskar Bahar Mangul Sircar*, (1871) 16 W. R., 232; followed *Biku Halwai v. Mohesh*, (1904) 8 Cal. L. J., 266; *Krishna Pershad v. Rames*, (1903) 8 Cal. L. J., 274.

¹⁵ *Shankar Lal Singh v. Kacha Kaur*, (1874) 6 All. H. C., 170.

¹⁶ *Shankar Kuttu v. Govind Kuttu*, (1895) 19 Mad., 23.

making of the decree have been taken by the Court¹. It must appear that the Court's attention was directed to the fact that a minor was a party². Where the guardian *ad litem* of certain minors assented on their behalf to a compromise, which compromise was accepted by the Court, and a decree passed thereon, and was found not to be prejudicial to the interests of the minors, it was held that the minors could not, after the decree based upon the compromise had become final, succeed in a suit to set it aside on the sole ground that the Court had not previously given leave to the guardian to enter into the compromise³. A compromise made by a father as guardian of his natural son is binding on the son.⁴ The guardian *ad litem* of three minors having agreed to compromise a suit and having signed a petition embodying the terms arrived at, undertook to present the petition at the next sitting of the Court. Leave of the Court had not been obtained; and at the time appointed the guardian declined to present the petition, and opposed a decree being passed in its terms. *Held*, that the Court had no power to enforce the compromise⁵.

Assignment.—An assignment of a mortgage by a widow acting as natural guardian of her minor son without any certificate under the Bombay Minors Act, XX of 1864, is not invalid under this rule.⁶

Remedy.—A minor can sue by his next friend to set aside a compromise;⁷ or he may, on majority, proceed by review or a regular suit, making his next friend or guardian a co-defendant, or apply to the Court in which the compromise was made;⁸ but the binding effect of a compromise cannot be tried in execution of the decree⁹. A waiver by a guardian will not bind a minor, if not for his benefit.¹⁰ The compromise of a suit on behalf of a minor without the leave of the Court is voidable under this rule and can be avoided by the minor either on his attaining majority or before that time.¹¹ When the next friend of a minor plaintiff withdraws from a suit, the minor through another next friend can have the suit re-opened on review on the ground of the gross negligence of his former next friend.¹² The order may also be set aside on revision.¹³

¹ Kalavati v. Chedi Lal, (1897) 17 All., 531.

² Manohar Lal v. Jodmath Singh, (1906) 29 All., 595; 10 Cal. W. N., 898; 4 Cal. L. J., 8; 8 Bom. L. R., 499.

³ Aman Singh v. Narain Singh, (1893) 20 All., 98.

⁴ Nirvanaya v. Nirsanya, (1885) 9 Bom., 365.

⁵ Rang Rao v. Rajagopala, (1899) 22 Mad., 378.

⁶ Mani Sankar v. Bri Muli, (1898) 12 Bom., 690.

⁷ Solomon v. Abdul Azeez, (1891) 6 Cal., 678.

⁸ Diler Dutt Shahoo v. Subodra, (1876) 25 W. R., 449; Eshan Chunder v. Nundlamoni, (1884) 10 Cal., 357; followed in Barhunde v. Benarsi, (1906) 3 Cal. L. J., 119; Rukhsai Moni v. Adwytia Prowal, (1903) 30 Cal., 613; 7 Cal. W. N., 419; Karmali v. Rohimbhoy, (1899) 13 Bom., 137; Mirali v. Rahmoobhoy, 15 Bom., 694; and compare, Romon Kissen v. Hurrololl, (1892) 19 Cal., 334.

⁹ Arunachalam v. Murugappa, (1889) 12 Mad., 503.

¹⁰ Swamirao v. Collector of Dharwar, (1893) 17 Bom., 292.

¹¹ Virupakshappa v. Shudappa, (1902) 26 Bom., 109.

¹² Ramsurup Lal v. Shah Latifat Hossain, (1902) 29 Cal., 335.

¹³ Doraswami v. Thungasami, (1901) 27 Mad., 377.

¹⁴ Mohan Bibi v. Saral Chand Mitter, (1897) 2 Cal. W. N., 18; 2 Cal. W. N., 201; 25 Cal., 371.

ation that a state of things existed in the truth of which representation the person making it had no honest belief.¹ A Court of equity will deprive a fraudulent minor of the benefit of a plea of infancy; but he who invokes the aid of a Court must establish not only that a fraud was practised on him by the minor but that he was deceived into action by the fraud.² No suit can be maintained against a minor for a loan obtained upon a representation (which he knew to be false) that he was of age; but the defendant should not be allowed costs in either Court.³ But a suit to set aside a compromise decree may sometimes succeed without proof of fraud.⁴

Voidable—See *Hemanta v. Brojendra*.⁵ Where a decree to which a minor is a party has been compromised with leave of the Court under this rule the compromise cannot be subsequently re-opened by the Court *proprio motu* on the ground that it gave the minor less property than he was entitled to under the decree. The modes in which such an order can be impeached are, at the most, two, namely, by review or by suit,⁶ but not by an appeal.⁷ Apparent acquiescence in a disadvantageous compromise by one of the minors after arriving at majority, though evidence against him, is not evidence of a conclusive character, when not continued for any considerable time.⁸

8. (1) Unless otherwise ordered by the Court, a next friend shall not retire without first procuring a fit person to be put in his place and giving security for the costs already incurred.

(2) The application for the appointment of a new next friend shall be supported by an affidavit showing the fitness of the person proposed, and also that he has no interest adverse to that of the minor.

Act XIV of 1882, s. 447.

This rule applies to H. C. and Prov. S. C. C.

An application to substitute a next friend must be made with notice to the defendants; such is the English procedure.

An affidavit is necessary, although the application is not opposed by the defendants.⁹

9 (1) Where the interest of the next friend of a minor is adverse to that of the minor or where he is so connected with a defendant whose interest is adverse to that of the minor as to make it unlikely that the minor's interest will be properly protected by him, or where he does not do his duty, or, during the pendency of the suit, ceases to reside within British India,

¹ *Rajsoo Mary v. Premovithal*, (1896) 1 Cal. W. N., 453.

² *D'Armedis Ghose v. Brahmoo Dutt*, (1894) 23 Cal., 616; 2 Cal. W. N., 330; on appeal, (1899) 26 Cal., 341; 3 Cal. W. N., 464.

³ *Dharmal v. Ram Chander Ghosh*, (1896) 1 Cal. W. N., 270; 24 Cal., 263.

⁴ *Sarantia v. Hemangini*, (1887) 31 Cal., 83.

⁵ *Hemanta v. Brojendra*, (1891) 17 Cal., 573; L. R., 17 1 A., 65.

⁶ *Vinayakappa v. Sholappa*, (1899) 23 Bom., 620.

⁷ *Lalji Bhai v. Adwya Prasad*, (1899) 20 Cal., 613; 7 Cal. W. N., 410.

⁸ *Arjun Vaman v. Gurus Sholivas*, (1873) 10 Bom. H. C., 311.

⁹ *Hare v. Harman*, (1882) 5 L. R., 121.

or for any other sufficient cause, application may be made on behalf of the minor or by a defendant for his removal; and the Court, if satisfied of the sufficiency of the cause assigned, may order the next friend to be removed accordingly, and make such other orders as to costs as it thinks fit.

(2) Where the next friend is not a guardian appointed or declared by an authority competent in this behalf, and an application is made by a guardian so appointed or declared, who desires to be himself appointed in the place of the next friend, the Court shall remove the next friend unless it considers, for reasons to be recorded by it, that the guardian ought not to be appointed the next friend of the minor, and shall thereupon appoint the applicant to be next friend in his place upon such terms as to the costs already incurred in the suit as it thinks fit.

Act XIV of 1882, s. 436.

This rule applies to H. C. and Prov. S. C. C.

at the same time a *plaint* or a *petition* or *matrimonial property* in the name of his own wife.²

Leave to appeal against such a decree will be granted to a minor after attaining his majority when the interests of his guardian were at the time of passing the decree in conflict with those of the minor.³

Upon such terms.—Where a guardian insists upon his right to be appointed next friend the Court may require him to give security for the costs already incurred.⁴

10. (1) On the retirement, removal or death of the next friend of a minor, further proceedings shall be stayed until the appointment of a next friend in his place.

Stay of proceedings on removal, etc., of next friend.

(2) Where the plender of such minor omits, within a reasonable time, to take steps to get a new next friend appointed, any person interested in the minor or in the

¹ Sheoburnut Singh v. Lalljee, (1870) 13 W. R., 202.

² Pitamber v. Ishan Chunder, (1872) 18 W. R., 169.

³ Cursandas v. Laddavshoo, (1896) 20 Bom., 104.

⁴ See Report of Special Committee.

ation that a state of things existed in the truth of which representation the person making it had no honest belief.¹ A Court of equity will deprive a fraudulent minor of the benefit of a plea of infancy; but he who invokes the aid of a Court must establish not only that a fraud was practised on him by the minor but that he was deceived into action by the fraud.² No suit can be maintained against a minor for a loan obtained upon a representation (which he knew to be false) that he was of age; but the defendant should not be allowed costs in either Court.³ But a suit to set aside a compromise decree may sometimes succeed without proof of fraud.⁴

Voidable—See *Hemanta v. Brojendra*.⁵ Where a decree to which a minor is a party has been compromised with leave of the Court under this rule the compromise cannot be subsequently re-opened by the Court *proprio motu* on the ground that it gave the minor less property than he was entitled to under the decree. The modes in which such an order can be impeached are, at the most, two, namely, by review or by suit;⁶ but not by an appeal.⁷ Apparent acquiescence in a disadvantageous compromise by one of the minors after arriving at majority, though evidence against him, is not evidence of a conclusive character, when not continued for any considerable time.⁸

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Act XIV of 1882, s. 447.

This rule applies to H. C. and Prov. S. C. C.

An application to substitute a next friend must be made with notice to the defendants; such is the English procedure.

An affidavit is necessary, although the application is not opposed by the defendants.⁹

9 (1) Where the interest of the next friend of a minor is adverse to that of the minor or where he is so connected with a defendant whose interest is adverse to that of the minor as to make it unlikely that the minor's interest will be properly protected by him, or where he does not do his duty, or, during the pendency of the suit, ceases to reside within British India,

¹ *Itajoorisary v. Premadhab*, (1896) 1 Cal. W. N., 453.

² *Dharmadas Ghose v. Brahmo Dutt*, (1894) 21 Cal., 616; 2 Cal. W. N., 330; on appeal, (1897) 26 Cal., 381; 3 Cal. W. N., 464.

³ *Dhanraj v. Ram Chander Ghosh*, (1896) 1 Cal. W. N., 270; 21 Cal., 265.

⁴ *Surendra v. Hemangul*, (1896) 34 Cal., 83.

⁵ *Hemanta v. Brojendra*, (1894) 17 Cal., 473; L. R., 17 L. A., 65.

⁶ *Vasudevaswami v. Subbappa*, (1892) 23 Bom., 624.

⁷ *Pakhal Meht v. Adwayta Prasad*, (1897) 20 Cal., 613; 7 Cal. W. N., 410.

⁸ *Deane v. Varan v. Garay Shrinivas*, (1873) 10 Bom. H. C., 311.

⁹ *Hall v. Hall*, (1887) 5 Decc., 120.

or for any other sufficient cause, application may be made on behalf of the minor or by a defendant for his removal; and the Court, if satisfied of the sufficiency of the cause assigned, may order the next friend to be removed accordingly, and make such other order as to costs as it thinks fit.

(2) Where the next friend is not a guardian appointed or declared by an authority competent in this behalf, and an application is made by a guardian so appointed or declared, who desires to be himself appointed in the place of the next friend, the Court shall remove the next friend unless it considers, for reasons to be recorded by it, that the guardian ought not to be appointed the next friend of the minor, and shall thereupon appoint the applicant to be next friend in his place upon such terms as to the costs already incurred in the suit as it thinks fit.

Act XIV of 1882, s. 446

This rule applies to H. C. and Prov. S. C. C.

In a suit against A for himself and as guardian of B, a decree was given in favor of B. Subsequently C contended that she, and not A, was the

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Leave to appeal against such a decree will be granted to a minor after attaining his majority when the interests of his guardian were at the time of passing the decree in conflict with those of the minor.³

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10. (1) On the retirement, removal or death of the next friend of a minor, further proceedings shall be stayed until the appointment of a next friend in his place.

(2) Where the pleader of such minor omits, within a reasonable time, to take steps to get a new next friend appointed, any person interested in the minor or in the

¹ Sheoburrut Singh v. Lalljee, (1870) 13 W. R. 202

* Pitamber v. Ishan Chunder, (1872) 18 W. R., 169

* *Cursandas v. Ladkavahoo*, (1896) 20 Bom., 194.

* See Report of Special Committee.

ation that a state of things existed in the truth of which representation the person making it had no honest belief.¹ A Court of equity will deprive a fraudulent minor of the benefit of a plea of infancy; but he who invokes the aid of a Court must establish not only that a fraud was practised on him by the minor but that he was deceived into action by the fraud.² No suit can be maintained against a minor for a loan obtained upon a representation (which he knew to be false) that he was of age, but the defendant should not be allowed costs in either Court.³ But a suit to set aside a compromise decree may sometimes succeed without proof of fraud.⁴

Voidable—See *Hemanta v Brojendra*.⁵ Where a decree to which a minor is a party has been compromised with leave of the Court under this rule the compromise cannot be subsequently re-opened by the Court *proprio motu* on the ground that it gave the minor less property than he was entitled to under the decree. The modes in which such an order can be unpeached are, at the most, two, namely, by review or by suit;⁶ but not by an appeal.⁷ Apparent acquiescence in a disadvantageous compromise by one of the minors after arriving at majority, though evidence against him, is not evidence of a conclusive character, when not continued for any considerable time.⁸

8. (1) Unless otherwise ordered by the Court, a next friend shall not retire without first procuring a fit person to be put in his place and giving security for the costs already incurred.

(2) The application for the appointment of a new next friend shall be supported by an affidavit showing the fitness of the person proposed, and also that he has no interest adverse to that of the minor.

Act XIV of 1882, s. 447.

This rule applies to H. C. and Prov. S. C. C.

An application to substitute a next friend must be made with notice to the defendants; such is the English procedure.

An affidavit is necessary, although the application is not opposed by the defendants.⁹

9 (1) Where the interest of the next friend of a minor is adverse to that of the minor or where he is so connected with a defendant whose interest is adverse to that of the minor as to make it unlikely that the minor's interest will be properly protected by him, or where he does not do his duty, or, during the pendency of the suit, ceases to reside within British India,

¹ *Rajecommey v. Premasulbhu*, (1896) 1 Cal. W. N., 453.

² *Dharmadas Ghose v. Brahmoo Dutt*, (1898) 25 Cal., 616; 2 Cal. W. N., 330; on appeal, (1899) 26 Cal., 381; 3 Cal. W. N., 463.

³ *Dharmul v. Ram Chander Ghosh*, (1896) 1 Cal. W. N., 270; 21 Cal., 265.

⁴ *Sundara v. Hemangini*, (1897) 31 Cal., 83.

⁵ *Hemanta v. Brojendra*, (1899) 17 Cal., 975; 1 L. R., 17 L. A., 65.

⁶ *Venugopalappa v. Shulappa*, (1899) 23 Bom., 631.

⁷ *Lakshmi Devi v. Adwaya Prasad*, (1899) 29 Cal., 613; 7 Cal. W. N., 410.

⁸ *Thakurji Vaman v. Georjee Shrinivas*, (1873) 10 Bom. H. C., 311.

⁹ *Harrison v. Harrison*, (1842) 5 Bear., 130.

or for any other sufficient cause, application may be made on behalf of the minor or by a defendant for his removal; and the Court, if satisfied of the sufficiency of the cause assigned, may order the next friend to be removed accordingly, and make such other order as to costs as it thinks fit.

(2) Where the next friend is not a guardian appointed or declared by an authority competent in this behalf, and an application is made by a guardian so appointed or declared, who desires to be himself appointed in the place of the next friend, the Court shall remove the next friend unless it considers, for reasons to be recorded by it, that the guardian ought not to be appointed the next friend of the minor, and shall thereupon appoint the applicant to be next friend in his place upon such terms as to the costs already incurred in the suit as it thinks fit.

Act XIV of 1882, s. 446

This rule applies to H. C. and Prov. S. C. C.

In a suit against A for himself and as guardian of B, a decree was given against both. Subsequently C petitioned stating that she and not A was the

own wife.³

Leave to appeal against such a decree will be granted to a minor after attaining his majority when the interests of his guardian were at the time of passing the decree in conflict with those of the minor.⁴

Upon such terms—Where a guardian insists upon his right to be appointed next friend the Court may require him to give security for the costs already incurred.⁴

10. (1) On the retirement, removal or death of the next friend of a minor, further proceedings shall be stayed until the appointment of a next friend in his place.

Stay of proceedings on removal, etc., of next friend.

(2) Where the pleader of such minor omits, within a reasonable time, to take steps to get a new next friend appointed, any person interested in the minor or in the

³ Sheobharrat Singh v. Lalljee, (1870) 13 W. R., 202

⁴ Pitamber v. Ishan Chunder, (1872) 18 W. R., 169

⁵ Cursandas v. Ladvahoo, (1896) 20 Bom., 101

⁶ See Report of Special Committee.

matter in issue may apply to the Court for the appointment of one, and the Court may appoint such person as it thinks fit.

Act XIV of 1882, sects. 448-449

This rule applies to H. C. and Prov. S. C. C.

On the death or removal of a next friend, it is the duty of the solicitor or pleader for the plaintiff to apply to the Court for an order, appointing a new next friend in his stead.¹

In England, when a next friend dies, the paternal relations of the minor are first consulted as regards his successor.²

No person can be appointed next friend without his consent, and before making such an appointment the Judge should be satisfied of his willingness to act.

If a next friend be not appointed, and the suit is dismissed, defendant cannot get his costs from the minor.³

Quære—Whether a minor, who having been a party to a suit was served with summons, afterwards, on attaining majority carried on the suit as transferee of the estate from the widow, previous owner, was not bound as a party?⁴

11. (1) Where the guardian for the suit desires to retire or does not do his duty, or where other sufficient ground is made to appear, the Court may permit such guardian to retire or may remove him, and may make such order as to costs as it thinks fit.

(2) Where the guardian for the suit retires, dies or is removed by the Court during the pendency of the suit, the Court shall appoint a new guardian in his place.

Act XIV of 1882, sects. 458-459

This rule applies to H. C. and Prov. S. C. C.

Costs can be recovered from a person acting as guardian if he has acted improperly; ⁵ unless he has been appointed without his consent.⁶

Ordinarily, when the next friend of an infant dies, his nearest paternal relations are entitled to nominate the new next friend.⁷

Desires to retire—Provision is here made for the voluntary retirement of a Guardian; an addition to the above sections of the former Code.

¹ *Westby v. Westby*, 2 Coop. temp., Cott., 211.

² *Talbot v. Talbot*, (1874) L. R., 17 Eq., 317; *Woolf v. Pemberton*, (1877) 6 C. D., 19.

³ *Turner v. Turner*, 13 Cox, 708.

⁴ *Parthab Narain v. Trilokinath*, (1883) L. R., 11 L. A., 107; 11 Cal., 186.

⁵ *G. Ram Hare v. Yarnabai*, (1881) 8 Bom., 291; *Narasimha Rao v. Lakshmi*, 190, (1889) 3 Mad., 233.

⁶ *Jal v. Hal*, 11 C. L. J., (1881) 5 Bom., 284.

⁷ *Talbot v. Talbot*, (1874) L. R., 17 Eq., 317; *Woolf v. Pemberton*, (1877) 6 C. D., 19.

12. (1) A minor plaintiff or a minor not a party to a suit on whose behalf an application is pending shall, on attaining majority, elect whether he will proceed with the suit or application.

Course to be followed by minor plaintiff or applicant on attaining majority.

(2) Where he elects to proceed with the suit or application, he shall apply for an order discharging the next friend and for leave to proceed in his own name.

(3) The title of the suit or application shall in such case be corrected so as to read thenceforth thus:—

“A. B., late a minor, by C. D., his next friend, but now having attained majority.”

(4) Where he elects to abandon the suit or application, he shall, if a sole plaintiff or solo applicant, apply for an order to dismiss the suit or application on repayment of the costs incurred by the defendant or opposite party or which may have been paid by his next friend.

(5) Any application under this rule may be made *ex parte*: but no order discharging a next friend and permitting a minor plaintiff to proceed in his own name shall be made without notice to the next friend.

Act XIV of 1882, sects. 430, 451, 452 and 453.

This rule applies to H. C. and Prov. S. C. C.

Leave will be given as a matter of course, unless there is an absolute bar by positive enactment. The omission to comply with the requirements of this rule is a mere irregularity and will not bar execution of a decree. An application under this rule may be made *ex parte* and does not require any notice. The provisions as to the correction of title refer to a pending suit and not to a suit after final decree, in which it only remains to proceed to execution.¹

13. (1) Where a minor co-plaintiff on attaining majority desires to repudiate the suit, he shall apply to have his name struck out as co-plaintiff; and the Court, if it finds that he is not a necessary party, shall dismiss him from the suit on such terms as to costs or otherwise as it thinks fit.

Where minor co-plaintiff attaining majority desires to repudiate suit.

(2) Notice of the application shall be served on the next friend, on any co-plaintiff and on the defendant.

(3) The costs of all parties of such application, and of all or any proceedings theretofore had in the suit, shall be paid by such persons as the Court directs.

¹ Doorga Mohun Dass v. Tahir Ally, (1893) 22 Cal., 270.

(4) Where the applicant is a necessary party to the suit, the Court may direct him to be made a defendant.

Act XIV of 1882; sect. 454

This rule applies to H. C. and Prov. S. C. C.

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In England, if the next friend requires it, the late minor will be made a co-defendant.¹

14 (1) A minor on attaining majority may, if a sole plaintiff, apply that a suit instituted in his name by a next friend be dismissed on the ground that it was unreasonable or improper.

Unreasonable or im-
proper suit.

(2) Notice of the application shall be served on all the parties concerned; and the Court, upon being satisfied of such unreasonableness or impropriety, may grant the application and order the next friend to pay the costs of all parties in respect of the application and of anything done in the suit, or make such other order as it thinks fit.

This rule applies to H. C. and Prov. S. C. C.

A minor, on attaining his majority, cannot get a bill filed on his behalf dismissed with costs to be paid by his next friend, unless he can prove to the satisfaction of the Court that the suit was unreasonable or improper, otherwise he must pay all costs.² A filed a bill as next friend of B, whom he alleged to be of unsound mind. B's sanity was established: *held*, on application by B, to have the bill taken off the file, that he was entitled to an indemnity against all the consequences of the suit having been instituted in his name, and that A must pay B's costs, as between solicitor and client, of the application, and the defendant's costs of the suit, as between party and party including the costs of the application in the lowest Court and on appeal.³

15 The provisions contained in rules 1 to 14, so far as they are applicable, shall extend to persons adjudged to be of unsound mind and to persons who though not so adjudged are found by the Court on inquiry, by reason of unsoundness of mind or mental infirmity, to be incapable of protecting their interests when suing or being sued.

Application of rules
to persons of unsound
mind

Act XIV of 1882, sect. 453

This rule applies to H. C. and Prov. S. C. C.

Unsound mind.—The term unsound mind comprehends imbecility, whether arising from old age, as well as lunacy or mental alienation

¹ See *11 A. & E. (1863) 32 Bear. 381*

² *4 M. & C. 461*

³ *11 A. & E. (1863) 3 Ch. App. 772.*

resulting from disease.¹ Unsoundness of mind taken by itself is not sufficient to bring a person within the term "lunatic".² This rule has been extended to cover the case of a person incapacitated by reason of mental weakness or of being a deaf mute from protecting his own interests.³

Lunacy.—A person alleged to be a lunatic, though not found so under Act XXXV of 1858, may appear either in person or by *vakil*;⁴ and where a suit for partition was brought by a next friend for a person not adjudged a lunatic, a subsequent adjudication was held not to save the error;⁵ but this decision has not been followed, and it has been decided that on general principles a Court

under Act XXXV of 1858 must be made a party to a suit against the lunatic.⁶ As to the distinction to be drawn between lunacy with lucid intervals and a state of sound mind subject to occasional unsoundness arising from accidental and temporary causes, see the case of *Nagappa Chetti in re*.⁷ When the name of a lunatic plaintiff was struck out of the plaint by his pleader and by his guardian without authority and subsequently restored, it was held that the restoration of his name must relate back to the filing of the suit, which was accordingly instituted in time.⁸ On an application under sect. 115 to the Judicial Commissioner to set aside a decree which had been obtained in a suit against the Court of Wards as representing the state of a lunatic, *held*, that, even if a guardian of the lunatic's person had been appointed (of which there was no evidence) and had continued to be guardian at the date of the decree, Act XVII of 1874, ss. 175 and 176, did not render the suit incompetent.⁹

The High Court of the North-West has not by s. 12 of the Charter any original jurisdiction in respect of lunatics who are natives of India.¹⁰ Act XXXV of 1858 provides no machinery nor does it confer any power upon the Court to deal with the joint family property or interfere in the affairs of a joint family.¹¹ Where a wife alleging her husband not adjudged a lunatic to be of unsound mind, brought a suit as next friend, the Bombay High Court ordered an enquiry (1) as to whether the husband was of unsound mind; (2) as to whether the suit was for his benefit.¹² The provisions of Chap. XXXI, former code, were not exhaustive, and where a person is admitted or has been found to be of unsound mind, although he has not been adjudged to be so under Act XXXV of 1858,

¹ *Cowasji Beramji, in re*, (1893) 7 Bom., 15.

² *Sherman v. Schorn*, (1875) 21 W. R., 124.

³ See Report of the Special Committee.

⁴ *Uma Sundari Dasi v. Ramji Halidar*, (1891) 7 Calc., 242; see also *Bindabun Chunder v. Kali Doss*, W. R., 1861, 268; *Jounagadla v. Thatiparthi*, (1883) 6 Mad., 390.

⁵ *Tukaram v. Vithal*, (1889) 13 Bom., 656.

⁶ *Rasik v. Buthumukhi*, (1906) 33 Calo. 1091; 10 Calo. W. N. 719; 4 Calc. L. J., 306; *Venkatramana v. Timappa*, (1891) 16 Bom., 132; and see *Cohen, ex parte*, (1879) 10 C. D., 183. See, however, *Bhoopendra Narain Roy v. Gresh Narain Roy*, (1881) 6 Calc., 539.

⁷ *Kala Chand v. Shoolochana*, (1874) 22 W. R., 33.

⁸ *Chunderabati Koeri v. Monji Lal*, (1896) 23 Calo., 512.

⁹ See *Nagappa Chetti, in re*, (1893) 18 Mad., 472.

¹⁰ *Kirparam v. Modia Dayalji*, (1895) 19 Bom., 135.

¹¹ *Asharfi Lal v. Deputy Comr. of Barabanki*, (1894) L. R., 22 I. A., 90; 22 Calc., 729.

¹² *Jaundha Kuar v. Court of Wards*, (1882) 4 All., 159.

¹³ *Trimbak Lal v. Hira Lal*, (1896) 20 Bom., 659.

¹⁴ *Pransukhram v. Bai Ladhkar*, (1899) 23 Bom., 653.

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(2) Notice of the application shall be served on all the parties concerned ; and the Court, upon being satisfied of such unreasonableness or impropriety, may grant the application and order the next friend to pay the costs of all parties in respect of the application and of anything done in the suit, or make such other order as it thinks fit.

This rule applies to H. C. and Prov. S. C. C.

A minor, on attaining his majority, cannot get a bill filed on his behalf dismissed with costs to be paid by his next friend. . . . satisfaction of the Court that the suit . . . he must pay all costs² A filed a . . . be of unsound mind. B's sanity was . . . have the bill taken off the file, that . . . the consequences of the suit having . . . must pay B's costs, as between sole . . . defendant's costs of the suit, as between . . . the application in the lowest Court and on appeal.³

15 The provisions contained in rules 1 to 14, so far as they are applicable, shall extend to persons adjudged to be of unsound mind and to persons who though not so adjudged are found by the Court on inquiry, by reason of unsoundness of mind or mental infirmity, to be incapable of protecting their interests when suing or being sued.

Act XIV of 1882, sect 463

This rule applies to H. C. and Prov. S. C. C.

Unsound mind.—The term unsound mind comprehends imbecility, whether congenital or arising from old age, as well as lunacy or mental alienation

¹ See *1 L. Arnell, (1873) 32 Beav., 301.*

² *4 Moll., 461*

³ *1 L. Arnell, (1873) 32 Beav., 301.*

resulting from disease.¹ Unsoundness of mind taken by itself is not sufficient to bring a person within the term "lunatic".² This rule has been extended to cover the case of a person incapacitated by reason of mental weakness or of being a deaf mute from protecting his own interests.³

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¹ *Cowasji Beramji, in re*, (1883) 7 Bom., 15.

² *Sherman v. Schorn*, (1875) 21 W. R., 121.

³ See Report of the Special Committee.

⁴ *Uma Sundari Devi v. Ramji Halhar*, (1881) 7 Calo., 242; see also *Bindabun Chunder v. Kali Dass*, W. R., 1864, 263; *Jonnagadla v. Thatiparthi*, (1883) 6 Mad., 380.

⁵ *Tukaram v. Vithal*, (1889) 13 Bom., 656.

⁶ *Rastik v. Beldhumukhi*, (1906) 33 Calo., 1094; 10 Calo. W. N. 719; 4 Calo. L. J., 306; *Yenkatramana v. Timappa*, (1891) 16 Bom., 132; and see *Cohen, ex parte*, (1879) 10 C. D., 183. See, however, *Bhoopendra Narain Roy v. Gresh Narain Roy*, (1881) 6 Calo., 539.

⁷ *Kala Chaud v. Shoolochana*, (1874) 22 W. R., 33.

⁸ *Chunderabati Koeri v. Monji Lal*, (1896) 23 Calo., 512.

⁹ See *Nagappa Chetti, in re*, (1895) 18 Mad., 472.

¹⁰ *Kirparam v. Modia Dayalji*, (1893) 19 Bom., 135.

¹¹ *Asharfi Lal v. Deputy Comr. of Darabanki*, (1894) L. R., 22 I. A., 90; 22 Calo., 729.

¹² *Jaundha Kuar v. Court of Wards*, (1882) 4 All., 159.

¹³ *Trimbak Lal v. Hira Lal*, (1896) 20 Bom., 659.

¹⁴ *Pransukhram v. Bai Lalkor*, (1899) 23 Bom., 653.

or by any other law for the time being in force, he should, if a plaintiff, be allowed to sue through his next friend and the Court should appoint a guardian *ad litem*, where he was a defendant.¹ A guardian may be appointed under Act XXXV of 1858 to the property vested in a lunatic as a head of a *mutt*.² A Collector appointed under s. 11 of Act XXXV of 1858 to take charge of the estate of a lunatic cannot himself sue on behalf of the lunatic, but must appoint a manager for the purpose.³

A guardian of the person only of a lunatic has no right to bring a suit in respect of the lunatic's estate. The manager of the lunatic's estate is the only person who can institute such a suit. The word guardian in r. 1 when applied to a lunatic means the manager of his estate. Under this rule a person other than the guardian of the estate can also sue with the leave of the Court.⁴

Evidence of lunacy.—The bare assertion of witnesses unsupported by any details of the causes, the course and treatment of the malady ought not to be accepted as satisfactory proof of insanity.⁵ It should be clearly shown that there is ground for supposing that the person is of unsound mind.⁶ The inquiry should be directed to the fact as to whether the alleged lunatic is incapable of managing his affairs irrespective of the cause of such incapacity.⁷ In the absence of any provisions in the Code of Civil Procedure for the maintenance of suits against persons of unsound mind who have not been so adjudged under the Act, the Court should appoint a guardian *ad litem*, upon its being established that the defendant was of unsound mind.⁸

16 Nothing in this Order shall apply to a Sovereign Prince or Ruling Chief suing or being sued in the name of his State, or being sued by direction of the Governor General in Council or a Local Government in the name of an agent or in any other name, or shall be construed to effect or in any way derogate from the provisions of any local law for the time being in force relating to suits by or against minors or by or against lunatics or other persons of unsound mind.

Act XIV of 1852, s. 464.

This rule applies to H. C. and Prov. S. C. C.

Court of Wards.—Where a suit was brought by a manager under the Court of Wards on behalf of a ward, and it was objected that he had no authority to sue, the Privy Council considered the objection merely formal and refused to hear it.⁹

¹ *Nallu Khan v. Bida*, (1894) 20 All., 2.

² *Sitaran v. Charya v. Kesava Charya*, (1793) 21 Mad., 402.

³ *Green Nath v. Collector of Monghyr*, (1867) 7 W. R., 5.

⁴ *Dyal v. Hiralal*, (1892) 23 Bom., 403.

⁵ *Kalachand v. Pradalsany*, (1874) 22 W. R., 33.

⁶ *Banga Pershad v. Womra*, (1872) 18 W. R., 226.

⁷ *Harshey v. Bhutian Singh*, (1873) 20 W. R., 53.

⁸ *K. C. v. P. v. Neral*, (1893) 24 Mad., 505.

⁹ *Harshey Narayan v. Booder Pershad*, (1853) L. R., 11 L.A., 26; 10 Cal., 626. See also *Bhattacharya v. Bhattacharya*, (1899) 17 Mad., 107; *Banku v. Puttamma*, 14 Cal., 27; and see *Th. v. N. Narayan v. Raval's Prasad*, (1891) 18 Cal., 500; *Th. v. N. Narayan v. Raval's Prasad*, (1899) 17 Cal., 684; 14 L. R., 17 L.A., 5; *Th. v. N. Narayan v. Raval's Prasad*, (1892) 16 Cal., 82.

As to a suit on behalf of a ward held to have been properly instituted, sanction not having been obtained, see *Biseswar Roy v. Shoshi Shikhareswar*.¹

Local law.—See note under r. 3 (1) and *Guru Churn v. Kali Kishen*.²

¹ *Biseswar Roy v. Shoshi Shikhareswar*, (1889) 17 Cal., 688; L. R., 17 I. A., 5.

² *Guru Churn v. Kali Kishen*, (1885) 11 Cal., 402.

ORDER XXXIII.

Suits by Paupers.

Suits may be instituted in *forma pauperis*

1. Subject to the following provisions, any suit may be instituted by a pauper.

Explanation.—A person is a “pauper” when he is not possessed of sufficient means to enable him to pay the fee prescribed by law for the plaint in such suit, or, where no such fee is prescribed, when he is not entitled to property worth one hundred rupees other than his necessary wearing-apparel and the subject-matter of the suit.

Act XIV of 1882, sect. 401.

This rule applies to H. C. and Prov. S. C. C.

On an application to sue in *forma pauperis*, the Court is required to deal with the question of the applicant's pauperism with reference to this definition.¹

A person having property worth Rs 1600 is a pauper within this rule if he wishes to file a suit requiring a Court fee of a greater amount.²

“Other than” — See *Krishnakshu v. Manishar*.³

Subject-matter of the suit.—The enquiry into pauperism under rr. 6 and 7 takes place before any suit is in existence. Where on such an investigation the other side deposited articles claimed of the value of one hundred rupees, it was held that these articles did not form any portion of the subject-matter of the suit, and the petitioner was not a pauper.⁴ A person who applies for permission to sue as a pauper is not bound to try and raise funds by mortgaging his claim.⁵

The old section (402) withholding the right to sue for damages for loss of caste, defamation and abusive language has not been reproduced.

Plaintiff.—A plaintiff may be allowed to carry on as a pauper a suit instituted in the ordinary way.⁶ A person who has obtained leave to sue under s. 18 of the Religious Endowments Act for the removal of the trustees of a temple may sue in *forma pauperis*.⁷

Minor.—A suit can be brought in *forma pauperis* on behalf of a pauper minor by a next friend.⁸ but the failure of the suit is no ground for throwing the costs of the suit on the next friend.⁹

Representative.—There is no necessity to enquire if the representative of

¹ *Mohammad Hussain v. Ajudhia Prasad*, (1888) 10 All., 407.

² *Gangabai v. Shrinagar*, (1895) 8 Bom. L. R., 642.

³ *Krishnakshu v. Manishar*, (1895) 20 Bom. 533; 8 Bom. L. R., 671.

⁴ *Itanagarath v. M. Bharrav*, (1895) 10 Bom., 217.

⁵ *Velantia v. Perumthammam*, (1879) 3 Mad., 219.

⁶ *Naraj Chandra v. Dyal Nath*, (1877) 12 Cal., 170; *Berji v. Sakhamam*, (1884) 8 Cal., 615; *Thompson v. Patutta Tramway Co.*, (1893) 20 Cal., 319.

⁷ *Thirumalai Chettai v. Krishnasami Nair*, (1901) 24 Mad., 419.

⁸ *Thirumalai Chettai v. Krishnasami Nair*, (1873) 11 B. L. R., 373; who is not a pauper—*Verkhatarasaya v. Arhemma*, (1879) 3 Mad., 3.

⁹ *Thirumalai Chettai v. Krishnasami Nair*, (1876) 25 W. R., 318.

a pauper is also a pauper the Court, if satisfied that he is the legal representative should allow him to carry on the suit.¹

Fiduciary character—An executor or administrator can sue in *forma pauperis*.²

Defendant—A defendant may be allowed to defend a suit in *forma pauperis*.³

Pauper appeals—See O XLIV, *first*.

Respondent.—Cross objections under O XLI, r. 22 cannot be heard in *forma pauperis*.⁴

2 Every application for permission to sue as a pauper shall contain the particulars required in regard to plaints in suits; a schedule of any moveable or immoveable property belonging to the applicant, with the estimated value thereof, shall be annexed thereto, and it shall be signed and verified in the manner prescribed for the signing and verification of pleadings.

Act XIV of 1882, sect 403

This rule applies to H. C. and Prov. S. C. C.

An unsuccessful application of a wife to sue for dower in *forma pauperis* though opposed by her husband in a counter-petition denying his liability, is not such a demand and refusal of a dower as to constitute a cause of action. The application merely expresses an intention to demand, if allowed to do so, in a particular way.⁵

Court-fee.—See art 2, Sched. II, Act VII of 1870

3. Notwithstanding anything contained in these rules, the application shall be presented to the Court by the applicant in person, unless he is exempted from appearing in Court, in which case the application may be presented by an authorized agent who can answer all material questions relating to the application, and who may be examined in the same manner as the party represented by him might have been examined had such party attended in person.

Act XIV of 1882, s. 404

This rule applies to H. C. and Prov. S. C. C.

This rule is imperative, and a petition to sue in *forma pauperis* must be presented in person, unless the pauper is exempted from appearing in Court under ss 132, 133.⁶

¹ Bhagbut v Boloram, (1865) 3 W. R., Mss., 20.

² Bill, *in re*, (1884) 7 Mad., 390; Dawn Bai, *in the matter of*, (1894) 18 Bom., 237.

³ Doorga Churn v. Nittokally, (1880) 6 C. L. R., 120; 5 Cal., 819.

⁴ Brojeshwari v Guroo Churn, (1895) 11 Cal., 735

⁵ Khajooroonissa v. Ryeesoonissa, (1874) L. R., 2 L. A., 235; 15 B. L. R., P. C., 306; 24 W. R., P. O., 163

⁶ Devgir Gura Sumbhagir, *ex parte*, (1867) 4 Bom. H. C., 91; Burgess v Sidden (1887) 10 Mad., 193

ORDER XXXIII.

Suits by Paupers.

Suits may be instituted in *forma pauperis*

1. Subject to the following provisions, any suit may be instituted by a pauper.

Explanation.—A person is a “pauper” when he is not possessed of sufficient means to enable him to pay the fee prescribed by law for the plaint in such suit, or, where no such fee is prescribed, when he is not entitled to property worth one hundred rupees other than his necessary wearing-apparel and the subject-matter of the suit.

Act XIV of 1882, sect. 401.

This rule applies to H. C. and Prov. S. C. C.

On an application to sue in *forma pauperis*, the Court is required to deal with the question of the applicant's pauperism with reference to this definition¹

A person having property worth Rs 1600 is a pauper within this rule if he wishes to file a suit requiring a Court fee of a greater amount.²

“Other than”—See *Krishnabai v. Manashar*.³

sue as a pauper is not bound to try and raise funds by mortgaging his claim⁴

The old section (402) withholding the right to sue for damages for loss of caste, defamation and abusive language has not been reproduced.

Plaintiff—A plaintiff may be allowed to carry on as a pauper a suit instituted in the ordinary way⁵ A person who has obtained leave to sue under s. 18 of the Religious Endowments Act for the removal of the trustees of a temple may sue in *forma pauperis*.⁷

Minor.—A suit can be brought in *forma pauperis* on behalf of a pauper minor by a next friend,⁶ but the failure of the suit is no ground for throwing the costs of the suit on the next friend.⁹

Representative—There is no necessity to enquire if the representative of

¹ *Muhammad Hussain v. Ajudhia Prasad*, (1883) 10 All., 467.

² *Gangabai v. Shridhar*, (1906) 8 Bom. L. R., 642.

³ *Krishnabai v. Monashar*, (1906) 30 Bom., 593; 8 Bom. L. R., 671.

⁴ *Dwarkanath v. Madhavray*, (1896) 10 Bom., 207.

⁵ *Vedanta v. Perindesamma*, (1879) 3 Mad., 219.

⁶ *Nirmal Chandra v. Doyal Nath*, (1877) 2 Cal., 190; *Revji v. Sakhamam*, (1884) 8 Bom., 615; *Thompson v. Calcutta Tramway Co.*, (1893) 20 Cal., 319.

⁷ *Gurusami Chetti v. Krishnasami Naikar*, (1901) 21 Mad., 419.

⁸ *Chandramones Deyee v. Prasannomoye*, (1873) 11 B. L. R., 373; who is not a pauper—*Venkatamarasaya v. Achamma*, (1893) 3 Mad., 3.

⁹ *Rajasuree v. Kishore*, (1876) 23 W. R., 316.

a pauper is also a pauper the Court, if satisfied that he is the legal representative should allow him to carry on the suit.¹

Fiduciary character—An executor or administrator can sue in *forma pauperis*.²

Defendant—A defendant may be allowed to defend a suit in *forma pauperis*.³

Pauper appeals—See O. XLIV. *Ant*

Respondent—Cross objections under O. XLI. r. 22 cannot be heard in *forma pauperis*.⁴

2 Every application for permission to sue as a pauper shall contain the particulars required in regard to plaints in suits: a schedule of any moveable or immoveable property belonging to the applicant, with the estimated value thereof, shall be annexed thereto, and it shall be signed and verified in the manner prescribed for the signing and verification of pleadings.

Act XIV of 1882, sect. 403

This rule applies to H. C. and Prov. S. C. C.

An unsuccessful application of a wife to sue a husband for maintenance, though opposed by her such a demand and re application merely expressed in a particular way.⁵

Court-fee.—See art. 2, Sched. II, Act VII of 1870

3 Notwithstanding anything contained in these rules, the application shall be presented to the Court by the applicant in person, unless he is exempted from appearing in Court, in which case the application may be presented by an authorized agent who can answer all material questions relating to the application, and who may be examined in the same manner as the party represented by him might have been examined had such party attended in person.

Act XIV of 1882, s. 404.

This rule applies to H. C. and Prov. S. C. C.

This rule is imperative, and a petition to sue in *forma pauperis* must be presented in person, unless the pauper is exempted from appearing in Court under ss. 132, 133.⁶

¹ Bhagbut v Buloram, (1865) 3 W. R., Mis., 20.

² Bill, in re, (1891) 7 Mad., 399; Dawn Bai, in the matter of, (1891) 18 Bom., 237.

³ Doorga Churn v Nittokally, (1890) 6 C. L. R., 120; 5 Calo., 810.

⁴ Brojeshwari v Guroo Churn, (1883) 11 Calo., 735.

⁵ Khajooroonissa v. Ryeesoonissa, (1874) L. R., 2 L. A., 235; 15 B. L. R., P. C., 306; 24 W. R., P. C., 163.

⁶ Devgir Guru Sumbhagir, ex parte, (1867) 4 Bom. H. C., 91; Burgess v Siddon (1887) 10 Mad., 103.

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This rule applies to H. C. and Prov. S. C. C.

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A person having property worth Rs 1600 is a pauper within this rule if he wishes to file a suit requiring a Court fee of a greater amount.²

“Other than”—See *Krishnabai v. Manashar*.³

Subject-matter of the suit.—The enquiry into pauperism under rr. 6 and 7 takes place before any suit is in existence. Where on such an investigation the other side deposited articles claimed of the value of one hundred rupees, it is held that these and the petition sue as a pauper.

The old section (401) withholding the right to sue for damages for loss of caste, defamation and abusive language has not been reproduced.

Plaintiff.—A plaintiff may be allowed to carry on as a pauper a suit instituted in the ordinary way.⁴ A person who has obtained leave to sue under s. 18 of the Religious Endowments Act for the removal of the trustees of a temple may sue in *forma pauperis*.⁵

Minor.—A suit can be brought in *forma pauperis* on behalf of a pauper minor by a next friend;⁶ but the failure of the suit is no ground for throwing the costs of the suit on the next friend.⁷

Representative—There is no necessity to enquire if the representative of

¹ Muhammad Husain v. Ajudha Prasad, (1883) 10 All., 467.

² Gangabai v. Shridhar, (1906) 8 Bom. L. R., 642.

³ Krishnabai v. Manashar, (1906) 30 Bom., 593; 8 Bom. L. R., 671.

⁴ Dwarkanath v. Madhavray, (1886) 10 Bom., 297.

⁵ Venkateswara v. Venkateswara, (1899) 3 Mad., 3.

⁶ Venkateswara v. Venkateswara, (1899) 3 Mad., 3.

⁷ Venkateswara v. Venkateswara, (1899) 3 Mad., 3.

⁸ Gurusami Chetti v. Krishnasami Nair, (1901) 24 Mad., 419.

⁹ Gollapinneni Dossu v. Protonmoye, (1873) 11 B. L. R., 373; who is not a pauper—Venkateswara v. Venkateswara, (1899) 3 Mad., 3.

¹⁰ Brjeshwara v. Kishore, (1876) 23 W. R., 316.

a pauper is also a pauper the Court, if satisfied that he is the legal representative should allow him to carry on the suit.¹

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Act XIV of 1882, sect. 203

This rule applies to H. C. and Prov. S. C. C.

An unsuccessful application of a wife to sue for dower in *forma pauperis* though opposed by her husband in a counter-petition denying his liability, is not such a demand and refusal of a dower as to constitute a cause of action. The application merely expresses an intention to demand, if allowed to do so, in a particular way.⁵

Court-fee.—See art. 2, Sched. II, Act VII of 1870

3 Notwithstanding anything contained in these rules, the application shall be presented to the Court by the applicant in person, unless he is exempted from appearing in Court, in which case the application may be presented by an authorized agent who can answer all material questions relating to the application, and who may be examined in the same manner as the party represented by him might have been examined had such party attended in person.

Act XIV of 1882, s. 404.

This rule applies to H. C. and Prov. S. C. C.

This rule is imperative, and a petition to sue in *forma pauperis* must be presented in person, unless the proper is exempted from appearing in Court under ss. 132, 133.⁶

¹ Bhagbut v. Buloram, (1865) 3 W. R., M.S., 20.

² Bill, in re, (1881) 7 Mad., 399; Dawn Bai, in the matter of, (1891) 18 Bom., 237.

³ Doorga Churn v. Nittokally, (1890) 6 C. L. R., 120; 5 Cal., 819.

⁴ Brojeshwari v. Guroo Churn, (1885) 11 Cal., 735.

⁵ Khajooroomissa v. Ryeesoomissa, (1874) L. R., 2 I. A., 235; 15 B. L. R., P. C., 306; 24 W. R., P. C., 163.

⁶ Devgir Guru Sumbhagir, ex parte, (1867) 4 Bom. H. C., 91; Burgess v. Siddons (1887) 10 Mad., 103.

Authorized agent.—It is not necessary that the duly authorized agent should be a pauper,¹ he may be a pleader;² but then he must be specially authorized as the pauper's attorney; an ordinary vakalatnamah is not sufficient.³

If the applicant does not appear in person, he may be examined by commission, see r 4

* * * * * appeal *in forma pauperis* by her
at apply to an application under

4. (1) Where the application is in proper form and duly presented, the Court may, if it thinks fit, examine the applicant, or his agent when the applicant is allowed to appear by agent, regarding the merits of the claim and the property of the applicant.

Examination of applicant.

(2) Where the application is presented by an agent, the Court may, if it thinks fit, order that the applicant be examined by a commission in the manner in which the examination of an absent witness may be taken.

If presented by agent, Court may order applicant to be examined by commission.

Act XIV of 1882, section 406.

This rule applies to H. C. and Prov. S. C. C.

The Judge must apparently conduct the examination under the first clause. He cannot delegate it to any other person.⁴

Rejection of application.

5. The Court shall reject an application for permission to sue as a pauper—

- (a) where it is not framed and presented in the manner prescribed by rules 2 and 3, or
- (b) where the applicant is not a pauper, or
- (c) where he has, within two months next before the presentation of the application, disposed of any property fraudulently or in order to be able to apply for permission to sue as a pauper, or
- (d) where his allegations do not show a cause of action, or

¹ Bhagbut v. Buloram, (1865) 3 W. R., 20.

² Kishore Mohun v. Gour Monee, (1871) 15 W. R., 199.

³ Dhugolatty Koor v. Gunesah, (1874) 21 W. R., 308.

⁴ Wazir un nissa v. Habi Bakhsh, (1902) 21 All., 172.

⁵ Malhar v. Somappa Banta, (1903) 26 Mad., 369.

⁶ Reg. v. Mir Sahib Kassamia, (1862) 1 Bom H. C., 100.

(c) where he has entered into any agreement with reference to the subject-matter of the proposed suit under which any other person has obtained an interest in such subject-matter.

Act XIV of 1882, sections 401 and 407

This rule applies to H. C. and Prov. S. C. C.

Examination—The examination referred to in this rule is that of the petitioner or his agent, and at this stage the Court has no power to examine witnesses.¹

Right to sue—If it appears that the suit is bad on the merits;² or that the Court has no jurisdiction;³ or that any other of the circumstances mentioned in this rule exists, the Judge must reject the application. Clause (b) does not refer solely to a question of jurisdiction but the applicant must make out that he has a good subsisting *bona fide* cause of action capable of enforcement in Court and relying for an answer.⁴ The Court is not bound to give leave if the allegations are such that, if true, they would show a good cause of action.⁵ The Judge should not at this stage of the proceedings address himself to the merits of the case and the rights of the parties,⁶ which are entirely foreign to the enquiry required to be made under this rule.⁷

Any agreement—Plaintiff being about to sue to redeem a village, agreed to pay his creditor a lump sum of Rs. 1,500, and in default to realize it out of the revenue of the property. *Held*, plaintiff could not sue as a pauper.⁸

Appeal—There is no appeal from an order rejecting an application under this rule, see O. XLIII.⁹ But where a Judge, without any enquiry into the alleged poverty of the petitioner, struck off her petition on the ground that she had subsequently to filing the petition, applied to withdraw it, an appeal was allowed.¹⁰

Revision—An order under this rule is subject to revision.¹¹ It cannot be set aside under the Charter Act.¹²

Limitation—If one of the defendants dies during the enquiry the special limitation under O. XVII r. 4 does not apply.¹³

¹ Parkash Ojha, *petitioner*, (1876) 25 W. R., 74. See also, Tarramoney v. Hurro Mohun, (1872) 11 B. L. R., App., 21.

² Dulari v. Vallabhis (1889) 13 B. om., 126, see also, Koka v. Koka, (1882) 4 Mad., 324, or *Varad*—Vallabhis Parkash Ojha, *petitioner*, (1876) 25 W. R., 74; Chittar Pal v. Raja Ram, (1885) 7 All., 661; Vijendra Tirtha v. Sudhindra Tirtha, (1896) 19 Mad., 197.

³ Gunga Dass, *in the matter of*, (1870) 14 W. R., 281.

⁴ Kamrakh Nath v. Saundir Nath, (1893) 20 All., 299; Amirtham v. Alwar Manakkham, (1901) 27 Mad., 37.

⁵ Sankararama v. Subramama, (1901) 27 Mad., 120.

⁶ Debo Das v. Ram Charn Das, (1897) 2 Cal. W. N., 474.

⁷ Gopal Chandra v. Bigoo Mistry, (1903) 8 Cal. W. N., 70.

⁸ Manohar v. Lakshman, (1885) 9 Bom., 371.

⁹ Secretary of State v. Jillo, (1899) 21 All., 137.

¹⁰ Baldeo v. Gula Kuar, (1897) 9 All., 129. Compare, however, Dwarkanath v. Ma. Mayrav, (1886) 10 Bom., 207; and remarks of Sir Montague Smith in *Skinner v. Orle*, (1879) 2 All., 211, p. 245. L. R., 6 I. A., 126.

¹¹ Mohanmad v. Ajndhia, (1888) 10 All., 497; Debo Das v. Ram Charn Das, (1897) 2 Cal. W. N., 474.

¹² Babur Ali, *in the matter of*, (1875) 21 W. R., 62; Rhodejoonisa, *petitioner*, (1897) 7 W. R., 486.

¹³ Janardan Jithal v. Anant, (1883) 7 Bom., 373.

6. Where the Court sees no reason to reject the application on any of the grounds stated in rule 5, it shall fix a day (of which at least ten days' clear notice shall be given to the opposite party and the Government pleader) for receiving such evidence as the applicant may adduce in proof of his pauperism, and for hearing any evidence which may be adduced in disproof thereof.

Act XIV of 1882, sect. 408

This rule applies to H. C. and Prov. S. C. C.

7. (1) On the day so fixed or as soon thereafter as may be convenient, the Court shall examine the witnesses (if any) produced by either party, and may examine the applicant or his agent, and shall make a memorandum of the substance of their evidence.

(2) The Court shall also hear any argument which the parties may desire to offer on the question whether, on the face of the application and of the evidence (if any) taken by the Court as herein provided, the applicant is or is not subject to any of the prohibitions specified in rule 5.

(3) The Court shall then either allow or refuse to allow the applicant to sue as a pauper.

Act XIV of 1882, s. 409

This rule applies to H. C., the Panjab Chief Court, and the Judicial Commissioner, N. W. Provinces. It also applies to the making of a memorandum, which is required by the provisions of the Act, O. XLIX, r. 1.

Act VII of 1901, s. 42 (2), and Prov. S. C. C.

The examination must be conducted by the Judge in person,¹ and it is not limited to the question of pauperism; but embraces all the matters referred to in r. 5.² No day was fixed, and on default by non-appearance, the Judge struck off the application "for the present." It was held that, as there had been no refusal to allow the applicant to sue as a pauper, the applicant might renew his application.³ So an application struck off for want of prosecution may be re-admitted.⁴ A successfully opposed application to sue in *forma pauperis* in a Subordinate Judge's Court on the ground of over-valuation: *held*, he could not afterwards turn round and object to the jurisdiction of the Munsif.⁵ A was allowed to sue in *forma pauperis* by the Delhi Court. Subsequently, his application was returned, for presentation in the Court at Meerut: *held*, the Meerut Court was not bound by the previous order, but should proceed *de novo*: *held*, also, that

¹ *Ekusthan Malhotra*, (1862) 1 Bom. H. C., 102.

² *Ganga Das, petitioner*, (1870) 14 W. R., 281; 11 B. L. R., App., 23.

³ *Thy Singh v. Mohi Koonwar*, (1868) 3 Agra M., 1.

⁴ *Urvashi Devi, held, in the matter of*, (1870) 5 B. L. R., App., 20.

⁵ *Budhram Misra v. Anant Chaudhary*, (1874) 22 W. R., 120.

the time spent in prosecuting the suit in the Delhi Court should be deducted,¹ but where an application for leave to appeal as a pauper was rejected, a regular appeal filed subsequently but after limitation had expired, was not allowed to relate back.²

Para. 2 enables the parties to argue the question referred to, but does not preclude the Court, if no argument is offered, from considering it.³

Revision—See *Ram Sahai Singh v. Mumtaz*,⁴ where the High Court refused to interfere under s. 115.

Review.—An order under this rule refusing leave to sue as a pauper subject to review.⁵ When an application for review is presented in a suit *in forma pauperis*, that application, like the plaint in the suit, is not liable to any Court fee.⁶

8 Where the application is granted, it shall be numbered and registered, and shall be deemed the plaint in the suit, and the suit shall proceed in all other respects as a suit instituted in the ordinary manner, except that the plaintiff shall not be liable to pay any court fee (other than fees payable for service of process) in respect of any petition, appointment of a pleader or other proceeding connected with the suit.

Act XIV of 1882, sect. 410

This rule applies to H. C. and Prov. S. C. C.

Shall be deemed a plaint—There is no suit in existence until the application has been granted,⁷ and if the applicant dies before leave is granted the right cannot survive to the representative.⁸

Appeal : revision.—When an application is granted, the order cannot be set aside, on appeal or motion, by a superior Court. If, subsequently to permission being granted, it appears that the order has been obtained improperly, application should be made to the Court out of which the order issued.⁹

When the Court of first instance has allowed a suit to be instituted *in forma pauperis* and has given the plaintiff a decree, the defendant cannot in appeal question the propriety of the Court's order allowing the plaintiff to sue as a pauper.¹⁰

When a defendant appealed against a decree passed in a suit brought *in forma pauperis*, and an order by consent was passed directing the suit to be tried on the merits, it was held that the defendant could not thereafter object that

¹ *Skinner v. Orde*, (1874) 6 All. H. C., 225; 1 All., 230; compare, *Skinner v. Orde*, (1879) 2 All., 241; L. R., 6 I. A., 120.

² *Bishuath v. Jagannath*, (1891) 13 All., 309. See also, *Lakshmi v. Ananta*, (1870) 2 Mad., 230.

³ *Amirtham v. Alwar Manikkam*, (1901) 27 Mad., 37.

⁴ *Ram Sahai Singh v. Mumtaz*, (1890) 6 C. L. R., 223.

⁵ *Aduri v. Manikji*, (1890) 4 Bom., 414. See also, *Unusuulari, in the matter of*, (1870) 5 B. L. R., App. 29; *Mahommed Gazi v. Daulah Bibi*, (1870) 5 B. L. R., 318, note; 11 W. R., 22.

⁶ *Umda v. Naima*, (1893) 20 All., 410.

⁷ *Dwarkanath v. Madhavray*, (1886) 10 Bom., 207.

⁸ *Lalit v. Satish*, (1906) 33 Cal., 1167; 4 Cal. L. J., 231.

⁹ *Rhodesjounsa, in re*, (1867) 7 W. R., 486.

¹⁰ *Mumtaz v. Rasulan*, (1901) 23 All., 364.

there had been no enquiry into the right of the representative of the original plaintiff, then deceased, to sue as a pauper.¹

Limitation.—Limitation depends on the date of the application and not on the day when the application is granted and registered.² When an application for leave to sue as a pauper is refused, and the applicant subsequently brings a suit on the same matter on a full court fee, such suit dates for the purposes of limitation from the time of filing the plaint, and not from the date of the application for leave to sue as a pauper. *Aliter*, when leave to sue as a pauper having been granted, the applicant is dispaupered.³ On an application for leave to sue as a pauper being opposed, the applicant put in the proper court fee. *Held*, that the application should for the purpose of limitation be deemed to be a plaint presented on the date on which it was filed.⁴

Stamp.—The exemption from liability to pay stamps only extends to the cases mentioned in the rule. A pauper must pay the proper stamps and penalty (if any) on a document on which he relies.⁵

9. The Court may, on the application of the defendant, or of the Government pleader, of which seven days' clear notice in writing has been given to the plaintiff, order the plaintiff to be dispaupered—

- (a) if he is guilty of vexatious or improper conduct in the course of the suit;
- (b) if it appears that his means are such that he ought not to continue to sue as a pauper; or
- (c) if he has entered into any agreement with reference to the subject-matter of the suit, under which any other person has obtained an interest in such subject-matter.

Act XIV of 1882, sect. 414

This rule applies to H. C. and Prov. S. C. C.

If it appears from facts that have been discovered after permission to sue in *forma pauperis* has been granted, that the applicant ought not to be allowed to continue to sue as a pauper, the remedy is by application under this rule and not by appeal or motion in the superior Court.⁶

10 Where the plaintiff succeeds in the suit, the Court shall calculate the amount of court-fees which would have been paid by the plaintiff if he had not been permitted to sue as a

¹ Akbar Hussain v. Alta Bida, (1903) 25 All., 137.

² Dhayle v. Simvat, (1867) 4 Bom. H. C., A. C. J., 39; Naraganty Lutchmee Dayanish v. Venjanna Nandoo, (1901) 2 Moo. L. A., 91. See also Skinner v. Gole, (1876) 1 All., 279; 2 All., 211; Khem Karan v. Har Dayal, (1852) 4 All., 57.

³ Narain Kaur v. Mahan Lal, (1895) 17 All., 526; Abbasi v. Naothi, (1906) 18 All., 281. See also, Chander Mohan v. Bhuban Mohan, (1877) 2 Cal., 389.

⁴ Jankidhary Sukute v. Janki Koor, (1911) 28 Cal., 427.

⁵ Isam v. Fakim, (1863) 10 W. R., 357.

⁶ Kholaj v. Naoth, in re, (1867) 7 W. R., 196.

pauper, such amount shall be recoverable by the Government from any party ordered by the decree to pay the same, and shall be a first charge on the subject-matter of the suit.

Act XIV of 1882, sect. 417

This rule applies to II C and I Prov S C C

By the Government.—Government has no lien on the decree for stamps. It can recover their value in the same manner as cash, but has no higher position than an ordinary judgment creditor. So, where Government, after attaching plaintiff's decree, consented to its sale in execution of a decree against the pauper and obtained an order by which it secured any surplus that might arise from the sale, it was held that it could not follow the purchaser, when the sale did not yield a surplus,¹ and it cannot sell the decree.²

A pauper suit for possession was decreed, with *mesne* profits to be ascertained in execution, and Government was to be paid by plaintiff and defendant in shares proportionate to their ultimate shares, when the amount of what should be ascertained. The parties did not enquire into the *mesne* profits, and the Court on the motion of Government called on the parties to appear, and on default changed its order and directed that the fees should be realized from both jointly: *Held*, the first order was improper as a continuing order, but the Court could not change it after the decree had been passed and nothing remained to be done.³ The amount of the stamp fees recoverable by Government is a first charge on the property, so a sale held in execution of such a charge must prevail against a subsequent sale.⁴

Subject-matter of the suit.—A obtained a decree against B for Rs 1,439 and costs Rs 23. B got a decree for Rs 879 costs. A was directed to pay a portion of the Court-fees. Government in order to realize A's portion applied to attach and sell the sum of Rs 1,439 due by B. B claimed to set-off his Rs. 879 and a further sum due by A under another decree. No proceeding in execution had been taken in regard to these sums. *Held*, that the sum of Rs. 1,439 was part of the subject-matter of the suit, and Government having a first charge against A, no set-off could be allowed.⁵

From any party.—A defendant should not be made liable to pay court-fees on any sum greater than that decreed against him.⁶

First charge.—See the following cases.⁷ In a suit brought *in forma pauperis* the plaintiff was successful, and the decree directed that the court-fee should be a first charge on the subject-matter of the suit. *Held*, that the Government need not bring a separate suit, but could realize the court-fee from the property by proceedings in execution.⁸

Sale.—An order under this rule for sale of property for the purpose of realizing court-fees erroneously supposed to be due to Government and a sale under such order are *ultra vires* and nullities, when in fact there was no juris-

¹ *Frankisto v. Collector of Moorshedabad*, (1871) 15 W. R., 205.

² *Jotindra Nath Chowdhry v. Dwarka Nath Dey* (1893) 20 Cal., 111.

³ *Shostee Churn v. Collector of Clottagong*, (1870) 14 W. R., 155.

⁴ *Puthia Valappa v. Veloth Aaseenar*, (1902) 25 Mad., 733.

⁵ *Janki v. Collector of Allahabad*, (1887) 9 All., 64.

⁶ *Chandraseka v. Secretary of State*, (1891) 14 Mad., 163.

⁷ *Das Mohamed v. Collector of Moorshedabad*, (1899) 22 All., 527; *Collector of Moorshedabad v. Collector of Moorshedabad*, (1899) 2 All., 527; *Collector of Moorshedabad v. Collector of Moorshedabad*, (1899) 2 All., 527; and compare the

⁸ *Ram Das v. Secretary of State*, (1896) 18 All., 419.

there had been no enquiry into the right of the representative of the original plaintiff, then deceased, to sue as a pauper.¹

Limitation—Limitation depends on the date of the application and not on the day when the application is granted and registered.² When an application for leave to sue as a pauper is refused, and the applicant subsequently brings a suit on the same matter on a full court fee, such suit dates for the purposes of limitation from the time of filing the plaint, and not from the date of the application for leave to sue as a pauper. *Aliter*, when leave to sue as a pauper having been granted, the applicant is dispaupered.³ On an application for leave to sue as a pauper being opposed, the applicant put in the proper court fee. *Held*, that the application should for the purpose of limitation be deemed to be a plaint presented on the date on which it was filed.⁴

Stamp.—The exemption from liability to pay stamps only extends to the cases mentioned in the rule. A pauper must pay the proper stamps and penalty (if any) on a document on which he relies.⁵

9. The Court may, on the application of the defendant, or of the Government pleader, of which seven days' clear notice in writing has been given to the plaintiff, order the plaintiff to be dispaupered—

- (a) if he is guilty of vexatious or improper conduct in the course of the suit;
- (b) if it appears that his means are such that he ought not to continue to sue as a pauper; or
- (c) if he has entered into any agreement with reference to the subject-matter of the suit, under which any other person has obtained an interest in such subject-matter.

Act XIV of 1882, sect. 414.

This rule applies to H. C. and Prov. S. C. C.

If it appears from facts that have been discovered after permission to sue in *forma pauperis* has been granted, that the applicant ought not to be allowed to continue to sue as a pauper, the remedy is by application under this rule and not by appeal or motion in the superior Court.⁶

10. Where the plaintiff succeeds in the suit, the Court shall calculate the amount of costs where pauper succeeds which would have been paid by the plaintiff if he had not been permitted to sue as a

¹ Akbar Husain v. Aha Bibi, (1903) 25 All., 137.

² Dhayle v. Samvat, (1867) 4 Bom. H. C., A. C. J., 39; Naraganty Lutchmee Dayamini v. Yengana Nandoo, (1861) 9 M.S. 1. A., 94. See also Skinner v. Orde, (1876) 1 All., 230; 2 All., 241; Khem Karan v. Hai Dayal, (1882) 4 All., 37.

³ Naraini Khar v. Mahan Lal, (1895) 17 All., 526; Abbasi v. Nanhi, (1896) 18 All., 206. See also, Chunder Mohun v. Bhuban Mohun, (1877) 2 Calc., 359.

⁴ Janakdhary Sukul v. Janki Koer, (1901) 23 Calc., 127.

⁵ Golam v. Karam, (1868) 10 W. R., 357.

⁶ Khosajoomna, in re, (1867) 7 W. R., 496.

pauper; such amount shall be recoverable by the Government from any party ordered by the decree to pay the same, and shall be a first charge on the subject-matter of the suit.

Act XIV of 1882, sect. 411

This rule applies to H. C. and Prov. S. C. C.

By the Government—Government has no lien on the decree for stamps. It can recover their value in the same manner as cash, but has no higher position than an ordinary judgment creditor. So, where Government, after attaching plaintiff's decree, consented to its sale in execution of a decree against the pauper and obtained an order by which it secured any surplus that might arise from the sale, it was held that it could not follow the purchaser, when the sale did not yield a surplus,¹ and it cannot sell the decree.²

A pauper suit for possession was decreed, with *mesne* profits to be ascertained in execution, and Government was to be paid by plaintiff and defendant in shares proportionate to their ultimate shares, when the amount of *wa-ilat* should be ascertained. The parties did not enquire into the *mesne* profits, and the Court on the motion of Government called on the parties to appear, and on default changed its order and directed that the fees should be realized from both jointly: *held*, the first order was improper as a contingent order, but the Court could not change it after the decree had been passed and nothing remained to be done.³ The amount of the stamp fees recoverable by Government is a first charge on the property, and a sale held in execution of such a charge must prevail against a subsequent sale.⁴

Subject-matter of the suit—A obtained a decree against B for Rs. 1,439 and costs Rs. 27. He got a decree for Rs. 879 costs. A was directed to pay a portion of the Court-fees. Government in order to realize A's portion applied to attach and sell the sum of Rs. 1,439 due by B. B claimed to set-off his Rs. 879 and a further sum due by A under another decree. No proceeding in execution had been taken in regard to these sums. *Held*, that the sum of Rs. 1,439 was part of the subject-matter of the suit, and Government having a first charge against A, no set-off could be allowed.⁵

From any party—A defendant should not be made liable to pay court-fees on any sum greater than that decreed against him.⁶

First charge—See the following cases.⁷ In a suit brought *in forma pauperis* the plaintiff was successful, and the decree directed that the court-fee should be a first charge on the subject-matter of the suit. *Held*, that the Government need not bring a separate suit, but could realize the court-fee from the property by proceedings in execution.⁸

Sale—An order under this rule for sale of property for the purpose of realizing court-fees erroneously supposed to be due to Government and a sale under such order are *ultra vires* and nullities, when in fact there was no juris-

¹ Praukisto v. Collector of Moorshedabad, (1871) 15 W. R., 205.

² Jotindro Nath Chowdhry v. Dwarka Nath Dey (1893) 20 Cal., 111.

³ Shostee Churn v. Collector of Chittagong, (1870) 13 W. R., 155.

⁴ Puthia Valappil v. Veloth Assewar, (1902) 25 Mad., 733.

⁵ Janki v. Collector of Allahabad, (1887) 9 All., 64.

⁶ Chandrareka v. Secretary of State, (1891) 14 Mad., 163.

⁷ Dost Mahomed v. Munt., (1907) 29 All., 537; Gajpat Putaya v. Collector of Kanara (1875) 1 196; foll.: in Gajpat Putaya v. Collector of Kanara (1899) 2 All., W. N., 837; compare the argument in Jui.

⁸ Ram Das v. Secretary of State, (1896) 18 All., 419.

there had been no enquiry into the right of the representative of the original plaintiff, then deceased, to sue as a pauper.¹

Limitation—Limitation depends on the date of the application and not on the day when the application is granted and registered.² When an application for leave to sue as a pauper is refused, and the applicant subsequently brings a suit on the same matter on a full court fee, such suit dates for the purposes of limitation from the time of filing the plaint, and not from the date of the application for leave to sue as a pauper. *After*, when leave to sue as a pauper having been granted, the applicant is dispaupered.³ On an application for leave to sue as a pauper being opposed, the applicant put in the proper court fee. *Held*, that the application should for the purpose of limitation be deemed to be a plaint presented on the date on which it was filed.⁴

Stamp—The exemption from liability to pay stamps only extends to the cases mentioned in the rule. A pauper must pay the proper stamps and penalty (if any) on a document on which he relies.⁵

9. The Court may, on the application of the defendant, or of the Government pleader, of which seven days' clear notice in writing has been given to the plaintiff, order the plaintiff to be dispaupered—

- (a) if he is guilty of vexatious or improper conduct in the course of the suit;
- (b) if it appears that his means are such that he ought not to continue to sue as a pauper; or
- (c) if he has entered into any agreement with reference to the subject-matter of the suit, under which any other person has obtained an interest in such subject-matter.

Act XIV of 1882, sect. 414.

This rule applies to H. C. and Prov. S. C. C.

If it appears from facts that have been discovered after permission to sue in *forma pauperis* has been granted, that the applicant ought not to be allowed to continue to sue as a pauper, the remedy is by application under this rule and not by appeal or motion in the superior Court.⁶

10 Where the plaintiff succeeds in the suit, the Court shall calculate the amount of court-fees which would have been paid by the plaintiff if he had not been permitted to sue as a

¹ Akbar Husain v. Aha Biba, (1903) 25 All., 137.

² Dhivle v. Simvat, (1867) 4 Bom. H. C., A. C. J., 39; Naraganty Lutchmee Dayamali v. Vengima Nambal, (1861) 9 Moo. L. A., 91. See also Skinner v. Orde, (1876) 1 All., 220; 2 All., 241; Khem Karan v. Har Dayal, (1882) 4 All., 37.

³ Narain Kuar v. Makhani Lal, (1895) 17 All., 526; Abbasi v. Nandi, (1896) 18 All., 206. See also, Chumdar Mohan v. Bhubhan Mohan, (1877) 2 Calc., 389.

⁴ Jankdhary Bukul v. Janki Kuar, (1901) 28 Calc., 427.

⁵ Goolam v. Karam, (1868) 10 W. R., 357.

⁶ Kholejontia, in re, (1867) 7 W. R., 490.

Revision review—Where Government is not a party to the suit, it cannot be heard in regard to a defective decree.¹ But in Bombay the Collector of Revenue is allowed to apply under s. 114, and have the error of a subordinate Court amended.²

Defendant—This rule does not apply to the costs of a successful defendant in a pauper suit.³

12. The Government shall have the right at any time to apply to the Court to make an order for the payment of court-fees under rule 10 or rule 11.

13. All matters arising between the Government and any party to the suit under rule 10, rule 11 or rule 12 shall be deemed to be questions arising between the parties to the suit within the meaning of section 47.

14. Where an order is made under rule 10, rule 11 or rule 12, the Court shall forthwith cause a copy of the decree to be forwarded to the Collector.

These rules are new and apply to H. C. and Prov. S. C. C.

15. An order refusing to allow the applicant to sue as a pauper shall be a bar to any subsequent application of the like nature by him in respect of the same right to sue; but the applicant shall be at liberty to institute a suit in the ordinary manner in respect of such right, provided that he first pays the costs (if any) incurred by the Government and by the opposite party in opposing his application for leave to sue as a pauper.

Act XIV of 1882, sect 413

This rule applies to H. C. and Prov. S. C. C.

This rule does not apply when the Court has not passed an order of refusal; for instance, if it returns the application to have the question for pauperism tried by a Court of concurrent jurisdiction,⁴ or strikes off "for the present," the application for default by non-appearance,⁵ or dismisses it in default of prosecution.⁶ Under such circumstances, the application may be renewed or revived. O. 11, r. 2 cannot apply so as to bar a subsequent suit where the so-called previous suit

¹ Secretary of State, *petitioner*, (1878) 2 C. L. R., 461.

² Collector of Kanara v. Krishnappa (1891) 15 Bom., 77; Collector of Kanara v. Rambhat, (1894) 18 Bom., 454.

³ Jetha v. Gulraj, (1884) 8 Bom., 577.

⁴ Skinner v. Orde, (1874) 6 All. H. C., 225; 2 All., 241.

⁵ Bhoj Singh v. Moha Koonwer, (1868) 3 Agra, M.S., 1.

⁶ Umaundari, in the matter of, (1870) 5 B. L. R., App., 29.

was not a regular suit, but an application for leave to sue in *forma pauperis* which was rejected ¹. A bar under this rule being one to jurisdiction, a Court is competent and bound to take notice of it at any stage of the suit ². Limitation runs from the date of presentation of the plaint after payment of the full fee ³.

- 16 The costs of an application for permission to sue
Costs as a pauper and of an inquiry into pauperism shall be costs in the suit.

Act XIV 1882, sect 415

This rule applies to H. C. and Prov. S. C. C.

¹ Narain Singh v. Jaswant Singh, (1899) 21 All., 359

² Ranchod Morar v. Bezantji Edulji, (1876) 20 Bom., 86

³ Aubbhaya Churn Dey v. Bhassawari (1897) 24 Cal., 839. See also, Keshu v. Krishnarao, (1896) 20 Bom., 504; Narain Kuar v. Makhun Lal, (1895) 17 All., 520, and Abhaal v. Nanhi, (1893) 18 All., 206; and note, r. 8. But see, Jumnabai v. Viscondas, (1897) 21 Bom., 576.

ORDER XXXIV

Suits relating to Mortgage of Immovable Property.

1. Subject to the provisions of this Code, all persons having an interest either in the mortgage-security or in the right of redemption shall be joined as parties to any suit relating to the mortgage.

Explanation—A prior mortgagee may sue for foreclosure or for sale without making the prior mortgagee a party to the suit; and a prior mortgagee need not be joined in a suit to redeem a subsequent mortgage.

Compare, Transfer of Property Act, IV of 1882, sect. 85.

This is a new order introduced into the Code from the Transfer of Property Act, in order that all the provisions regulating the procedure in mortgage suits may be collected in one Act. It is proposed that the corresponding sections of the Transfer of Property Act be repealed.

The provisions of this Code—Order XXXI, r. 1 provides that beneficiaries need not be joined in suits by third parties against a trustee or executor or administrator.

All persons having an interest—Subject to this exception all persons interested in the mortgage security or in the right of redemption must be joined in any suit on a mortgage. These words are new and dissolve the doubt created by the interpretation of section 85 of the Transfer of Property Act. This rule reverts expressly to the English practice.¹

Prior Mortgagees—The explanation clearly states that prior mortgagees are not necessary parties either in a suit to redeem a subsequent mortgage or a suit brought by a subsequent mortgagee for foreclosure or sale.

This settles a conflict of decisions of the High Courts under sections 61, and 85 of the Transfer of Property Act.²

Suit relating to the Mortgage.—Under the Transfer of Property Act, sect. 85 this phrase has been interpreted to relate to suits for foreclosure, redemption and sale only as mentioned in the marginal note.³

Non-joinder.—The proviso to section 85 of the Transfer of Property Act has been amended to read: "where the necessary party will have the same interest as the party already joined, the court may allow such parties to be added." This will no doubt

¹ Seton on Decrees, 6th Ed., p. 1932. And see, *Mon Mohun v. Parvati*, (1903) 32 Cal., 740.

² See Report of Special Committee and cases collected in Shephard and Brown's T. P. Act, 6th Ed., p. 293.

³ *Gurga Pershad v. Chunnai Lall*, (1895) 18 All., 113; and *Shephard and Brown's T. P. Act*, 6th Ed., p. 397.

⁴ *Tikam Singh v. Thakur Kishore*, (1903) 20 All., 188; *Jamuna v. Gangi*, (1892) 19 Cal., 401; *Sorabji v. Rattonji*, (1893) 22 Bom., 701.

was not a regular suit, but an application for leave to sue in *forma pauperis* which was rejected.¹ A bar under this rule being one to jurisdiction, a Court is competent and bound to take notice of it at any stage of the suit.² Limitation runs from the date of presentation of the plaint after payment of the full fee.³

16. The costs of an application for permission to sue
Costs. as a pauper and of an inquiry into pauperism shall be costs in the suit.

Act XIV 1882, sect 415.

This rule applies to H. C. and Prov. S. C. C.

ORDER XXXIV.

Suits relating to Mortgages of Immovable Property.

1. Subject to the provisions of this Code, all persons having an interest either in the mortgage-security or in the right of redemption shall be joined as parties to any suit relating to the mortgage.

Explanation—A puisne mortgagee may sue for foreclosure or for sale without making the prior mortgagee a party to the suit; and a prior mortgagee need not be joined in a suit to redeem a subsequent mortgage.

Compare, Transfer of Property Act, IV of 1882, sect. 85.

This is a new order, introduced into the Code from the Transfer of Property Act, in order that all the provisions regulating the procedure in mortgage suits may be collected in one Act. It is proposed that the corresponding sections of the Transfer of Property Act be repealed.

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This settles a conflict of decisions of the High Courts under sections 61, and 85 of the Transfer of Property Act.²

Suit relating to the Mortgage—Under the Transfer of Property Act, sect. 85 this phrase has been interpreted to relate to suits for foreclosure, redemption and sale only as mentioned in the marginal note.³

Non-joinder—The proviso to section 85 of the Transfer of Property Act has been omitted, but presumably the non-joinder of a necessary party will have the same effect as heretofore. The Court in a proper case can allow such parties to be added under O I, r. 10 at any time up to Final Decree, and this will no doubt usually be allowed.⁴

¹ Seton on Decrees, 6th Ed., p. 1032. And see, *Mon Mohini v. Parvati*, (1905) 32 Cal., 746.

² See Report of Special Committee and cases collected in Shephard and Brown's T. P. Act, 6th Ed., p. 293.

³ *Ganga Pershad v. Churni Lal*, (1893) 18 All., 113; and Shephard and Brown's T. P. Act, 6th Ed., p. 337.

⁴ *Tikam Singh v. Thakur Kishore*, (1893) 20 All., 183; *Jamuna v. Ganga*, (1892) 19 Cal., 401; *Sorabji v. Ratnaji*, (1893) 22 Bom., 701.

The omission to join a person who is a necessary party must always have this consequence, that it can have no effect against such person;¹ and the plaintiff may find himself gravely prejudiced by an assertion of fresh rights in respect of the mortgaged property which are not covered by his decree. Where a subsequent mortgagee is not made a party to a suit for foreclosure or sale, a right to redeem may be asserted on his behalf and his right will not be reduced to a claim on the surplus proceeds, if any, of the sale.²

2 In a suit for foreclosure, if the plaintiff succeeds,

Preliminary decree in the Court shall pass a decree—
foreclosure-suit.

(a) ordering that an account be taken of what will be due to the plaintiff for principal and interest on the mortgage, and for his costs of the suit (if any) awarded to him on the day next hereinafter referred to, or

(b) declaring the amount so due at the date of such decree,

and directing—

(c) that if the defendant pays into Court the amount so due on a day within six months from the date of declaring in Court the amount so due to be fixed by the Court, the plaintiff shall deliver up to the defendant, or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, re-transfer the property to the defendant free from the mortgage and from all incumbrances created by the plaintiff or any person claiming under him, or, where the plaintiff claims by derived title, by those under whom he claims, and shall also, if necessary, put the defendant in possession of the property, but

(d) that, if such payment is not made on or before the day to be fixed by the Court, the defendant shall be debarred from all right to redeem the property.

Act IV of 1882, sect 86.

Interest—May be charged under this rule up to the date fixed for payment only, the reason being that in a suit for foreclosure, differing from one for sale the mortgage-debt is supposed to be discharged by default on the due date, since the mortgagee can forthwith secure the property.³

¹ *Ram Narsin v. Bandi*, (1901) 31 Cal., 737; *Brij Kishore v. Madho*, (1900) 23 All., 279.

² *Gulind Lal v. Ramjanam*, (1894) 21 Cal., 70 (P. C.)

³ See r. 3 (3), *infra*.

Rate of Interest—There is no law restricting the rate of interest which may be contracted to be paid under a mortgage, and stipulations for compound interest are valid.¹

Account—As to the method of taking accounts, see, Shephard and Brown's Transfer of Property Act, notes to sect. 26.

Res judicata—Where a mortgagee has been joined in a mortgage suit brought by another mortgagee and fails to assert his claims in that suit, he cannot bring another suit to enforce them; such a suit is barred by section 11 *ante*.²

Two mortgages—Where the second mortgage covers property not included in the first mortgage the order for sale in the first mortgagee's suit can only include property which is common to both mortgages.³

Form of Order—App D, No. 3.

3 (1) Where, on or before the day fixed, the defendant pays into Court the amount declared due as aforesaid, together with such subsequent costs as are mentioned in rule 10, the Court shall pass a decree—

(a) ordering the plaintiff to deliver up the documents which under the terms of the preliminary decree he is bound to deliver up,

and, if so required,

(b) ordering him to retransfer the mortgaged property as directed in the said decree,

and, also, if necessary,

(c) ordering him to put the defendant in possession of the property.

(2) Where such payment is not so made, the Court shall, on application made in that behalf by the plaintiff, pass a decree that the defendant and all persons claiming through or under him be debarred from all right to redeem the mortgaged property and also, if necessary, ordering the defendant to put the plaintiff in possession of the property:

Provided that the Court may, upon good cause shown and upon such terms (if any) as it thinks fit, from time to time postpone the day fixed for such payment.

(3) On the passing of a decree under sub-rule (2) the debt secured by the mortgage shall be deemed to be discharged.

Act IV of 1882, sect. 87.

¹ Ganga Pershad v. Land Mortgage Bank, (1894) 21 Calo., 366; 21 I. A., 1.

² Gopi Narsin v. Bausidhar, (1904) 32 I. A., 123; 27 All., 325; (1907) 30 Mad., 353; Gopal Lal v. Benarasi, (1904) 31 Calo., 428.

³ Jamna Das v. Misri, (1904) 26 All., 505.

Pays into Court—Payment can no longer be made to the plaintiff direct, but only into Court.

Payment made.—Clause 1 provides for the passing of a final decree in cases where payment is made in accordance with the terms of the preliminary decree, and this is a noteworthy addition.¹ See also *rules 5 (1) and 8 (1), infra*.

Payment not made—The plaintiff's application under clause (2) should be made in the Court of first instance, even if the decree has been modified on appeal.²

Form of Decree.—App D, No. 10

4. (1) In a suit for sale, if the plaintiff succeeds, the Court shall pass a decree to the effect mentioned in clauses (a), (b) and (c) of rule 2 and also directing that, in default of the defendant paying as therein mentioned, the mortgaged property or a sufficient part thereof be sold, and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court and applied in payment of what is declared due to the plaintiff as aforesaid, together with subsequent interest and subsequent costs, and that the balance (if any) be paid to the defendant or other persons entitled to receive the same.

(2) In a suit for foreclosure, if the plaintiff succeeds and the mortgage is not a mortgage by conditional sale, the Court may, at the instance of the plaintiff or of any person interested either in the mortgage-money or in the right of redemption, pass a like decree (in lieu of a decree for foreclosure) on such terms as it thinks fit including the deposit in Court of a reasonable sum, fixed by the Court, to meet the expenses of sale and to secure the performance of the terms.

Act IV of 1882, s. 88.

This rule applies to H. C.

Interest—See notes to r. 2 *supra*, the terms of which rule are embodied in the first clause. There is no provision for interest subsequent to the date fixed under rule 2 (c) for payment; but under the Transfer of Property Act, a practice has been established for sale. It has been held that interest may be given on the sale money actually been paid to the plaintiff with interest to

It has been suggested that subsequent interest, if allowed, should be given at the contract rate,³ but the Privy Council case on which this proposition is

¹ Report of Second Special Committee.

² Venkata v. Thilagayya, (1900) 23 M.L., 521; Sheonarain v. Chuni, (1901) 23 All., 89.

³ Raj Gokuldas v. Seth Ghawaram, (1907) L. R., 33 I. A., 23. (P. C.)

⁴ Rameswar v. Mahomed, (1898) 26 Cal., 32; 25 I. A., 179.

5 (1) Where on or before the day fixed the defendant pays into the Court the amount declared due as aforesaid, together with such subsequent costs as are mentioned in rule 10, the Court shall pass a decree—

(a) ordering the plaintiff to deliver up the documents which under the terms of the preliminary decree he is bound to deliver up,

and, if so required,

(b) ordering him to retransfer the mortgaged property as directed in the said decree,

and also, if necessary,

(c) ordering him to put the defendant in possession of the property.

(2) Where such payment is not so made, the Court shall on application made in that behalf by the plaintiff, pass a decree that the mortgaged property, or a sufficient part thereof, be sold, and that the proceeds of the sale be dealt with as is mentioned in rule 4.

¹ *Saminathan v. Swaminappa*, (1906) 29 Mad., 170.

² *Shephard and Brown, Op. cit.*, 422, 423.

³ *Chandi v. Ambika*, (1901) 31 Cal., 792.

⁴ *Jadonath v. Jagimohan*, (1903) 25 All., 511.

⁵ *Per Sale J.*, in *Berhanndas v. Tarathan I*, (1905) 33 Cal., at p. 111.

⁶ *Brewer v. Square*, (1892) 2 Ch. 111. *Shephard and Brown, Op. cit.*, p. 425.

⁷ *Kamalamma v. Komandur*, (1907) 30 Mad., 461, and cases there cited.

Act IV of 1882, sect. 89

This rule applies to H C

This rule follows the wording of rule 3, *supra*, and provision is made for payment or non payment by the mortgagor.

Pays into Court—Payment to the plaintiff direct is no longer permissible and to save himself from the consequences of clause (2) the mortgagor must pay the amount fixed into Court.

Re transfer—The decree will only pass an order under clause (b), *if so required*.

Right to redeem and security extinguished—It is important to observe that this provision in sect. 89, Transfer of Property Act, has been omitted from this rule.

A mortgagor, even under that section was given the right to redeem at any time until the sale of the mortgaged property had been completed,¹ and applying this rule it was decided in a recent Calcutta case,² that after the order absolute and before completion of sale the Court could investigate an adjustment of the decree between the parties under section 89 of the Transfer of Property Act and section 47, *ante*

6 Where the net proceeds of any such sale are found

Recovery of balance due on mortgage to be insufficient to pay the amount due to the plaintiff, if the balance is legally recoverable from the defendant otherwise than out of the property sold, the Court may pass a decree for such amount.

Act IV of 1882, sect. 90

Where the sale-proceeds prove insufficient the decree-holder must proceed under this rule; he cannot, without leave under this rule bring a fresh suit for the balance due.³ This rule is applicable only after sale and where the proceeds have proved insufficient.⁴

Puisne mortgage—It applies to a puisne mortgagee decree-holder who can obtain a decree in respect of the deficit due upon the prior incumbrances as well as in respect of the deficit upon his own mortgage.⁵

Limitation.—Art. 178 and not art. 179, Sch. II, Act XV of 1877 (Art. 181, Sch. I, Act IX of 1908) is applicable.⁶

Costs—See sections 86, 90 and 91 of the Transfer of Property Act and notes thereon in Shephard and Brown's, T. P. Act, 6th Ed.

Form of decree—See App D, No. 11.

Preliminary decree in redemption suit.

7 In a suit for redemption, if the plaintiff succeeds, the Court shall pass a decree—

¹ *Bibyan Biba v. Sochi Bawa*, (1971) 31 Cal., 853; 8 Cal. W. N., 634.

² *Hari Chander Mondal v. Jagabandhu*, (1907) 12 Cal. W. N., 232. See also *Ram Kaulasuri v. Sakhar Singh* (1902) 7 Cal. W. N., 172.

³ *Lal Behary Singh v. Hobibar Bahara*, (1903) 26 Cal., 166.

⁴ *Ram Ranjan v. Indra Narain*, (1906) 33 Cal., 899; diss. from *Sheo Prasad v. Phani Lal* (1902) 25 All., 79.

⁵ *Ali Jan v. Marian Bibi*, (1907) 26 All., 93.

⁶ *Paras Chandra v. Raghunath*, (1906) 33 Cal., 867; *Munawar v. Jani Bijai*, (1905) 27 All., 619.

(a) ordering that an account be taken of what will be due to the defendant for principal and interest on the mortgage, and for his costs of the suit (if any) awarded to him on the day next hereinafter referred to, or

(b) declaring the amount so due at the date of such decree,

and directing

(c) that, if the plaintiff pays into Court the amount so due on a day within six months from the date of declaring in Court the amount so due, to be fixed by the Court, the defendant shall deliver up to the plaintiff, or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, retransfer the property to the plaintiff free from the mortgage and from all incumbrances created by the defendant or any person claiming under him, or, where the defendant claims by derived title, by those under whom he claims, and shall, if necessary, put the plaintiff in possession of the property, but

(d) that, if such payment is not made on or before the day to be fixed by the Court, the plaintiff shall (unless the mortgage is simple or usufructuary) be debarred from all right to redeem or (unless the mortgage is by conditional sale) that the mortgaged property be sold.

Act IV of 1882, sect. 92.

This rule applies to ff. C.

Right to redeem—The law on this subject is contained in section 60 of the Transfer of Property Act; this rule merely lays down the procedure to be followed in suit brought under that Act.

Mortgagee in Possession—The account must effect a complete and final settlement between the mortgagor and mortgagee, and where a mortgagee had been in possession and has realized profits these must be taken into account in the redemption decree; if not, the mortgagor cannot bring a subsequent suit to recover such profits¹.

8. (1) Where, on or before the day fixed, the plaintiff pays into Court the amount declared due as aforesaid, together with such subsequent costs as are mentioned in rule 10, the Court shall pass a decree—

¹ *Kashi v. Bajrang Prasad*, (1907) 30 All. 36; and see, *Vinayak Shivrao t. Dattatraya*, (1902) 26 Bom., 661.

- (a) ordering the defendant to deliver up the documents which under the terms of the preliminary decree he is bound to deliver up,

and, if so required,

- (b) ordering him to retransfer the mortgaged property as directed in the said decree,

and, also, if necessary,

- (c) ordering him to put the plaintiff in possession of the property.

(2) Where such payment is not so made, and the mortgage is not simple or usufructuary, the Court shall, on application made in that behalf by the defendant, pass a decree that the plaintiff and all persons claiming through or under him be debarred from all right to redeem the mortgaged property and also, if necessary, ordering the plaintiff to put the defendant in possession of the property.

(3) On the passing of a decree under sub-rule (2) the debt secured by the mortgage shall be deemed to be discharged.

(4) Where such payment is not so made, and the mortgage is not by conditional sale, the Court shall, on application made in that behalf by the defendant, pass a decree that the mortgaged property or a sufficient part thereof be sold and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court and applied in payment of what is found due to the defendant, and that the balance (if any) be paid to the plaintiff or other persons entitled to receive the same :

Provided that the Court may, upon good cause shown and upon such terms (if any) as it thinks fit, from time to time postpone the day fixed for payment.

Act IV of 1882, sect. 93.

This rule applies to H. C.

This rule follows the wording of rules 3 and 5, *supra* : see notes thereto

9. Notwithstanding anything hereinbefore contained if it appears, upon taking the account, referred to in rule 7, that nothing is due to the defendant or that he has been overpaid, the Court shall pass a decree directing the defendant, if so required, to re-transfer the property

Where where nothing is found due or where mortgage has been overpaid.

and to pay to the plaintiff the amount which may be found due to him; and the plaintiff shall, if necessary, be put in possession of the mortgaged property

This is a new provision, it applies to H. C.

The Transfer of Property Act contained no express power, but this rule only confirms the practice of the Courts in the cases referred to¹

10 In finally adjusting the amount to be paid to a mortgagee in case of a foreclosure or sale or redemption, the Court shall, unless the conduct of the mortgagee has been such as to disentitle him to costs, add to the mortgage-money such costs of suit as have been properly incurred by him since the decree for foreclosure or sale or redemption up to the time of actual payment

Act IV of 1882, sect. 94

This rule applies to H. C.

This provision now extends to foreclosure decrees which were omitted from sect. 94 of the Transfer of Property Act

Costs—Subsequent to decree only are referred to here, previous and other costs may or may not be granted and allowed in taking the account.²

11 Where property is mortgaged for successive debts to successive mortgagees, any mesne mortgagee may institute a suit to redeem the interests of the prior mortgagees and to foreclose the rights of those that are posterior to himself and of the mortgagor.

Right of mesne mortgagee to redeem and foreclose

This is a new provision; it applies to H. C.

This rule had been inserted to give effect to the suggestion made in a Privy Council Case.³

Form of decree—See App D. No 6, 7, 8 and 9

12. Where any property the sale of which is directed under this Order is subject to a prior mortgage, the Court may, with the consent of the prior mortgagee, direct that the property be sold free from the same, giving to such prior mortgagee the same interest in the proceeds of the sale as he had in the property sold.

Sale of property subject to prior mortgage.

Act IV of 1882, s. 96.

This rule applies to H. C.

¹ See report of Special Committee.

² See Shephard and Brown, op cit, 6th Ed. p. 412.

³ Gopi Narain v. Babu Bansidhar, (1903) 32 I. A., 123

The language of this rule is practically the same as that used in section 73 (b) *ante*, and is repeated here for convenience.

Where a decree for sale omitted to reserve the admitted rights of a first mortgagee, a defendant in the action, it was ordered by the appellate Court that his consent might nevertheless be taken and the sale held under this provision.¹

Application of proceeds.

13. (1) Such proceeds shall be brought into Court and applied as follows :—

- first, in payment of all expenses incident to the sale or properly incurred in any attempted sale ;
- secondly, in payment of whatever is due to the prior mortgagee on account of the prior mortgage, and of costs, properly incurred in connection therewith ;
- thirdly, in payment of all interest due on account of the mortgage in consequence whereof the sale was directed, and of the costs of the suit in which the decree directing the sale was made ;
- fourthly, in payment of the principal money due on account of that mortgage ; and
- lastly, the residue (if any) shall be paid to the person proving himself to be interested in the property sold, or if there are more such persons than one, then to such persons according to their respective interests therein or upon their joint receipt

(2) Nothing in this rule or in rule 12 shall be deemed to affect the powers conferred by section 57 of the Transfer of Property Act, 1882.

Act IV of 1882, sect. 97.

This rule applies to H. C.

Section 57 of the Transfer of Property Act deals with the provision for incumbrances in sales by the Court and for sales freed from such incumbrances.

14 (1) Where a mortgagee has obtained a decree for the payment of money in satisfaction of a claim arising under the mortgage, he shall not be entitled to bring the mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage, and he may institute such suit notwithstanding anything contained in Order II, rule 2

Suit for sale necessary for bringing mortgaged property to sale.

¹ *Prinivasa Rao v. Samunabhai*, (1905) 29 Mad. 84.

(2) Nothing in sub-rule (1) shall apply to any territories to which the Transfer of Property Act, 1882, has not been extended.

This rule applies to H. C.

15 All the provisions contained in this Order as to the sale or redemption of mortgaged property shall, so far as may be, apply to property subject to a charge within the meaning of section 100 of the Transfer of Property Act, 1882.

Compare Act IV of 1882, sect. 100

This rule applies to H. C.

This rule extends the provisions of this Order as to sale and redemption only to all charges within the meaning of section 100. See sects. 58 and 100 of the Transfer of Property Act, and Brown and Shephard's T. P. Act, 6th Ed. p. 459, *etc.*

ORDER XXXV.

Interpleader.

1. In every suit of interpleader the plaintiff shall, in addition to the other statements necessary for complaints, state—

- (a) that the plaintiff claims no interest in the subject-matter in dispute other than for charges or costs ;
- (b) the claims made by the defendants severally ; and
- (c) that there is no collusion between the plaintiff and any of the defendants.

Act XIV of 1882, sect. 471. See sect. 88, ante.

This rule applies to H. C. and Prov. S. C. C.

For form of complaint, see App. A. No. 40.

No suit will lie if the plaintiff claims an interest in the property,¹ or disputes the amount,² or has handed over the property to one claimant on an indemnity.³ The plaintiff must also, if possible, bring the subject of the contention into Court before any order can be passed. See next rule.

2. Where the thing claimed is capable of being paid into Court or placed in the custody of the Court, the plaintiff may be required to so pay or place it before he can be entitled to any order in the suit.

Act XIV of 1882, sect. 472.

This rule applies to H. C. and Prov. S. C. C.

3. Where any of the defendants in an interpleader-suit is actually suing the plaintiff in respect of the subject-matter of such suit, the Court in which the suit against the plaintiff is pending shall, on being informed by the Court in which the interpleader-suit has been instituted, stay the proceedings as against him ; and his costs in the suit so stayed may be provided for in such suit ; but if, and in so far as, they are not provided for in that suit, they may be added to his costs incurred in the interpleader-suit.

¹ Mitchell v. Hayne, 2 S. & S., 63.

² Diplock v. Hammond, 2 Sm. & O. 141.

³ Burnett v. Anderson, 1 Mer., 405.

Act XIV of 1882, sect. 476.

This rule applies to H. C. and Prov. S. C. C.

The language of this rule is modified to enable proceedings to be stayed pending the hearing of the interpleader suit. Under the 30 and, 31 Vict., c. 142, s. 31, the Judge has power to adjudicate in an interpleader-suit upon any special damage, to which the claimant of the goods seized may be entitled, arising out of the execution, and no separate suit will lie.¹ This is not the law in India.²

Appeal—An appeal lies from an order under this rule see, O. XLIII, r. 1 (p).

Procedure at first hearing **4** (1) At the first hearing the Court may—

- (a) declare that the plaintiff is discharged from all liability to the defendants in respect of the thing claimed, award him his costs, and dismiss him from the suit; or
- (b) if it thinks that justice or convenience so require, retain all parties until the final disposal of the suit

(2) Where the Court finds that the admissions of the parties or other evidence enable it to do so, it may adjudicate the title to the thing claimed.

(3) Where the admissions of the parties do not enable the Court so to adjudicate, it may direct—

- (a) that an issue or issues between the parties be framed and tried, and
- (b) that any claimant be made a plaintiff in lieu of or in addition to the original plaintiff,

and shall proceed to try the suit in the ordinary manner.

Act XIV of 1882, sect. 473.

This rule applies to H. C. and Prov. S. C. C.

Appeal.—An appeal lies from an order under this rule, see, O. XLIII, r. 1 (p).

5. Nothing in this Order shall be deemed to enable agents to sue their principals, or tenants to sue their landlords, for the purpose of compelling them to interplead with any persons other than persons making claim through such principals or landlords

Agents and tenants may not institute interpleader-suits

¹ *Death v. Harrison*, (1870) L. R., 6 Ex., 15.

² *Walmsley v. Cartner*, 1 Gasper, 170.

Illustrations.

(a) A deposits a box of jewels with B as his agent. C alleges that the jewels were wrongfully obtained from him by A, and claims them from B. B cannot institute an interpleader-suit against A and C.

(b) A deposits a box of jewels with B as his agent. He then writes to C for the purpose of making the jewels a security for a debt due from himself to C. A afterwards alleges that C's debt is satisfied, and C alleges the contrary. Both claim the jewels from B, B may institute an interpleader-suit against A and C.

Act XIV of 1882, sect. 474.

This rule applies to H. C. and Prov. S. C. C.

An agent or tenant cannot ordinarily dispute the title of his principal or landlord, and hence he is not allowed to institute an interpleader-suit. But if a
 the agent is not cer-
 no right to bring a suit
 hom claimed rent from

6. Where the suit is properly instituted the Court may provide for the costs of the original plaintiff by giving him a charge on the thing claimed or in some other effectual way.

Charge for plaintiff's costs

Act XIV of 1880, sect. 475.

This rule applies to H. C. and Prov. S. C. C.

The plaintiff is, as a rule, entitled to be paid at once his costs out of the fund in Court;³ or to a charge upon it—and the losing defendant must make good the amount.⁴

Appeal.—An appeal lies from an Order under this rule see O XLIII, r. 1(p).

³ *Clarke v. Byne*, (1897) 13 Ves., 393; *Suart v. Welch*, 4 My. & C., 303.

⁴ *Koylash Chandra v. Goluk Chunder*, (1897) 2 Cal. W. N., 61.

⁵ *Glynn v. Locke*, (1812) 3 D. & War., 11, 21.

⁶ *Lang v. Zelen*, (1874) 9 Ch. App., p. 738.

ORDER XXXVI.

Special Case

1. (1) Parties claiming to be interested in the decision of any question of fact or law^{Power to state case for Court's opinion} may enter into an agreement in writing stating such question in the form of a case for the opinion of the Court, and providing that, upon the finding of the Court with respect to such question,—

- (a) a sum of money fixed by the parties or to be determined by the Court shall be paid by one of the parties to the other of them ; or
- (b) some property, moveable or immoveable, specified in the agreement, shall be delivered by one of the parties to the other of them ; or
- (c) one or more of the parties shall do, or refrain from doing, some other particular act specified in the agreement.

(2) Every case stated under this rule shall be divided into consecutively numbered paragraphs, and shall concisely state such facts and specify such documents as may be necessary to enable the Court to decide the question raised thereby.

Act XIV of 1882, sect 527.

This rule applies to H. C. and Prov. S. C. C.

For cases stated under this rule, see *Fatmabibi v Advocate General of Bombay*¹ For Court-fee, see Court-fees Act, VII of 1870, Sched. II, art. 19.

2. Where the agreement is for the delivery of any property, or for the doing, or the refraining from doing, any particular act, the estimated value of the property to be delivered, or to which the act specified has reference, shall be stated in the agreement.^{Where value of subject-matter must be stated.}

Act XIV of 1882, sect 528.

The rule applies to H. C and Prov. S. C. C.

¹ *Fatmabibi v. Advocate General of Bombay*, (1882) 6 Bom., 42; B. B. Trading Co., Ltd. v. Dorabji, (1888) 10 Bom., 415

3. (1) The agreement, if framed in accordance with the rules hereinbefore contained, may be filed in the Court which would have jurisdiction to entertain a suit, the amount or value of the subject-matter of which is the same as the amount or value of the subject-matter of the agreement.

(2) The agreement, when so filed, shall be numbered and registered as a suit between one or more of the parties claiming to be interested as plaintiff or plaintiffs, and the other or the others of them as defendant or defendants; and notice shall be given to all the parties to the agreement, other than the party or parties by whom it was presented.

Act XIV of 1882, sect. 529.

This rule applies to H. C. and Prov. S. C. C.

4. Where the agreement has been filed, the parties to it shall be subject to the jurisdiction of the Court and shall be bound by the statements contained therein.

Act XIV of 1882, sect. 530.

This rule applies to H. C. and Prov. S. C. C.

No amendment can be made for the purpose of raising fresh points, or adding to or altering the facts, except with consent.¹

5. (1) The case shall be set down for hearing as a suit instituted in the ordinary manner, and the provisions of this Code shall apply to such suit so far as the same are applicable.

(2) Where the Court is satisfied, after examination of the parties, or after taking such evidence as it thinks fit,—

- (a) that the agreement was duly executed by them,
- (b) that they have a *bonâ fide* interest in the question stated therein, and

(c) that the same is fit to be decided, it shall proceed to pronounce judgment thereon, in the same way as in an ordinary suit, and upon the judgment so pronounced a decree shall follow.

Act XIV of 1882, sect. 531.

This rule applies to H. C. and Prov. S. C. C.

The facts required to be proved under this rule may be proved by affidavit.²

¹ *Mercsey Dock Trustees v. Jones*, (1849) 8 C. B. N. S., 121; 20 L. J., C. P., 239.

² *Krall v. Whymper*, (1890) 17 Cal., 786; *Burgess v. Morton*, App. Cas., 1896, p. 144.

The Court will not proceed, if it appears that there is no matter really in controversy between the parties.¹

Appeal—Under Act XIV of 1882, it was held that where both parties to a suit referred the matters in dispute between them to the Court, and agreed to abide by its decision, and the Court passed a decree accordingly, it was held that no appeal lay from the decree, the decision of the Court being in the nature of an arbitrator's award.²

¹ Doe d. Duntze v Duntze, (1843) 6 C. B., 100.

² Zain v. Kalabhai, (1899) 23 Bom., 752.

ORDER XXXVII.

Summary Procedure on Negotiable Instruments.

Application of Order

1. This Order shall apply only to—

- (a) the High Courts of Judicature at Fort William, Madras and Bombay ;
- (b) the Chief Court of Lower Burma ;
- (c) the Court of the Judicial Commissioner of Sind ; and
- (d) any other Court to which sections 532 to 537 of the Code of Civil Procedure, 1882, have been already applied.

Act XIV of 1882, sect 538

Notifications—Sections 532 to 537 (both inclusive) have been applied to the following other Courts in

(1) Burmah—

(a) Court of the Judge of Moulmein ; and

(b) Court of the Deputy Commissioner of Akyab .

See Burmah Rules Manual, ed. 1897, p. 116

(2) The Madras Presidency—

(a) District and Subordinate Judges' Courts ;

(b) District Munsiff's Courts

See Madras List of Local Rules and Orders, ed. 1898, p. 196—*Note, Legislative Department.*

Further and other relief—See *Raghubar Dial v. Kesho*.¹

2. (1) All suits upon bills of exchange, hundis or promissory notes may, in case the plaintiff desires to proceed hereunder, be instituted by presenting a plaint in the form prescribed ; but the summons shall be in Form No. 4 in Appendix B or in such other form as may be from time to time prescribed.

(2) In any case in which the plaint and summons are in such forms, respectively, the defendant shall not appear or defend the suit unless he obtains leave from a Judge as

¹ *Raghubar Dial v. Kesho*, (1899) 11 All. 18; see also, *Narasinha v. Ayyan*, (1899) 12 Mad. 157.

hereinafter provided so to appear and defend; and, in default of his obtaining such leave or of his appearance and defence in pursuance thereof, the allegations in the plaint shall be deemed to be admitted, and the plaintiff shall be entitled to a decree for any sum not exceeding the sum mentioned in the summons, together with interest at the rate specified (if any) to the date of the decree, and such sum for costs as may be prescribed, unless the plaintiff claims more than such fixed sum, in which case the costs shall be ascertained in the ordinary way, and such decree may be executed forthwith.

Act XIV of 1882, sect. 532

This rule applies to the Courts mentioned in rule 1 *supra*.

Negotiable instrument—An instrument signed and bearing a one anna stamp was in the following terms, *viz.*, "on deposit of title deeds named hereinbelow for value received by me, I promise to pay three months after date Rs 100 to A B or order," then followed the details of the deeds. *Held*, that the instrument was a negotiable instrument.¹

The expression *dhani* is not in the ordinary or the commercial language of the Bombay Presidency equivalent to "bearer" in the sense in which that word is employed in the Paper Currency and Negotiable Instruments Acts and, therefore, a note payable to *dhani* on demand, is not a negotiable instrument.²

Application of the rule—It is optional with a plaintiff wishing to sue upon a negotiable instrument either to bring a summary suit under this order or an ordinary suit.

Suits under this order must be brought within six months from the time the summons was served, Act IX of 1908, Sch. I, art 159. The acceptor, drawer, and endorser may be sued in one suit.³

It applies to defendants not residing within jurisdiction.⁴ In Calcutta, the sums must be beyond the cognizance of the Small Cause Court.⁵

High cause, and But the Court has no power, after the time fixed by the summons for obtaining leave to appear and defend has expired, to extend the time and it is doubtful whether it has power to grant extension of time if an application for it be made before the time fixed by the summons has expired.⁷ If the defendant is at such a distance

¹ Rama Chandra v. Basha, (1891) 17 Mad., 85

² Jetha Parkha v. Ram Chandra (1892) 16 Bom., 689.

³ Bank of Bengal v. Kartick Chunder, (1889) 16 Cal., 804.

⁴ Chandrakant Roy v. Pogose, (1869) 3 B. L. R., (O. C.), 83.

⁵ Duff v. Fisher, (1871) 8 B. L. R., App., 10.

⁶ Groom v. Wilson, (1878) 3 Cal., 539

⁷ Mahmud Ali Rohman v. Sarat Chandra Dutt, (1900) 5 Cal. W. N., 239.

as to make it impossible for him to appear in ten days, the Court will stay execution for a time long enough to enable him to appear under r 4.¹

Plaintiff is entitled to claim by his summons and obtain by his decree whatever sum, principal and interest, is legally demandable on the instrument.²

A hundi which contains a direction on sufficient consideration to the drawee and accepted by him is within the Act.³ A hundi is duly stamped if the stamp is affixed and cancelled at the time of execution, or if, having been at any time previously affixed, it is cancelled at the time of execution.⁴

repayment and a promissory note payable on demand for the amount due was executed: at the same time an agreement was entered into by defendant to liquidate the amount due on the promissory note by fortnightly instalments, the first consignment to be made within fourteen days of the date of the promissory note. On the defendant's failure to send the consignments as promised, a suit was brought under Chap. XXXIX, former Code: *held*, that the suit was rightly filed under Chap. XXXIX, that the agreement to liquidate the amount due by fortnightly consignments was a collateral undertaking consistent with the existence of the note containing an absolute promise to pay, that such collateral . . . that the plaintiffs end to recover the . . . and delivered on . . . not endorsed the endorsement.⁷

Interest—In a suit under this order, the plaintiff is not entitled to recover any interest, unless such interest is specified in the promissory note itself or to give evidence regarding any agreement to pay interest.⁸

3. (1) The Court shall, upon application by the defendant, give leave to appear and to defend the suit, upon affidavits which disclose such facts as would make it incumbent on the holder to prove consideration, or such other facts as the Court may deem sufficient to support the application.

(2) Leave to defend may be given unconditionally or subject to such terms as to payment into Court, giving security, framing and recording issues or otherwise as the Court thinks fit.

¹ Chandrakant Roy v. Pogose, (1869) 3 B. L. R. (O. C.) 83; but see, Grob v. Palmer, (1866) 1 Ind. Jur., N. S., 395.

² DeSouza v. Ranganian, (1870) 6 Mad. H. C., 257.

³ East India Bank v. Vulliamy (Goodway), (1866) 1 Ind. Jur., N. S., 217.

⁴ Bhawanji Harbhun v. Desai Punja, (1895) 19 Bom., 635.

⁵ Krishnao v. Hart Valje, (1896) 20 Bom., 483.

⁶ Simon v. Hakim Mahomed Sheriff, (1896) 19 Mad., 368.

⁷ Gurumurti v. Sivayya, (1894) 21 Mad., 391.

⁸ Lhopati Ram v. Suresendra Mohun, (1903) 30 Calc., 445; 7 Calc. W. N., 412.

Act XIV of 1882, sect. 533

This rule applies to the Courts mentioned in r. 1

After the usual return of service, and the expiration of the period mentioned in the summons, an order of the Court for a decree should be obtained.¹

Discloses a defence—If the defendant appears and discloses any defence, legal or equitable, he will be allowed to appear and defend,² but where there is reason to doubt its *bona fides* the condition of paying the money into Court, or bringing in security will be imposed.³ Leave to appear may be granted *ex parte*, but the plaintiff can show by affidavit that the leave ought not to have been granted, or if granted at all, granted on more stringent terms.⁴ An application for leave to defend must under art. 159 Sched. II of the Limitation Act 1877 (Sch. I, Act IX of 1908) be made within 10 days of the service of the summons as shewn in the Sheriff's return.⁵ When the writ of summons was served on the defendant on the 11th June, and the application for leave to file written statement was made on the 22nd June (Monday); *held* that *prima facie* the application was within time.⁶

In giving leave to defend, the Court has a discretion to order security for costs not only where there is a doubt as to the *bona fides* of the defence, but also

up as a defence, except when it arises out of the very transaction sued upon and is in the nature of a set-off, but the special cross claim provided for by s. 95, *viz.*, a claim for compensation for arrest on insufficient grounds, may be taken into account in any suit; therefore it may be taken into account in a summary suit under Chap. XXXIX, former Code.⁷

As a general rule, it would be no answer in a suit in the Small Cause Court upon a promissory note, for a defendant to say that the claim is a matter of account. But, if subsequently, a suit is instituted in the High Court by the defendant in the Small Cause Court in which all the transactions between the parties can be dealt with, and if he gives security, then it is desirable that there should not be a separate proceeding in respect of the promissory note.⁸

4. After decree the Court may, under special circum-

stances, set aside the decree, and if necessary stay or set aside execution,

and may give leave to the defendant to appear to the summons and to defend the suit, if it seems reasonable to the Court so to do, and on such terms as the Court thinks fit.

Act XIV of 1882, sect. 534

This rule applies to the Courts mentioned in r. 1.

¹ Schiller v. Marker, (1896) 1 Ind., Jur., N. S., 283.

² Casella v. Darton, (1873) L. R., 8 C. P., 100.

³ Agra & Masterman's Bank v. Leighton, (1866) L. R., 2 Ex., 56; Ram Lal v. Haran Chandra, (1869) 3 B. L. R., O. C., 130; (1869) 12 W. R., O. C., 9.

⁴ Vonhutzky v. Narayan Singh, (1870) 6 B. L. R., App., 64.

⁵ Madhub Lal v. Upendra Narain, (1896) 23 Cal., 573.

⁶ Grimohun v. Amarendra Nath, (1903) 7 Cal. W. N., 2211.

⁷ Vonhutzky v. Narayan Singh, (1870) 6 B. L. R., App., 64.

⁸ Roulet v. Fettle, (1894) 18 Bom., 717.

⁹ Issur Singh v. Bergmann, (1903) 30 Cal., 627.

as to make it impossible for him to appear in ten days, the Court will stay execution for a time long enough to enable him to appear under r. 4.¹

Plaintiff is entitled to claim by his summons and obtain by his decree whatever sum, principal and interest, is legally demandable on the instrument.²

A hundi which contains a direction on sufficient consideration to the drawee and accepted by him is within the Act.³ A hundi is duly stamped if the stamp is affixed and cancelled at the time of execution, or if, having been at any time previously affixed, it is cancelled at the time of execution.⁴

By s. 13, Act V, 1866, a protest of a bill of exchange, inland or foreign, when purporting to be made by a notary public is *prima facie* evidence that the bill has been dishonoured. The Negotiable Instruments Act, (XXVI of 1881), in the absence of local usage to the contrary, applies to hundis. A member of a Hindu family whom it is sought to make liable by a suit on a hundi drawn by the manager of the family, had been given to the family, 30 of the Act,⁵ of certain goods, pressed for repayment and a promissory note payable on demand for the amount due was executed; at the same time an agreement was entered into by defendant to liquidate the amount due on the promissory note by fortnightly instalments, the first consignment to be made within fourteen days of the date of the promissory note. On the defendant's failure to send the consignments as promised, a suit was brought under Chap. XXXIX, former Code. *held*, that the suit was rightly

balance due on a promissory note alleged to have been made and delivered on account of his estate to his mother and guardian who had not endorsed the note; *held*, that the suit was maintainable in the absence of the endorsement.⁷

Interest.—In a suit under this order, the plaintiff is not entitled to recover any interest, unless such interest is specified in the promissory note itself or to give evidence regarding any agreement to pay interest.⁸

3. (1) The Court shall, upon application by the defendant, give leave to appear and to defend the suit, upon affidavits which disclose such facts as would make it incumbent on the holder to prove consideration, or such other facts as the Court may deem sufficient to support the application.

(2) Leave to defend may be given unconditionally or subject to such terms as to payment into Court, giving security, framing and recording issues or otherwise as the Court thinks fit.

¹ Chandrakant Roy v. Pogose, (1869) 3 B. L. R. (O. C.) 83; but see, Grob v. Palmer, (1866) 1 Ind. Jur., N. S., 395.

² DeSouza v. Ranganath, (1870) 6 Mad. H. C., 257.

³ East India Bank v. Vulbe Gootwamy, (1866) 1 Ind. Jur., N. S., 247.

⁴ Bhawanji Harbhun v. Desai Punja, (1895) 19 Bom., 675.

⁵ Krishnaswami v. Hari Valji, (1896) 20 Bom., 488.

⁶ Simpi v. Hakim Mahomed Sheriff, (1896) 19 Mad., 308.

⁷ Gurumurti v. Sivayya, (1894) 21 Mad., 391.

⁸ Chappati Ram v. Surenendra Mohun, (1903) 39 Calc., 446; 7 Calc. W. N., 412.

Act XIV of 1882, sect. 533.

This rule applies to the Courts mentioned in r. 1.

After the usual return of service, and the expiration of the period mentioned in the summons, an order of the Court for a decree should be obtained.¹

Discloses a defence.—If the defendant appears and discloses any defence, legal or equitable, he will be allowed to appear and defend,² but where there is reason to doubt its *bona fides* the condition of paying the money into Court, or bringing in security will be imposed.³ Leave to appear may be granted *ex parte*, but the plaintiff can show by affidavit that the leave ought not to have been granted, or if granted at all, granted on more stringent terms.⁴ An application for leave to defend must under art. 159 Sched. II of the Limitation Act 1877 (Sch. I, Act IX of 1908) be made within 10 days of the service of the summons as shown in the Sheriff's return.⁵ When the writ of summons was served on the defendant on the 11th June, and the application for leave to file written statement was made on the 22nd June (Monday); *held* that *prima facie* the application was within time.⁶

In giving leave to defend, the Court has a discretion to order security for costs not only where there is a doubt as to the *bona fides* of the defence, but also where it appears unnecessary, though allowable.⁷ In a summary suit if a

up as a defence, except when it arises out of the very transaction sued upon and is in the nature of a set-off, but the special cross claim provided for by s. 95, *vis*, a claim for compensation for arrest on insufficient grounds, may be taken into account in any suit; therefore it may be taken into account in a summary suit under Chap. XXXIX, former Code.⁸

As a general rule, it would be no answer in a suit in the Small Cause Court upon a promissory note, for a defendant to say that the claim is a matter of account. But, if subsequently, a suit is instituted in the High Court by the defendant in the Small Cause Court in which all the transactions between the parties can be dealt with, and if he gives security, then it is desirable that there should not be a separate proceeding in respect of the promissory note.⁹

4. After decree the Court may, under special circum-

stances, set aside the decree, and if

necessary stay or set aside execution, and may give leave to the defendant to appear to the summons and to defend the suit, if it seems reasonable to the Court so to do, and on such terms as the Court thinks fit.

Act XIV of 1882, sect. 534.

This rule applies to the Courts mentioned in r. 1.

¹ Schiller v. Marker, (1890) 1 Ind., Jur., N. S., 283.

² Casella v. Darton, (1873) L. R., 8 G. P., 108.

³ Agra & Masterman's Bank v. Leighton, (1866) L. R., 2 Ex., 56; Ram Lal v. Haran Chandra, (1863) 3 B. L. R., O. C., 139; (1869) 12 W. R., O. C., 9.

⁴ Vonhitzgy v. Narayan Singh, (1870) 6 B. L. R., App., 64.

⁵ Madhub Lal a. Upendra Narain, (1896) 23 Cal., 573.

⁶ Grimohun v. Amarendra Nath, (1903) 7 Cal. W. N., 101.

⁷ Vonhitzgy v. Narayan Singh, (1870) 6 B. L. R., App., 64.

⁸ Roulet v. Fettle, (1894) 18 Bom., 717.

⁹ Issur Singh v. Bergmann, (1903) 30 Cal., 627.

Irregular service of summons on two out of three defendants to an action brought on a joint promissory note does not give the defendant properly served any ground to question the decree passed against him.¹ For a case allowing the defendant to appear and defend a suit after decree see.²

Form of decree.—See *Bank of Bengal v. Kartick Chunder*.³

Appeal.—An appeal lay under Act XIV of 1882 from an order refusing to set aside an *ex parte* decree.⁴

5. In any proceeding under this Order the Court may

Power to order bill,
etc., to be deposited
with officer of Court.

order the bill, hundi or note on which the
suit is founded to be forthwith deposited
with an officer of the Court, and may

further order that all proceedings shall be stayed until the
plaintiff gives security for the costs thereof.

Act XIV of 1882, sect 535

This rule applies to H. C. and Prov. S. C. C

6. The holder of every dishonoured bill of exchange or

Recovery of cost of
noting non-acceptance of
dishonoured bill or note.

promissory note shall have the same
remedies for the recovery of the expenses
incurred in noting the same for non-

acceptance or non-payment, or otherwise, by reason of such
dishonour, as he has under this Order for the recovery of
the amount of such bill or note.

Act XIV of 1882, sect 536.

This rule applies to the Courts mentioned in r 1.

As to noting, see, Negotiable Instruments Act, sects. 99-104.

7. Save as provided by this Order, the procedure in

Procedure in suits.

suits hereunder shall be the same as the
procedure in suits instituted in the

ordinary manner.

Act XIV of 1882, sect 537.

This rule applies to Courts mentioned in rule 1.

¹ *Ewing & Co. v. Guest Dux*, (1869) 3 B. L. R., App. 7.

² *Joseph v. Solano*, (1872) 9 B. L. R., 341; 18 W. R., 421.

³ *Bank of Bengal v. Kartick Chunder*, (1889) 16 Cal., 801.

⁴ *Luckhills v. P'braham*, (1874) 2 Bom., 611. But see, *Lal Singh v. Kunjan*, (1882) 4 All., 387.

ORDER XXXVIII.

ARREST AND ATTACHMENT BEFORE JUDGMENT.

Arrest before judgment.

Where defendant
may be called upon to
furnish security for
appearance

1. Where at any stage of a suit, other than a suit of the nature referred to in section 16, clauses (a) to (d), the Court is satisfied, by affidavit or otherwise,—

- (a) that the defendant, with intent to deny the plaintiff, or to void any process of the Court or to obstruct or delay the execution of any decree that may be passed against him,—
- (i) has absconded or left the local limits of the jurisdiction of the Court, or
- (ii) is about to abscond or leave the local limits of the jurisdiction of the Court, or
- (iii) has disposed of or removed from the local limits of the jurisdiction of the Court his property or any part thereof, or
- (b) that the defendant is about to leave British India under circumstances affording reasonable probability that the plaintiff will or may thereby be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit,

the Court may issue a warrant to arrest the defendant and bring him before the Court to show cause why he should not furnish security for his appearance :

Provided that the defendant shall not be arrested if he pays to the officer entrusted with the execution of the warrant any sum specified in the warrant as sufficient to satisfy the plaintiff's claim ; and such sum shall be held in deposit by the Court until the suit is disposed of or until the further order of the Court.

Act XIV of 1882, sects. 477, 478.

This rule applies to H. C. and Prov. S. C. C., except as regards immoveable property.

A creditor is not entitled merely because he has a great demand against his debtor to arrest him before judgment. This procedure is intended only to secure to the creditor his rights when there is reason to believe that the debtor is about to depart from the jurisdiction of the Court so as to make away with his property, and if the creditor procures the arrest of the debtor without reasonable or probable cause, he is liable to a regular suit for compensation, or to the summary process set out in s 95.¹

This rule does not enable a creditor to sue out arrest before judgment, to secure easy execution of decree.²

An order should not issue under (a), (b), or (c), unless it should appear that defendant is about to leave jurisdiction, &c, with one or other of the intentions described in the text;³ but where a defendant is about to leave British India, it is sufficient if there is a reasonable probability that his going away may have the
ed
ed
of

Master of a ship—See, *Probode Chunder v. Dowey*⁴

Practice—This rule combines two sections of the former Code. The practice will probably continue as before—namely to grant a rule to shew cause. See rule 6 *infra*

No order can issue until the applicant has been examined, and such further investigation (if any) as may be deemed necessary has been made.⁵

Form.—See App. F, No. 1

2. (1) Where the defendant fails to show such cause
Security the Court shall order him either to
deposit in Court money or other property
sufficient to answer the claim against him, or to furnish
security for his appearance at any time when called upon
while the suit is pending and until satisfaction of any decree
that may be passed against him in the suit, or make such
order as it thinks fit in regard to the sum which may have
been paid by the defendant under the proviso to the last
preceding rule.

(2) Every surety for the appearance of a defendant
shall bind himself, in default of such appearance, to pay
any sum of money which the defendant may be ordered to
pay in the suit.

Act XIV of 1882, s 479.

This rule applies to H. C. and to Prov. S. C. C., except as regards immovable property.

¹ *Goutiere v. Charriot*, (1869) 1 All. H. C., 91.

² *Kelaram Majee v. Narain*, (1878) 13 W. R., 278

³ *Teenaram v. Ramrutton*, (1864) 2 Hyde, 181.

⁴ *Agra and Masterman's Bank v. Minto*, (1866) 1 Ind. Jur., N. S., 265; *Goutiere v. Robert*, (1870) 2 All. H. C., 333

⁵ *Harrison v. Hickson*, 1 Boul., 37.

⁶ *Probode Chunder v. Dowey*, (1887) 14 Calc., 693

⁷ *Kelaram Majee v. Narain*, (1870) 13 W. R., 278

Security—The security required to be given by a defendant who is arrested before judgment, does not include security for costs.

Cause—If the person has been charged with leaving India, good cause must be, either, (1) that he is not going to leave India or not for so long a time as will obstruct, or is likely to obstruct, the plaintiff, should he succeed; or that (2) the suit is not a *bona fide* one, or that (3), even if it is, the institution of it has been vexatiously delayed till the defendant is about to depart from India in order to embarrass or coerce him.¹

A defendant should not be committed unless he cannot show good cause, or cannot deposit sufficient to meet the demand, or is unable to give security, not for the demand, but for his appearance.²

Appeal—An appeal lies from an order under this rule O. XLIII, r. 1 (q).

Form—See App F, No 2.

3. (1) A surety for the appearance of a defendant may at any time apply to the Court in which he became such surety to be discharged from his obligation.

Procedure on application by surety to be discharged

(2) On such application being made, the Court shall summon the defendant to appear or, if it thinks fit, may issue a warrant for his arrest in the first instance.

(3) On the appearance of the defendant in pursuance of the summons or warrant, or on his voluntary surrender, the Court shall direct the surety to be discharged from his obligation, and shall call upon the defendant to find fresh security.

Act XIV of 1882, s. 480

This rule applies to H.C. and to Prov. S. C. C., except as regards immoveable property.

The Court can secure the defendant's appearance by a warrant to the jailor.³

Appeal—An appeal lies from an order under this rule O. XLIII, r. 1 (q).

Form—See App F, No. 3

4. Where the defendant fails to comply with any order under rule 2 or rule 3, the Court may commit him to the civil prison until the decision of the suit or, where a decree is passed against the defendant, until the decree has been satisfied;

Procedure where defendant fails to furnish security or find fresh security.

Provided that no person shall be detained in prison under this rule in any case for a longer period than six months, nor for a longer period than six weeks when the amount or value of the subject-matter of the suit does not exceed fifty rupees:

¹ *Spence's Hotel Company v. Anderson*, (1866) 1 Ind. Jur., N. S., 294.

² *Kelaram Majee v. Narain*, (1870) 13 W. R., 278; 5 B. L. R., 215.

³ *Kelaram Majee v. Narain*, (1870) 13 W. R., 278; 5 B. L. R., 215

Provided also that no person shall be detained in prison under this rule after he has complied with such order.

Act XIV of 1882, s. 481.

This rule applies to H. C. and Prov. S. C. C.

It is only in the event of a defendant neither furnishing security nor offering a sufficient deposit that he can be committed to custody.¹

Where a person is arrested under this rule, and a decree is afterwards obtained against him, the decree-holder, if he wishes to send the defendant to prison, must have him brought before the Court and his subsistence money fixed in the same way as if he had been arrested in execution of the decree; and if he fails to do so, the defendant is entitled to his discharge.² And in calculating six months under s. 58, the period of imprisonment suffered after decree must be taken into account.³

Form.—See App. F, No. 4

Attachment before Judgment.

5. (1) Where, at any stage of a suit, the Court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him,—

Where defendant may be called upon to furnish security for production of property.

(a) is about to dispose of the whole or any part of his property, or

(b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court,

the Court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the Court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security.

(2) The plaintiff shall, unless the Court otherwise directs, specify the property required to be attached and the estimated value thereof.

(3) The Court may also in the order direct the conditional attachment of the whole or any portion of the property so specified.

Act XIV of 1882, sects 483, 484

This rule applies to H. C. and to Prov. S. C. C., except as regards immovable property.

¹ Kelaram Majee v. Narain, (1870) 13 W. R., 278; 5. B. L. R., 215.

² Kalla Chand Dass, in the matter of, (1866) 1 Ind. Jur., N. S., 329; Bourke, 425.

³ Ghanshamdas v. Joharimull, (1853) 7 Bom., 471.

before judgment, if a decree is subsequently obtained, the attachment already effected becomes valid.¹

Profits—Attachment of property covers the profits of the property.²

Where in a suit against the member of an undivided Hindu family, not as representing the family, there is an attachment before judgment of family property, and the defendant dies before decree is passed the right of survivorship takes effect before the attachment becomes effectual for the purpose of execution.³

Wrongful attachment.—If the goods of a person not a party to the litigation be attached, the damages are measured by the value of the property on the date of attachment.⁴

Termination of attachment.—An attachment under this rule like a temporary injunction, becomes *functus officio* as soon as the suit terminates.⁵

Form—See app F, Nos. 5 and 6.

Appeal—does not lie from an order under this rule.⁶

6. (1) Where the defendant fails to show cause why he should not furnish security, or fails to furnish the security required, within the time fixed by the Court, the Court may order that the property specified, or such portion thereof as appears sufficient to satisfy any decree which may be passed in the suit, be attached.

(2) Where the defendant shows such cause or furnishes the required security, and the property specified or any portion of it has been attached the Court shall order the attachment to be withdrawn or make such other order as it thinks fit.

Act XIV of 1882, sect 485

This rule applies to H. C. and to Prov. S. C. C. except as regards immovable property.

Within the jurisdiction.—These words do not re-appear either in rule 5 or rule 6. See note to r. 5, *supra*.—‘*Dispose of his property.*’

Appeal—An appeal lies from an order of attachment or removal of the property.⁷

held (1) that the order was one under this rule and an appeal lay and (2) that the order of attachment should be reversed. The plaintiff's claim if established would be satisfied *pari passu* with the other debts of the company—he was not entitled to security for this claim in preference to the other creditors.⁸ But no

¹ Bhagwan Chandra v. Chandra Mela, (1905) 1 Cal. L. J., 97.

² Ram Coomar v. Gobind Nath, (1869) 12 W. R., 391.

³ Ramanayya v. Rangappayya, (1891) 17 Mad., 141.

⁴ Kiewer Mohan v. Harshukh, (1889) L. R., 17 I. A., 17; 17 Cal., 436.

⁵ Ram Chand v. Pitam Mal, (1888) 10 All., 506.

⁶ O. LIII, and see, Ahmed Ali v. Gladstone, (1867) 7 W. R., 508.

⁷ Sitaji v. Bihari Lal, (1897) 21 Bom., 273.

appeal will lie from an order of remand made under O.XLI, r. 23 when such order is itself made in an appeal from an order under this rule.¹

Form—See app F, No 7.

7. Save as otherwise expressly provided, the attachment shall be made in the manner provided for the attachment of property in execution of a decree.

Act XIV of 1882, s. 486

This rule applies to H. C. and to Prov. S. C. C. except as regards immoveable property

8. Where any claim is preferred to property attached before judgment, such claim shall be investigated in the manner hereinbefore provided for the investigation of claims to property attached in execution of a decree for the payment of money.

Act XIV of 1882, s. 487.

This rule applies to H. C. and to Prov. S. C. C. except as regards immoveable property

All claims to attached property should be disposed of under this rule²

Plaintiff applied for the attachment of certain property before judgment Defendant's wife opposed, claiming an interest in the property, and the Court, making her a party to the suit, decreed the plaintiff's claim and released the property. It was held that the order releasing the property, although irregular, must be taken to have been passed under the corresponding section of Act VIII of 1859. *Court and attached before judgment.* Before hearing of the suit, the insolvent and a vesting order

was declared an insolvent and before decree, the title of attaching creditor obtaining : the Official Assignee can move by an ordinary motion⁴

9. Where an order is made for attachment before judgment, the Court shall order the attachment to be withdrawn when the defendant furnishes the security required, together with security for the costs of the attachment, or when the suit is dismissed.

¹ Jhanday Lal v. Sarnian Lal, (1899) 21 All., 291.

² Ram Ruttun v. Gobind, (1867) 2 Agra, 141.

³ George v. Ram Ruttun, (1868) 3 Agra, 272.

⁴ Turner v. Pestonji Fardunji, (1896) 20 Bom., 403.

10. Attachment before judgment shall not affect the rights, existing prior to the attachment, of persons not parties to the suit nor bar any person holding a decree against the defendant from applying for the sale of the property under attachment in execution of such decree.

Attachment before judgment not to affect right of strangers, nor bar decree-holder from applying for sale.

Act XIV of 1882, sects 488-489.

This rule applies to H. C. and to Prov. S. C. C., except as regards immovable property.

The attachment does not affect the rights of persons not parties to the suit;¹ or prevent the property being sold in execution of another decree whether the decree has been obtained before or after the attachment;² nor does it amount to an injunction under s. 15 of the Limitation Act preventing the obligee suing.³

No new attachment is necessary after decree;⁴ and any private alienation made subsequent to attachment before judgment is null and void.⁵

11. Where property is under attachment by virtue of the provisions of this Order and a decree is subsequently passed in favour of the plaintiff, it shall not be necessary upon an application for execution of such decree to apply for a re-attachment of the property.

Property attached before judgment not to be re-attached in execution of decree.

Act XIV of 1882, s. 490.

This rule applies to H. C. and to Prov. S. C. C., except as regards immovable property.

This rule does not confer upon the decree-holder the right to come in under s. 73 and share in the distribution of the profits which he has attached. The effect of this rule is merely to take away the necessity for a re-attachment of the property. The attachment before judgment endures and becomes an attachment in execution.⁶

12. Nothing in this Order shall be deemed to authorize the plaintiff to apply for the attachment of any agricultural produce in the possession of an agriculturist, or to empower the Court to order the attachment or production of such produce.

Agricultural produce not attachable before judgment.

This is a new rule, and a corollary to sections 60 (b) and 61 in the body of the Code.

¹ Sarkies v. Bundhoo Bacc, (1869) 1 All. H. C., 172, p. 185.

² (1870) 6 Mad. H. C., 135.

³ Collector of Etawah v. Betti, (1892) 14 All., 162; 17 All., 193; L. B., 22 J. A., 31.

⁴ Sarkies v. Bundhoo Bacc, (1869) 1 All. H. C., 172.

⁵ See v. H. in re Raj Chunder Roy v. Isser Chunder, Bourke, 139; Savaramji v. Jalasji, (1862) 2 Bom. H. C., 112.

⁶ Patilji Shapurji v. Jordan, (1888) 12 Bom., 100.

ORDER XXXIX.

TEMPORARY INJUNCTIONS AND INTERLOCUTORY ORDERS.

Temporary Injunctions.

Cases in which temporary injunction may be granted

1. Where in any suit it is proved by affidavit or otherwise—

- (a) that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree, or
- (b) that the defendant threatens, or intends, to remove or dispose of his property with a view to defraud his creditors,

the Court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property as the Court thinks fit, until the disposal of the suit or until further orders

Act XIV of 1882, s. 492

This rule applies to H. C.,

Scope of the rule—This rule only refers to temporary injunctions, leaving perpetual injunctions to be regulated by the Specific Relief Act¹ The

The provisions of the Code of Civil Procedure as to temporary or interlocutory injunctions are not the same as those under the Judicature Act, 1873, s. 25, sub-cl 8²

Courts of Equity will not issue an injunction against officers of Government exercising a right or alleged right to levy taxes, though they will against municipal officers in regard to the levy of rates³

Jurisdiction—A Subordinate Judge has power under this rule to issue a temporary injunction to a District Judge to postpone a sale⁴ The jurisdiction

¹ Nasserwanji v. Gordon, (1882) 6 Bom., 266, 279.

² Chandidat Jha v. Padmanand Singh, (1895) 22 Cal., 459.

³ Jaiaram Das v. Zamon Lal, (1909) 27 Bom., 357.

⁴ Hormasji v. Pedder, (1875) 12 Bom. H. C., 199, 203: see r. 5, *infra*.

⁵ Amir Dullin v. Administrator General of Bengal, (1896) 23 Cal., 351.

of the Court is determined by the amount at which the relief sought is valued in the plaint and the Court has no power to increase the value of the relief.¹

Pleading.—A plaintiff should enter a claim for injunction in his plaint, when obtaining it is a substantial object of his action.²

A person not named in the pleadings cannot be committed for breach of an injunction.³

Evidence.—Evidence should be adduced to prove that property in dispute is in danger of being wasted or dealt with in one or other of the ways described in this rule.⁴ In a suit for a specific sum of money, if the defendant expresses his intention of employing it in trade, an injunction should issue,⁵ but not where the suit is for real property, and the defendant admittedly has a half share in it,⁶ or the property covered by the injunction is not the property in dispute,⁷ or the person against whom it is asked is not a party to the suit.

Agreement.—An agreement to grant a charter-party will not support an injunction.⁸ An injunction to restrain the breach of an illegal agreement entered into by an unregistered association of artisans to enhance the price of their work,⁹ or to restrain a rival tradesman from carrying on his business in pursuance of an agreement entered into while he was under a criminal charge,¹⁰ or to prevent a widow from adopting a son in violation of an agreement,¹¹ cannot be granted. But the Court will grant an injunction to restrain a partner from excluding his co-partner from the partnership business,¹² or a person from practising as a physician.¹³

Alienation by widow.—For circumstances under which an *interim* injunction will be continued, see *Gopée Nath v. Kally Doss*.¹⁴

the duration of the suit.

Real property.—Real property should always be retained if possible *in statu quo* until the suit is decided.¹⁵ Plaintiff, in possession of a dock used for repairing vessels, on being threatened by the defendants with a suit to eject them, sued for specific performance of an alleged agreement with the defendants under which they were entitled to hold the dock until their two vessels were repaired. In support of an application for an *interim* injunction to restrain proceedings in the suit for ejectment until the latter should have been decided, plaintiffs stated that on the faith of the agreement, one of their ships had been docked and taken to pieces; that the repairs could not be finished for a considerable time; and

¹ *Gururajamma v. Venkata Krishnamma*, (1901) 21 Mad., 31.

Colebourne v. Colebourne, (1876) 1 C. 12, 690.

Sadagopachari v. Krishnamachari, (1889) 12 Mad., 356.

Prosunno Moyee v. Wooma Moyee, (1870) 14 W. R., 409; *Dhundiram Santukram v. Chandanabai*, (1861) 2 Bom. H. C., 98.

Goluck Chunler v. Mohim Chunder, (1870) 13 W. R., 93.

Mun Mohini v. Ichamoyee, (1870) 13 W. R., 50.

Agarain Geereo v. Shilpershad, (1866) 6 W. R., 1.

Al-lul v. Haji Al-lul, (1882) 6 Bom., 5.

Bapu Safu, (1876) 1 Bom., 550.

Arjun v. Nari Tricum, (1891) 18 Bom., 702.

Am v. Batabai, (1869) 13 Bom., 56.

Assani, (1862) 1 Mad. H. C., 311.

Donald, (1899) 23 Bom., 193.

..., (1891) 10 Cal., 225.

..., (1897) 21 Cal., 260. See also,

..., (1891) 1 Ind. Jur. N. S., 411.

that the vessel could not be removed from the dock without great loss and irreparable injury to them. The defendants denied the agreement, and set forth another, and which having come to an end, they were entitled to eject. They did not deny the loss that would ensue to the plaintiffs, nor allege delay in repairing. *Held*, that the plaintiffs were entitled to an *interim* injunction restraining the defendants from executing the ejectment decree until the suit had been decided.¹

Where A obtained a decree against B for possession of a dwelling-house in which C was admittedly interested as a co-sharer, and C brought a suit to declare that A had obtained no title to the property, an injunction restraining A from executing the decree was allowed.²

Official Assignee.—When money due to an insolvent is deposited in Court and the Court orders payment to the creditors instead of to the Official Assignee, the remedy of the latter is to sue out an injunction to restrain the creditors and apply for an *ad interim* injunction.³

Copy-right.—For cases in which injunction was granted for colourable imitation of a book, see *Gangavishnu v. Moreshtar Bapuji*,⁴ and for infringement of copy-right by publication of a piracy before registration, see *Macmillan v. Suresh Chunder*.⁵

Co-sharers.—See *Watson & Co. v. Ram Chund Dutt*.⁶

Hindu marriage.—An injunction will not be granted to restrain a Hindu woman from marrying her minor daughter to a third party, pending the decision of a suit for specific performance of a contract of marriage.⁷ Such an injunction may be granted under the Guardian and Ward Act (VIII of 1890)⁸ or to prevent the marriage of a bride for the second time to any one else.⁹

Joint property.—In disputes between members of a joint Hindu family with respect to joint property, the exercise of the Court's jurisdiction to grant relief by injunction should be confined to acts of waste, illegitimate use of the family property or acts amounting to ouster.¹⁰ The rule of Hindu law does not prevent an injunction being granted in cases in which one member of the family is prevented from taking part in the business of the family firm.¹¹

Legal representative.—Where A caused C to be improperly placed on the record as the legal representative of B, C obtained an injunction against A, restraining him from executing the decree against him.¹²

Libel.—An injunction will be allowed to restrain the publication of a libel injurious to the plaintiff's trade.¹³

¹ *Moran v. The River Steam Navigation Co.*, (1875) 14 B. L. R., 332.

² *Ananthinath Day v. Mackintosh*, (1870) 6 B. L. R., 571.

³ *Miller, in the matter of*, (1869) 12 W. R., 103.

⁴ *Gangavishnu v. Moreshtar Bapuji*, (1899) 13 Bom., 353.

⁵ *Macmillan v. Suresh Chunder*, (1890) 17 Cal., 931.

⁶ *Watson & Co. v. Ramchund Dutt*, (1891) 18 Cal., 10; L. R., 17 I. A., 110; *Joy Chunder v. Bipro Ghurn*, (1887) 14 Cal., 236; *Sivaraman v. Muthya*, (1889) 12 Mad., 211; L. R., 16 I. A., 48.

⁷ *Gunput Narain v. Rajoo Koer*, (1875) 21 W. R., 207; 1 Cal., 74; but see *Nanabhai Ganpatra v. Janardhan*, (1893) 12 Bom., 110.

⁸ *Harendra Nath v. Brinda Ram*, (1898) 2 Cal. W. N., 521.

⁹ *Venkatacharyulu v. Rangacharyulu*, (1891) 14 Mad., 316.

¹⁰ *Anant Ramray v. Gopal Balwant*, (1895) 19 Bom., 269; *Soshi Bhusan Ghose v. Gonesh Chunder Ghose*, (1902) 29 Cal., 500.

¹¹ *Ganpat v. Annaji*, (1893) 23 Bom., 144.

¹² *Dhuronidhur Sen v. Agra Bank*, (1879) 4 C. L. R., 434; 5 Cal., 86.

¹³ *Thorley's Cattle Food Company v. Massam*, (1879) 14 G. D., 763.

of the Court is determined by the amount at which the relief sought is valued in the plaint and the Court has no power to increase the value of the relief.¹

Pleading.—A plaintiff should enter a claim for injunction in his plaint, when obtaining it is a substantial object of his action.²

A person not named in the pleadings cannot be committed for breach of an injunction.³

Evidence.—Evidence should be adduced to prove that property in dispute is in danger of being wasted or dealt with in one or other of the ways described in this rule.⁴ In a suit for a specific sum of money, if the defendant expresses his intention of employing it in trade, an injunction should issue,⁵ but not where the suit is for real property, and the defendant admittedly has a half share in it,⁶ or the property covered by the injunction is not the property in dispute,⁷ or the person against whom it is asked is not a party to the suit.

Agreement.—An agreement to grant a charter-party will not support an injunction.⁸ An injunction to restrain the breach of an illegal agreement entered into by an unregistered association of artisans to enhance the price of their work,⁹ or to restrain a rival tradesman from carrying on his business in pursuance of an agreement entered into while he was under a criminal charge,¹⁰ or to prevent a widow from adopting a son in violation of an agreement,¹¹ cannot be granted. But the Court will grant an injunction to restrain a partner from excluding his co-partner from the partnership business,¹² or a person from practising as a physician.¹³

Alienation by widow.—For circumstances under which an *interim* injunction will be continued, see *Gopie Nath v. Kally Doss*.¹⁴

Actual damage.—Where an act threatening danger to a person's land is such that injury will inevitably follow, a Court may grant an injunction restraining the continuance of that act, even though no damage has actually occurred before the institution of the suit.¹⁵

Real property.—Real property should always be retained if possible in

In support of an application for an *interim* injunction to restrain proceedings in the suit for ejectment until the latter should have been decided, plaintiffs stated that on the faith of the agreement, one of their ships had been docked and taken to pieces; that the repairs could not be finished for a considerable time; and

¹ *Gurusajamma v. Venkata Krishnama*, (1901) 21 Mad., 31.

² *Colbourne v. Colbourne*, (1876) 1 C. D., 690.

³ *Sadagopachari v. Krishnamachari*, (1889) 12 Mad., 356.

⁴ *Prosunno Moyee v. Wooma Moyee*, (1870) 13 W. R., 409; *Dhundram Santukram v. Chandanabai*, (1864) 2 Bom. H. C., 94.

⁵ *Goluck Chunder v. Mohim Chunder*, (1870) 13 W. R., 95.

⁶ *Man Mohini v. Ichamoyee*, (1870) 13 W. R., 60.

⁷ *Joynarain Geere v. Shilpershad*, (1866) 6 W. R., 211.

⁸ *Haji Alolul v. Haji Alolul*, (1882) 6 Bom., 5.

⁹ *Haji v. Kapu Saju*, (1876) 1 Bom., 550.

¹⁰ *Harjivan v. Narsi Trium*, (1891) 18 Bom., 702.

¹¹ *Am v. Ratanlal*, (1889) 13 Bom., 56.

¹² *Am v. Ratanlal*, (1862) 1 Mad. H. C., 311.

¹³ *Am v. Ratanlal*, (1879) 23 Bom., 103.

¹⁴ *Am v. Ratanlal*, (1881) 10 Calc., 225.

¹⁵ *Jahnuhi Chowdhram*, (1897) 21 Calc., 260. See also,

Lowthry v. Ram Chander, W. R., (1864) 302.

Am v. Ratanlal, (1877) 1 Ind. Jur. N. S., 411.

Light—As to a case of mandatory injunction in connection with an obstruction to light and air, see ¹

Public Worship—As to whether an injunction should be granted or not restraining one class of Mahomedans from worshipping in a mosque; see, *Fazl Karim v. Moula Baksh* ²

Rent—An injunction to restrain a person from collecting without any title rent over and above the full sixteen annas in the rupee may be granted. ³

Well—The digging of a well by a defendant *talookdar* is not an act of waste requiring an injunction ⁴

Way—Injunction to restrain a gateway leading across level crossing of a railway over in *G. I. P.*
Railway v. . . person from
 using a way 6

Practice—A Court in granting an *ad interim* injunction, will first see that there is a *bona fide* contention between the parties, and then, on which side, in the event of success, will lie the balance of inconvenience if the injunction does not issue. ⁷

Trade-mark—For injunction in case of infringement of trade-marks, see the under-noted cases ⁸

As to what is necessary to be shown in order to obtain an *ad interim* injunction in the case of an alleged infringement of trade-mark, see *Reddaway & Co. v. Schroder Smidt & Co.* ⁹

Restrain breach of contract—The general principles are to be sought in cl. (g) of the Specific Relief Act: that the agreement provides a

Public Bodies—An injunction to restrain a corporate body from publishing resolutions calculated to injuriously affect the plaintiff in his commercial relations with the Government as being in excess of their powers, ¹⁰ or to restrain a

¹ *Pravalutty Dike v. Mohendra Lall*, (1891) 7 Cal., 453.

² *Fazl Karim v. Moula Baksh*, (1891) 18 Cal., 448; L. R., 18 I. A., 59. See also on this point, *Jamma Das v. Atmarain*, (1874) 2 Bom., 131; *Sand Kishor v. Theng Bai*, (1881) 8 Bom., 97; *Boyeon v. Deane*, (1899) 22 Mad., 271; *Penole Gromston v. Gondamney*, (1889) 16 Cal., 232; *Thunghun v. Lihon*, (1889) 13 Bom., 252; *Kadar Dhar v. Bahum Dhar*, (1889) 13 Bom., 674; *Nawaz Jung v. Rustumji*, (1896) 20 Bom., 701; *Yaro v. Sanaullah*, (1897) 19 All., 259; *Kalhan Das v. Talu Das*, (1899) 23 Bom., 756.

³ *Nadurajm v. Ben Chumler*, W. R., (1891) 362.

⁴ *Magneerani v. Guresh Datt*, W. R., (1891) 275.

⁵ *G. I. P. Railway v. Nowroji*, (1886) 10 Bom., 399. As to the granting of an injunction in the case of obstructing a private way, see *Madanmohan v. Chandra Kumar*, (1871) 9 B. L. R., 379.

⁶ *Dasu Bhagoral v. Dasai Chundal*, (1890) 21 Bom., 183.

⁷ *Deputy v. Allman*, (1876) 3 App. Cas., 700; *Nusservanji v. Gordon*, (1882) 6 Bom., 265, p. 279; *Moham Ry. Co. v. Rust*, (1891) 14 Mad., 18, and the cases cited. See also *Babbar v. Dhunput Singh*, (1897) 1 Cal., W. N., 429.

⁸ *Graham v. Kerr Dole*, (1869) 3 B. L. R., App. 1; *Badische Anilin Fabrik v. Staedekj Hespurg*, (1897) 17 Bom., 581; *Hounger v. Droz*, (1901) 25 Bom., 473.

⁹ *Reddaway & Co. v. Schroder Smidt & Co.* (1903) 8 Cal., W. N., 151.

¹⁰ *Nusservanji v. Gordon*, (1882) 6 Bom., 266, p. 279.

¹¹ *Moham Ry. Co. v. Rust*, (1891) 14 Mad., 18.

¹² *Kishor v. Trustees of the Port of Bombay*, (1876) 1 Bom., 132.

company from appointing its own solicitor in accordance with a resolution, though passed in contravention of a previous agreement with the plaintiffs,¹ or to deprive a public body of the power of exercising its discretion to levy and collect a rate, cannot be granted.²

Religious Office—The Court will not grant any injunction when its effect would be to force upon any section of the community the services of a priest whom they are unwilling to recognise, and to forbid them from employing a priest whose ministrations they desire.³ But an injunction will be granted when a person is prevented from performing his religious duties.⁴ When the use of a particular new seal in connection with a religious office had the effect of extending the priestly rights, which according to the old seal had been limited, an injunction was granted.⁵

Wrongfully sold in execution of decree—(If a claimant under s. 278, former Code O. XXI, r. 38, whose claim has been disallowed, institutes a regular suit against the decree holder, the Court has power to grant an injunction staying the sale pending the decision of the suit.⁶ The purchaser of a share of a decree who has signed in his endeavour to get himself upon the record, has no right to an injunction to prevent the decree-holder from executing the whole decree.⁷ But an execution purchaser in possession of the property is entitled to an *ad interim* injunction in a suit to restrain a decree-holder from selling a share in the same property.⁸ In execution of a mortgage-decree against the father of a Hindu family, his right, title and interest only in ancestral property were advertised for sale; *held*, in a suit brought by a son to protect his interest, that no injunction should be allowed.⁹ The term decree does not include the decree of a Revenue Court. An application under this rule for stay of sale in execution of a decree of a Court of Revenue in a suit under s. 93 of Act XII of 1891 cannot be entertained by a civil Court,¹⁰

Dispose of his property.—A subsequent alienation is not void.¹¹

it of the Court trying the
to an end, and does not

¹ Nusservanji v. Gordon, (1882) 6 Bom., 260.

² Municipal Commissioners of Madras v. Branson, (1878) 3 'Mail., 211. For principles upon which the Court will interfere by injunction to restrain acts of public functionaries in excess of their statutory powers, see Chabildas Lalubhai v. Municipal Commissioner of Bombay, (1911) 8 Bom. H. C., O. C., 55.

³ Shivappa v. Krishnabhat, (1879) 3 Bom., 232.

⁴ Moro Mahadev v. Anant Bhimaji, (1897) 21 Bom., 621. See also, Srinivasa v. Tiruvengala, (1888) 11 Mad., 450.

⁵ Ramanuja v. Rama Kisore, (1899) 22 Mad., 189.

⁶ Brojendra Kumar v. Rup Lall, (1886) 12 Calc., 515; Kirpa Dayal v. Kishori, (1883) 10 All., 69. But the latter decision was overruled in Chanda Bui, in the matter of, (1901) 26 All., 311, on the ground that unattached property cannot be said to be in danger of being wrongfully sold in execution of a decree.

⁷ Rohimunnissa v. Leakut Ali, (1874) 22 W. R., 596.

⁸ Rup Lall v. Mahim Chandra, (1870) 5 B. L. R., 251.

⁹ Amolak Ram v. Sahib Singh, (1885) 7 All., 556.

¹⁰ Onkar Singh v. Bhup Singh, (1891) 16 All., 493.

¹¹ Delhi Bank v. Ram Narain, (1887) 9 All., 497; Monohar Das v. Ram Autar Pande, (1903) 25 All., 131.

¹² Dhundram Santukram v. Chandanabai, (1861) 2 Bom. H. C., 93.

¹³ Mohierooddeen v. Ahmed, (1870) 14 W. R., 334; Money Purse v. Guru Pershad, (1885) 11 Calc., 146.

Court-fee—The Court-fee on the plaint of a suit for an injunction is payable on the amount at which the relief sought is valued,—see s. 7, cl. iv (d) of the Court-fees Act.¹

Form—See App. F, No. 8.

Appeal.—An appeal lies from an order under this rule O. XLIII, r. 1, (r). An appeal lies against an order purporting to be made under this rule even though made without jurisdiction.²

2 (1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the Court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right.

(2) The Court may by order grant such injunction, on such terms as to the duration of the injunction, keeping an account, giving security, or otherwise, as the Court thinks fit.

(3) In case of disobedience, or of breach of any such terms, the Court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached and may also order such person to be detained in the civil prison for a term not exceeding six months, unless in the meantime the Court directs his release.

(4) No attachment under this rule shall remain in force for more than one year, at the end of which time, if the disobedience or breach continues, the property attached may be sold, and out of the proceeds the Court may award such compensation as it thinks fit, and shall pay the balance, if any, to the party entitled thereto.

Act XIV of 1882, sect. 493

This rule applies to H. C.

The granting of an injunction under this provision is a matter of judicial discretion.³

Does not apply.—This rule does not refer to persons in prison for contempt.⁴ Where an applicant was committed to jail under this rule for con-

¹ *Gururajamma v. Venkata Krishnaiah*, (1901) 21 Mad., 34.

² *Abdul Rahman v. Ganapathi Bhatta*, (1909) 23 Mad., 517.

³ *Sabha Narain v. Pado's*, (1913) 26 Mad., 163.

⁴ *Martin v. Lawrence*, (1870) 4 Cal., 655.

Ex parte—Such an injunction is a deviation from the ordinary course of justice, and nothing but the existence of great and serious danger not capable of being averted, probably, if delay be interposed, can justify its issue.¹

Practice—When an injunction is granted without notice, the party aggrieved may apply either to have it discharged under r. 4 or he may appeal to

Appeal—No appeal lies from an order refusing to issue an injunction without issuing notice to the opposite party.²

4. Any order for an injunction may be discharged, or varied, or set aside by the Court, on application made thereto by any party dissatisfied with such order.

Order for injunction may be discharged, varied or set aside

¹ Advocate-General of Bombay v. Gangji Akhal, (1905) 10 Bom., 152.

² Delhi Bank v. Ram Narain, (1897) 9 All., 497.

³ Darab Kuar v. Oomti Kuar, (1900) 22 All., 449.

⁴ Kochappa v. Sachu Devi, (1907) 26 Mad., 491.

⁵ See O. XLIII, r. 1 (r).

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¹ Calo. W. N., 422.

¹⁰ Amolak Ram v. Sahib Singh, (1885) 7 All., 550.

¹¹ Luis v. Luis, (1880) 12 Mad., 186; and see O. XLIII.

m v. Dhunput Sing. (1807)

Act XIV of 1882, s. 496

This rule applies to H. C.

one is false,
the motion
it.¹

Appeal.—An appeal lies from an order under this rule; see, O. XLIII, r. 1, (r).

5. An injunction directed to a corporation is binding not only on the corporation itself, but also on all members and officers of the corporation whose personal action it seeks to restrain.

Injunction to corporation binding on its officers.

Act XIV of 1882, sect. 495.

This rule applies to H. C.

The High Court has jurisdiction by a proceeding in the nature of *quo warranto* to restrain a person who has not been duly elected from exercising the functions of a duly elected Commissioner.²

Interlocutory Orders.

6. The Court may, on the application of any party Power to order to a suit order the sale, by any person interim sale. named in such order, and in such manner and on such terms as it thinks fit, of any moveable property, being the subject-matter of such suit, or attached before judgment in such suit, which is subject to speedy and natural decay, or which for any other just and sufficient cause it may be desirable to have sold at once.

Act XIV of 1882, s. 498.

This rule applies to H. C.

An application under this rule should be made upon notice.³

Any other cause.—The addition of this phrase empowers the Court to order the sale of securities where the state of the market renders such sale advisable.⁴

7. (1) The Court may, on the application of any party to a suit, and on such terms as it thinks fit,—

Detention, preservation, inspection, etc. of subject matter of suit.

(a) make an order for the detention, preservation or inspection of any property which is the subject-matter of such suit, or as to which any question may arise therein;

¹ *Andocherry Passer v. Roy*, 2 Broun, 62; see also, *Freeman v. Mc Arthur*, 2 Tay, and Bell, 10.

² *Cockhill in the matter of*, (1895) 22 Cal., 717. See note under r. 1, *supra*.

³ *Perpetua v. Harasani*, (1884) 7 Mad., 241.

⁴ See Report of Special Committee.

(b) for all or any of the purposes aforesaid authorize any person to enter upon or into any land or building in the possession of any other party to such suit; and

(c) for all or any of the purposes aforesaid authorize any samples to be taken, or any observation to be made or experiment to be tried, which may seem necessary or expedient for the purpose of obtaining full information or evidence.

(2) The provisions as to execution of process shall apply, *mutatis mutandis*, to person authorized to enter under this rule.

Act XIV of 1882, s. 499 Rules of Supreme Court, 1883, O. 50, r. 3

This rule applies to H. C.

An order under this rule can only be made after summons has been served and reasonable notice has been given in writing.¹ In an action for damages alleged to have been caused to the plaintiff's house by the erection, by the defendant, of an adjoining house, *held*, that an order could be made under this rule for the inspection of the plaintiff's house, it forming the "subject of the suit".

8 (1) An application by the plaintiff for an order under rule 6 or rule 7 may be made after notice to the defendant at any time after institution of the suit.

(2) An application by the defendant for a like order may be made after notice to the plaintiff at any time after appearance.

Act XIV of 1882, s. 500 Rules of Supreme Court, 1883, O. 50, r. 6.

This rule applies to H. C.

Either party may apply for the order after notice; the plaintiff after service of summons, the defendant after he has appeared. If both apply, only one order should be passed on the two applications.²

A plaintiff should enter in his plaint his claim for injunction, when the obtaining of it is a substantial object of his suit.³

9. Where land paying revenue to Government, or n tenure liable to sale, is the subject-matter of a suit, if the party in possession of such land or tenure neglects to pay the Government revenue, or the rent due to the proprietor of the tenure, as the case may be, and such land or

When party may be put in immediate possession of land the subject-matter of suit.

¹ Sengotha v. Ramasami, (1884) 7 Mad., 241.

² Dhoroney Dhur Ghose v. Radha Gobind Kar, (1896) 24 Calo., 117; 1 Calo. W. N., 99.

³ Sargent v. Read, (1876) 1 C. D., 600.

⁴ Colebourne v. Colebourne, (1876) 1 C. D., 699.

tenure is consequently ordered to be sold, any other party to the suit claiming to have an interest in such land or tenure may, upon payment of the revenue or rent due previously to the sale (and with or without security at the discretion of the Court), be put in immediate possession of the land or tenure ;

and the Court in its decree may award against the defaulter the amount so paid, with interest thereon at such rate as the Court thinks fit, or may charge the amount so paid, with interest thereon at such rate as the Court orders, in any adjustment of account which may be directed in the decree passed in the suit.

Act XIV of 1882, s. 501.

This rule applies to H. C.

When a plaintiff is put in possession under this rule and the suit dismissed, the defendant can recover what he lost during the plaintiff's dispossession in execution.¹

The person paying the revenue is entitled to a charge upon the share of each of his co-sharers.²

10. Where the subject-matter of a suit is money or

Deposit of money, some other thing capable of delivery and
etc., in Court. any party thereto admits that he holds
such money or other thing as a trustee for another party, or
that it belongs or is due to another party, the Court may
order the same to be deposited in Court or delivered to such
last-named party, with or without security, subject to the
further direction of the Court.

Act XIV of 1882, s. 502.

This rule applies to H. C.

Where a defendant was ordered to deposit money due but refused to do so, he was held liable to pay interest on the money from the date of the order.³

This rule would seem to apply only when the party making the admission holds the property or other thing which the party in whose favour the decree is made seeks to have delivered to him. Even if it was intended to apply to a case when property is not so held by the party making the admission, it will not cover a case where the money is held by another Court to the credit of another suit.⁴

Appeal—An appeal lies from an order under this rule ; see, O. XLIII, r. 1. (r).

¹ *Kaibay Singh v. Mangri Ram*, (1902) 6 Cal. W. N., 710.

² *Rajah of Viranagram v. Rajah Setracherla*, 11903) 26 Mad., 686.

³ *Ram Dass v. Prounno Moyee*, (1971) 16 W. R., 297.

⁴ *Parthasarathi v. Rengiah*, (1904) 27 Mad., 163.

ORDER XL.

Appointment of Receivers.

1. (1) Where it appears to the Court to be just and convenient, the Court may by order—

Appointment of receiver.

- (a) appoint a receiver of any property, before or after decree;
- (b) remove any person from the possession or custody of the property;
- (c) commit the same to the possession, custody or management of the receiver; and
- (d) confer upon the receiver all such powers as the bringing and defending suits and for the possession, management, protection, preservation, and improvement of the property, the collection of the rents and profits thereof, the application and disposal of such rents and profits, and the execution of documents as the owner himself has, or such of those powers as the Court thinks fit.

(2) Nothing in this rule shall authorize the Court to remove from the possession or custody of property any person whom any party to the suit has not a present right so to remove.

Act XIV of 1882, sect. 503.

This rule applies to H. C.

Power to appoint.—It is discretionary with the Court to appoint a manager under this rule,¹ but the discretion must be reasonable;² and should be exercised with the greatest care and caution.³ The High Court in England has powers as the superior Courts in England.⁴ Receivers.⁵ But it is doubtful whether it can exercise this power outside its jurisdiction.⁶ A High Court can

¹ *Brajender Narsin v. Kasseesur*, (1861) 1 W. R., 15; *Ottum Singh v. Ram Suran*, (1875) 23 W. R., 287.

² *Zuhoorun v. Nujeebooddeen*, (1809) 11 W. R., 505.

³ *Prosonomoyi v. Beni Madhab*, (1883) 5 All., 650.

⁴ *Jaissondas v. Zenabai*, (1890) 14 Bom., 431.

⁵ *Ismael Hadjee v. Mahomed Hadjee*, (1879) 13 B. L. R., 91; 21 W. R., 206.

appoint a Receiver in a testamentary suit.¹ The fact that there exists in respect of any immoveable property an order of a Magistrate passed under s. 113 of the Code of Criminal Procedure, does not bar the exercise by a Civil Court of its power to appoint a Receiver in respect of the property for the purpose of amount to misapprehension of the purposes of the rule.²

A District Judge has no power to appoint a Receiver of properties which are the subject of a suit or attachment in other Courts, even though such Courts may be subordinate to his own.³ Disobedience to an order of a High Court appointing a Receiver is punishable as a contempt.⁴ It is within the discretion of a Court appointing a receiver in a suit to order that the office should continue permanently after the decree, when such continuance is necessary, or for so long as it may be so.⁵ A Court has power to order a Receiver to pay debts, though such an order should be made in special cases only. Such an order when made is final, subject only to review or appeal.⁷ In a suit under the Religious Endowments Act, a Civil Court cannot appoint a Receiver or Manager except under s. 5, 2 e, when there is a dispute as to the right of succession.⁸

Who can appoint.—This rule clearly intends to give the power only to the Court in which the suit is brought or by which the property has been attached. There is no doubt that a Court cannot appoint a Receiver, except it has seisin of the property, either by a suit pending or by proceedings in execution of decree made in a suit being pending and attachment having been made. Also it is only the Court in which a proceeding is pending and which has thereby the property under its control that can appoint a Receiver.¹⁰

When a suit in which a Receiver has been appointed is dismissed the Court has no jurisdiction to give him any fresh power.¹⁰

Attachment of a debt due to a judgment debtor by a third party.—As to when a Receiver should be appointed in such cases, see the under-noted cases.¹¹

Cost of management—A manager under a "lease" has a preferential claim for the business, and wages due

After decree—A Receiver can be appointed after decree.¹²

Property.—The words property "*the subject of the suit*" have been omitted from this rule, but the proviso to sec. 503, former Code, is reproduced in clause (2). Where the suit is for partition of a joint estate, means the whole joint estate.¹⁴

¹ *Yeshwant Bhagwant v. Shankar Ramchandra*, (1893) 17 Bom., 389.

² *Harkutunissa v. Abdul Aziz*, (1900) 22 All., 214.

³ *Hanumayya v. Venkatasubbayya*, (1897) 18 Mad., 23.

⁴ *Latafat Hossein v. Anant Choudhry*, (1896) 23 Cal., 517.

⁵ *Harivallabh v. Utamchand*, (1870) 7 Bom. H. C., O. C. J., 172.

⁶ *Mathuri Umamba v. Mathuri Deepamba*, (1896) 19 Mad., 120.

⁷ *Motivahu v. Premvahu*, (1892) 16 Bom., 511.

⁸ *Gyanananda Atram v. Kristo Choudra*, (1903) 8 Cal. W. N., 401.

⁹ *Latafat Hossein v. Anant Choudhry*, (1896) 23 Cal., 517.

¹⁰ *Ratcliffe v. Smith*, (1897) 31 Cal., 33d.

¹¹ *Umbay Churn v. Meik*, (1881) 5 Cal. W. N., xxii, and *Toola v. Antone*, (1887) 11 Bom., 445; and *Protap Singh v. Delhi & London Bank*, (1905) 30 All., 293.

¹² *Scott v. Pickering*, (1883) 6 Mad., 134.

¹³ *Shenmugam v. Moldin*, (1885) 8 Mad., 229.

¹⁴ *Prasad Nath v. Omerto Nath*, (1899) 17 Cal., 616.

When a suit was brought under Act VIII of 1859, B. C., for arrears of rent and ejectment of the defendant *Acld.* that a Receiver of the rents and profits of the tenure might properly be appointed.¹

Where a party entitled to a share of real estate applied for a Receiver of the entire joint property and some of the co-sharers who resisted the appointment were not subject to the jurisdiction of the Court, a Receiver was only granted for the share of the applicant.² The rule of the Court of Chancery that a Receiver will not be appointed against an executor unless gross misconduct is shown does not apply to the case of an executor of the will of a Mahomedan.³

As the owner himself has.—In a case of partition, these words means the whole body of owners.⁴

Not appointed.—A Court would not appoint a Receiver under s. 243, Act VIII of 1859, where the application was made simply to put off payment;⁵ nor to collect rents accruing due since the death of the judgment-debtor, of immovable property then in the hands of his widow as her widow's estate;⁶ nor to carry on a judgment-debtor's business pending execution proceedings and to invest him with power to raise money for the purpose;⁷ nor to realize the profits of the property attached and pay off the debtors, when it would take twenty years,⁸ or fifteen years,⁹ or even one year, to do so;¹⁰ though six months would not be considered unreasonable;¹¹ and where a Judge, on the death of a Receiver, finding that under the management, the decree would not be satisfied for a long time refused to appoint a new Receiver, and ordered execution to issue, his order was upheld.¹²

A Receiver should not be appointed for a portion of a railway;¹³ nor in regard to property in possession of the defendant, claiming under a legal title, unless a strong case is made out,¹⁴ or a good *prima facie* title.¹⁵ The removal of a large amount of property during the pendency of a suit is a sufficiently strong ground for the appointment of a Receiver.¹⁶ In an application for the appointment of a Receiver, it is sufficient if a *prima facie* title in the property over which the Receiver is sought to be appointed is made out.¹⁷ The mere circumstance that the appointment of a Receiver will do no harm to any one is no ground for his appointment.¹⁸ Where the property to be managed is not the subject of the suit, no manager can be appointed before attachment;¹⁹ on

¹ Kartick Nath v. Padmanand, (1897) 11 Cal., 496.

² Chowdhry v. Chowdhry, 2 Tay. and Ell, 192.

³ Hafizabai v. Abdul Karim, (1893) 19 Bom., 87.

⁴ Pooreshnath v. Omerto Nanth, (1890) 17 Cal., 614.

⁵ Ootum Singh v. Ram Suran, (1875) 23 W. R., 287.

⁶ Kanno Du v. Levy, (1877) 19 All., 235.

⁷ Moran v. Mittu Bibee, (1878) 2 Cal., 59.

⁸ Mohinee Mohun v. Ram Kant, (1871) 15 W. R., 322.

⁹ Rednam Atchutaramayya v. Mahomed, (1892) 5 Mad. H. C., 272.

¹⁰ Pyazooldeen v. Giraulth Singh, (1870) 2 All. H. C., 1.

¹¹ Mohinee Mohun v. Ram Kant, (1871) 15 W. R., 322.

¹² Doorga Dutt v. Bunwaree Lall, (1876) 25 W. R., 33.

¹³ Latimer v. Aylesbury Railway Company, (1878) 9 C. D., 385.

¹⁴ Sidheswari v. Abhoyeswari, (1898) 15 Cal., 818.

¹⁵ Chondidat Jha v. Padmanand Singh, (1893) 23 Cal., 439.

¹⁶ Sia Ram Das v. Mahabir Das, (1900) 27 Cal., 279; 5 Cal. W. N., 362.

¹⁷ Sham Chand v. Bhaya Ram, (1890) 5 Cal. W. N., 365.

¹⁸ Prosonomoy v. Beni Madhub, (1893) 5 All., 556.

¹⁹ Bunwaree Lall v. Girdhars Singh, (1871) 16 W. R., 273; 8 B. L. R.,

the other hand, the appointing of a manager does not release the property from attachment.¹ A Receiver can be appointed in a suit to enforce a mortgage.²

Appointed.—The circumstance that a judgment-debtor has property other than that attached, is in itself no ground for refusing his application for the appointment of a Receiver, if he proposes to place all the properties under the management of the Court. The Judge should consider all the circumstances of the case.³ A Receiver may be appointed without the consent of the decree-holder,⁴ even though the latter has a lien on the property as a collateral security, and he has taken a money-decree, stating that the property is liable;⁵ but a party or his attorney should receive the order appointing the Receiver without the consent of the Receiver does not date from the order the security required.⁷

Procedure after appointment.—The rule of the original side of the High Court is not to compel a party to a suit to give up to the Receiver possession of the property unless an order of Court to that effect has previously been made upon him; the proper course being by proceedings in Court to fix an occupation rent and to order the party in possession to pay the same.⁸

Dismissal.—A Receiver should not be dismissed *ex parte* at the decree-holder's request.⁹ Where a decree appoints a Receiver for a fixed period, the Court has a discretion to discharge the Receiver, when it thinks necessary.¹⁰ No order for the discharge of a Receiver in an administration suit can be made before the completion of the administration decree.¹¹

Decree of maintenance.—To avoid any difficulty in executing a decree for maintenance out of property charged with payment of the allowance and make a fresh suit unnecessary in case of default in payment of the instalments, a Receiver should be appointed under the decree itself with directions in case of default in payment of the maintenance to take possession of the estate and sell the same and out of the sale proceeds to pay the allowance for maintenance.¹²

Appeal.—An appeal lies from an order passed under this rule;¹³ or when the application is refused;¹⁴ but not a second appeal.¹⁵ Where one of the defendants in a suit applied to have a Receiver removed from his office on the ground of mismanagement and the application was refused, an appeal was allowed on the ground that the question was one arising in execution of decree.¹⁶ No appeal lies to His Majesty in Council against an order refusing to appoint a

¹ *Bhawaree Lall v. Mohabber Peshad*, (1873) L. R., 11 L. A., 84, p. 95; 12 L. L., 297; *Mohabber Peshad v. Collector of Tirhoot*, (1870) 13 W. R., 423.

² *Ghanashyam Misser v. Golanda Muni Das*, (1902) 7 Cal. W. N., 452.

³ *Debi Kumari v. Ram Lall*, (1869) 3 B. L. R., App., 107, 12 W. R., 66; see, *Jyoti Amlo, ex parte*, (1894) 13 Mad., 390.

⁴ *Thakoor Chunder, petitioner*, *Marsh*, 261.

⁵ *Ram Bacha v. George Dutt*, (1870) 13 W. R., 453.

⁶ *Lloyd, in re*, (1870) 12 C. D., 417.

⁷ *Edwards v. Edwards*, (1876) 2 C. D., 291. See r. 3, *infra*.

⁸ *Ram Lakshun v. Hogg*, (1868) 10 W. R., 470.

⁹ *Huttee Bunkur v. Jogendra Coomar*, (1873) 19 W. R., 60.

¹⁰ *Mathurani Umamba v. Mathurani Deepimba*, (1895) L. R., 23 L. A., 24.

¹¹ *Bhugwan Das Bureka v. Heera Lall*, (1901) 5 Cal. W. N., 417.

¹² *Hemanginnee v. Kurnale Chander*, (1879) 26 Cal., 411; 3 Cal. W. N., 139.

¹³ *Pirajee Koor v. Pam Churn*, (1881) 7 Cal., 719; O. XIII, r. 1, (i); *Sangappa v. Shrivastava*, (1890) 24 Bom., 28.

¹⁴ *Debmur Puri v. Hetarain*, (1880) 6 C. L. R., 462; *Venkatarami v. Stridavams*, (1887) 10 Mad., 172.

¹⁵ *Pradya Nath v. Mahan Lal*, (1880) 17 Cal., 680.

¹⁶ *Mohabber v. Lami*, (1881) 5 Bom., 42.

Receiver¹ In cases in which a Receiver appointed at the instance of the judgment creditor in appropriate moneys collected by him, the decree is not satisfied *pro tanto* but the loss falls on the estate or its owner, subject to the Receiver's liability.² When a District Judge on the report of a subordinate Court refuses to appoint a Receiver, his order is one under this rule and is appealable.³

Debt incurred by Receiver—A creditor is entitled to proceed against the representative of an estate for recovery of a debt incurred by a Receiver during the management of the estate by him.⁴

Sale by Receiver—A purchaser at a sale by a Receiver on applying to the Calcutta High Court in its original jurisdiction will obtain an order to be put in possession.⁵

Letters Patent Appeal—An order directing a Receiver in a suit to advance moneys to a guardian *ad litem* to enable him to conduct the defence on behalf of a defendant is not a judgment within the meaning of art. 15 of the Letters Patent and no appeal lies therefrom.⁶

Form—See App F No 9

2 The Court may by general or special order fix the amount to be paid as remuneration for the services of the receiver.

Remuneration

Act XIV of 1882, sect 503

Remuneration—A receiver being an officer of the Court, the Court only is to determine his fees or remuneration and the parties cannot by any act of theirs add to, or derogate from, the functions of the Court without its authority.⁷

Receiver's lien—A Receiver, though discharged by the dismissal of the suit in which he was appointed, is entitled to a lien on the estate for all his just claims and allowances.⁸

3. Every receiver so appointed shall—

Duties

- (a) furnish such security (if any) as the Court thinks fit, duly to account for what he shall receive in respect of the property;
- (b) submit his accounts at such periods and in such form as the Court directs;
- (c) pay the amount due from him as the Court directs; and
- (d) be responsible for any loss occasioned to the property by his wilful default or gross negligence.

¹ Chundi Dutt Jha v. Padmanund Singh, (1893) 22 Cal., 928.

² Orr v. Mathia Chetti, (1891) 17 Mad., 501; 20 Mad., 224.

³ Khagendra Narain v. Shashadar Jha, (1934) 31 Cal., 493; 8 Cal. W. N., 608.

⁴ Mohari v. Shyama, (1903) 30 Cal., 937.

⁵ Minatoonnessa v. Khatoonnessa, (1894) 21 Cal., 479.

⁶ Kuppasami v. Rathnavela, (1901) 24 Mad., 511.

⁷ Prokash Chandra v. Adlam, (1903) 30 Cal., 696.

⁸ Prem Lal Mullick v. Sumbhooath Roy, (1895) 22 Cal., 973.

the other hand, the appointing of a manager does not release the property from attachment.¹ A Receiver can be appointed in a suit to enforce a mortgage.²

Appointed—The circumstance that a judgment-debtor has property other than that attached, is in itself no ground for refusing his application for the appointment of a Receiver, if he proposes to place all the properties under the management of the Court. The Judge should consider all the circumstances of the case.³ A Receiver may be appointed without the consent of the decree-holder,⁴ even though the latter has a lien on the property as a collateral security, and he has taken a money-decree, stating that the property is liable;⁵ but a party or his attorney should not, save in an extreme case, be appointed Receiver without the consent of the other party.⁶ The appointment of a Receiver does not date from the order of appointment, but from the date of giving the security required.⁷

Decree-holder's right to possession—

original side, of the
he Receiver possesses
has previously been

made upon him; the proper course being by proceedings in Court to fix an occupation rent and to order the party in possession to pay the same.⁸

Dismissal—A Receiver should not be dismissed *ex parte* at the decree-holder's request.⁹ Where a decree appoints a Receiver for a fixed period, the Court has a discretion to discharge the Receiver, when it thinks necessary.¹⁰ No order for the discharge of a Receiver in an administration suit can be made before the completion of the administration decree.¹¹

Decree of maintenance—To avoid any difficulty in executing a decree for maintenance out of property charged with payment of the allowance and make a fresh suit unnecessary in case of default in payment of the instalments, a Receiver should be appointed under the decree itself with directions in case of default in payment of the maintenance to take possession of the estate and sell the same and out of the sale proceeds to pay the allowance for maintenance.¹²

Appeal—An appeal lies from an order passed under this rule;¹³ or when the application is refused;¹⁴ but not a second appeal.¹⁵ Where one of the defendants in a suit applied to have a Receiver removed from his office on the ground of mismanagement and the application was refused, an appeal was allowed on the ground that the question was one arising in execution of decree.¹⁶ No appeal lies to His Majesty in Council against an order refusing to appoint a

¹ *Baiwarree Lall v. Mohabeer Proshad*, (1873) L. R., 1 I A, 89, p. 95; 12 B. L. R., 297; *Mohabeer Pershad v. Collector of Tirhoot*, (1870) 13 W. R., 423.

² *Ghanashyam Misser v. Gobinda Momi Das*, (1902) 7 Cal. W. N., 452.

³ *Deb Kumari v. Ram Lall*, (1869) 3 B. L. R., App., 107; 12 W. R., 66, see, *Jijai Amba, ex parte*, (1890) 13 Mad., 390.

⁴ *Thakoor Chunder, petitioner*, Marsh., 261.

⁵ *Ram Rucha v. Doorga Dutt*, (1870) 13 W. R., 453.

⁶ *Lloyd, in re*, (1879) 12 C. D., 447.

⁷ *Edwards v. Edwards*, (1876) 2 C. D., 291. See r. 3, *infra*.

⁸ *Ram Lochun v. Hogg*, (1868) 10 W. R., 430.

⁹ *Huree Sunkur v. Jogendro Coomar*, (1873) 19 W. R., 66.

¹⁰ *Mathusri Umamba v. Mathusri Deepamba*, (1893) L. R., 23 I A, 28.

¹¹ *Bhugwan Das Sureka v. Heera Lall*, (1901) 5 Cal. W. N., 417.

¹² *Hemanginee v. Kumode Chander*, (1899) 26 Cal., 441; 3 Cal. W. N., 139.

¹³ *Birajan Kocer v. Ram Churn*, (1881) 7 Cal., 719; O XLIII, r. 1, (s); *Sangappa v. Shivbasawa*, (1900) 24 Bom., 33.

¹⁴ *Dulmir Puri v. Hetwarain*, (1880) 6 C. L. R., 467; *Venkatasami v. Stridavamma*, (1887) 10 Mad., 179.

¹⁵ *Boidya Nath v. Makhan Lal*, (1890) 17 Cal., 680.

¹⁶ *Mithibai v. Lajmi*, (1881) 5 Bom., 45.

debtor can sell properties in the hands of a Receiver of the Court in execution of a mortgage-decree although he cannot execute a decree against such properties by way of attachment or sale.¹ Property in the hands of a Receiver can be sold in execution of a mortgage decree but not of a money decree.² Property in the hands of the Receiver of the High Court cannot be proceeded against by attachment in the *molussil*,³ nor can he be made a party to a proceeding under s. 145, Crim P C.⁴ A Receiver appointed during the pendency of an appeal continues to be Receiver after the disposal of the appeal until finally discharged.⁵

Practice power to sue—As to whether a Receiver can sue in his own name, see the case of *Shunmugam v. Moidin*.⁶ A Court has authority to confer on a Receiver the power to sue in his own name. If the order appointing him Receiver, gives him liberty, he may do so;⁷ and it has been held that a Receiver may sue in his own name without express authority.⁸ A Receiver cannot be made a party to any suit or proceedings without previous leave of the Court appointing him.⁹ He does not represent the owner of the estate for which he is Receiver, but is merely an officer of the Court, and as such cannot sue and be sued, except with the permission of the Court.¹⁰ A receiver is responsible not only for actual sums received by him but for those which might have been received by him but for his wilful neglect and default.¹¹ He can apply to take proceedings against a party for contempt.¹² When a Receiver has been appointed to a property, the leave of the Court should be taken to bring a suit with regard to it.¹³ A Court having appointed a Receiver in a suit has authority incidental to its jurisdiction to order him to account, although the suit may be no longer pending.¹⁴ The Receiver is not a necessary party to a suit for possession of immoveable property.¹⁵

Where a new Receiver is appointed pending civil proceedings by the first Receiver he should be made a party.¹⁶

Application—In making an application under this rule on affidavit, the affidavit should show special reasons for the appointment.¹⁷

¹ *Jogendra Nath Gossain v. Debendra Nath*, (1899) 26 Cal., 127.

² *Jogendra Nath Gossain v. Debendra Nath Gossain*, (1898) 3 Cal. W. N., 00; 26 Cal., 127.

³ *Hem Chander v. Frankristo*, (1876) 1 Cal., 403.

⁴ *Dunne v. Chandra Kisore*, (1903) 30 Cal., 593; 7 Cal. W. N., 390.

⁵ *Grey v. Woogra Mohun Thakur*, (1901) 28 Cal., 700.

⁶ *Shunmugam v. Moidin*, (1899) 26 Cal., 127. *Wells*, (1892) 8 Cal., 719; 884) 10 Cal., 713; *Gopalasa* *oyi v. Davis*, (1887) 14 Cal., *Hari Dass v. Macgregor*, (1891) 18 Cal., 477.

⁷ *Fink v. Moharaj Bahadur Singh*, (1899) 25 Cal., 642; 2 Cal. W. N., 469.

⁸ *Jagat v. Nabogopal*, (1907) 34 Cal., 305; 5 Cal. L. J., 270.

⁹ *Dunne v. Chandra Kisore*, (1903) 30 Cal., 593; 7 Cal. W. N., 390; *Fink v. Calcutta Municipal Corporation*, (1902) 7 Cal. W. N., 706.

¹⁰ *Miller v. Ram Ranjan*, (1884) 10 Cal., 1014.

¹¹ *Sattya Sankar Ghosal v. Golap Monee Debee*, (1900) 5 Cal. W. N., 223.

¹² *Grey v. Woogra Mohan Thakur*, (1901) 28 Cal., 710.

¹³ *Rodger v. Ashutosh Mukerji*, (1902) 6 Cal. W. N., 829.

¹⁴ *Administrator-General of Bengal v. Prem Lal Mullick*, (1895) 22 Cal., 788, 1011; L. R., 22 L. A., 107, 203.

¹⁵ *Sattya Sankar Ghosal v. Golap Monee Debee*, (1900) 5 Cal. W. N., 27; *Rodger v. Ashutosh Mukerji*, (1902) 6 Cal. W. N., 829.

¹⁶ *Akula v. Dhelli*, (1905) 28 Mad., 157.

¹⁷ *Dulmir Puri v. Hetoarsin*, (1890) 6 C. L. R., 467; *Prosonomoyi v. Beni Madhab*, (1883) 6 All., 536.

Application against Receiver.—On the original side of the High Court, persons not parties to the suit in which a Receiver has been appointed may establish their rights by motion.¹ An application for the appointment of a Receiver on the retirement of another should be made in Court and not in chambers.²

A person not a party to an action is not entitled to apply by motion for payment of money to him by the Receiver.³

When a party feels aggrieved at the conduct of a Receiver, he should seek redress in the proceeding in which the Receiver was appointed. Separate proceedings against him can only be with the leave of the Court;⁴ which must be obtained before the institution of the suit.⁵

Form—See App. F, No. 10.

Enforcement of receiver's duties,

4. Where a receiver—

- (a) fails to submit his accounts at such periods and in such form as the Court directs, or
- (b) fails to pay the amount due from him as the Court directs, or
- (c) occasions loss to the property by his wilful default or gross negligence,

the Court may direct his property to be attached and may sell such property, and may apply the proceeds to make good any amount found to be due from him or any loss occasioned by him, and shall pay the balance (if any) to the receiver.

This is a new provision under which Receivers are made liable for loss occasioned by their wilful default or gross negligence. As to when a separate suit may be brought against a Receiver, see *note to r. 3, supra*.

5. Where the property is land paying revenue to the

When Collector may be appointed receiver. Government, or land of which the revenue has been assigned or redeemed, and the Court considers that the interests of those concerned will be promoted by the management of the Collector, the Court may, with the consent of the Collector, appoint him to be receiver of such property.

Act XIV of 1882, sect. 504.

This rule applies to H. C. and Prov. S. C. C.

¹ Mohamed Medhi v. Zoharra, (1890) 17 Cal., 295; and see Dry Docks Corporation, *in re*, (1893) 39 C. D., 306 p. 314.

² Stalkart v. Stalkart, (1901) 28 Cal., 230.

³ Brookbank v. East London Ry. Co. (1879) 12 C. D., 839.

⁴ Kamatchi Ammal v. Sundaram Ayyar, (1902) 26 Mad., 492.

⁵ Promotha Nath Ganguli v. Khetra Nath Banerjee, (1905) 9 Cal. W. N., 247; 32 Cal., 270.

ORDER XLI

Appeals from Original Decrees

1. (1) Every appeal shall be preferred in the form of a memorandum signed by the appellant or his pleader and presented to the Court or to such officer as it appoints in this behalf. The memorandum shall be accompanied by a copy of the decree appealed from and (unless the Appellate Court dispenses therewith) of the judgment on which it is founded.

(2) The memorandum shall set forth, concisely and under distinct heads, the grounds of objection to the decree appealed from without any argument or narrative; and such grounds shall be numbered consecutively.

Act XIV of 1882, sec. 541.

This rule applies to H. C.

For form, see App 6, No 1.

"Where there has been an appeal."—These words in art. 179, Schedule II, of the Limitation Act, 1877, (Art 182, Sch. I, Act IX of 1908) mean when a memorandum of appeal has been presented in Court.¹

Presentation—The presentation of an appeal by a person who is not an advocate, vakil or attorney of the Court nor a sutor, is not a valid presentation in law.²

If presented by a pleader the grounds must have been drawn up by a pleader, and the grounds must be set forth in the memorandum.

be allowed to appeal set forth pleaders, which by the pleader is not a fatal objection to an appeal that the same is described in the memorandum as "first appeal from order," being in reality a "first appeal from a decree."³

Copy of Decree—A memorandum of appeal is not a good memorandum of appeal in law, unless accompanied by a copy of the decree appealed against.⁴ An order determining any question referred to in s. 47 being a decree, it is

¹ Akshoy Kumar v. Chunder Mohun, (1889) 16 Colo., 250.

² Shyam Karan v. Raghunandan, (1900) 22 All., 331, but see, Wazir-un nissa v. Hahu Bakshah, (1902) 24 All., 172.

³ Noor Ahmed, in the matter of, (1872) 17 W. R., 338.

⁴ Calc., Civ. Cir. O. No. 17, 1871.

⁵ Ayanra v. Nagabhooshanam, (1873) 16 Mad., 285.

⁶ Sant Lal v. Sri Krishen, (1892) 14 All., 221.

⁷ Chamela Kuar v. Amir Khan, (1894) 16 All., 77; Bhawan Prasad v. Kallu, (1895) 17 All., 553.

of the order itself, and though such a decree or proceedings having (s) it is necessary to

Copy of the judgment—Where the judgment in the case governs other cases, the filing of that judgment is a substantial compliance with the rule.² Under the rules of practice adopted by the Allahabad High Court, copies of judgments are not required in appeals under cl 10 of the Letters Patent, and no deduction will be made from the period fixed for appealing on account of the time necessary to obtain copies of them.³

Second appeal—The Code does not require the appellant in second appeal to file a copy of the decree of the original Court with the memorandum of appeal.⁴

Grounds of objection—The appellant must not in appeal make out a new case;⁵ such as raising a question of fraud, when it was not alleged in the written statement and no issue was framed regarding it.⁶ An appeal cannot be maintained upon a ground inconsistent with the case insisted on the Court below, although the new ground may be one that might have been brought forward in the first instance as an alternative.⁷ See note to O. VI, r. 17, "CHANGING CHARACTER OF SUIT," p 496 An objection fatal to the proceedings, e. g., and objection to non-joinder of parties in a mortgage suit,⁸ or an objection to a notice under Reg VIII of 1819, not taken in the lower Court, but appearing on the face of the notice may be taken in appeal.⁹ See also an objection as to the jurisdiction of the Court may be taken for the first time in appeal.¹⁰ The plea of *res judicata* may be raised at any stage including first or second appeal, but an appellate Court is not bound to entertain it, if it cannot be decided upon the record before the Court, and if its consideration involves the reference of fresh issues for determination by the lower Court.¹¹

Court Fees—The memorandum must bear a stamp according to the law in force for the time being.¹² The stamp value may be made up by several (et)¹³ If excess stamps have f the stamps are inadequate, of making up the deficiency on affects jurisdiction;¹⁴ and

¹ Khurode Sundari v. Jnanendra Nath, (1901) 6 Cal. W. N., 233.

² Mothoor Nath v. Kissen Mohun, W. R., (1864) Mss., p. 9; Bhyrub Nath v. Huro Soonduree, W. R., (1864) Mss., 28.

³ Fazil Muhammed v. Phul Kuar, (1879) 2 All, 192

⁴ Pirathi Seng v. Venkatramanayyan, (1892) 4 Mad., 419

⁵ Indur Chunder v. Radha Kishore, (1892) 19 Cal., 507; L. R., 19 I. A., 90.

⁶ Pandit Prayag Raj v. Goukaran, (1902) 6 Cal. W. N., 787.

⁷ Gajapati v. Yasudeva, (1892) 15 Mad., 503; L. R., 19 I. A., 179; Ilahi Khan v. Sher Ali Khan, (1904) 26 All, 331

⁸ Ghulam Kadir v. Mustakim Khan, (1896) 18 All, 109.

⁹ Ahsanullah v. Harj Charan, (1893) 20 Cal., 86; L. R., 19 I. A., 191.

¹⁰ Ramayya v. Subbarayudu, (1890) 13 Mad., 25.

¹¹ Kanchai Lal v. Suraj Kunwar, (1899) 21 All, 446, see also sec. 105.

¹² (1882) 5 Mad., xlv.

¹³ Tarunee Churn v. Taranath Goocho, (1869) 12 W. R., 449.

¹⁴ Grant, in the matter of, (1870) 14 W. R., 47.

¹⁵ Nussurut Ali v. Mahomed Kanoo, (1869) 11 W. R., 541.

¹⁶ Subah Roy v. Buldeo Singh, (1875) 24 W. R., 225.

where an appeal is tried, relief cannot be limited to the portion covered by the stamps.¹

When the report of a taxing officer that a memorandum of appeal has been insufficiently stamped, has been proved to be erroneous, an appellant is entitled to the relief sought, notwithstanding the provisions of s. 5, Act VII of 1870.² When there has been no decision of a taxing officer, a respondent can object at the hearing that the memorandum of appeal has been insufficiently stamped.³ An appeal preferred to the Governor in Council against the decision of the Governor General's Agent at Vizagapatam and referred by the Government to the High Court is not chargeable under the Court Fees Act.⁴ A Court of first appeal may entertain an appeal when the full court fees have not been paid, but the decree should not be made till the fees due are paid; if not paid, the appeal should be dismissed.⁵ When an appeal was dismissed for insufficiency of stamp, the appellant was permitted to bring a fresh appeal on full stamp after twenty days.⁶ A Court should not dismiss an appeal on the ground of insufficiency of court fees, while the appeal is pending.⁷ It should levy the deficient stamp duty.⁸ A memorandum of appeal from a decree directing ejectment and awarding mesne profits is chargeable with court fees calculated both on the land and the mesne profits.⁹ But no court fees need be paid on a memorandum of appeal, for mesne profits subsequent to the institution of suit the amount of which has been left to be determined in execution.¹⁰ A memorandum of appeal from an order under s. 214 of Act VI of 1883 (Indian Companies Act) is properly stamped with a court-fee of Rs 2.¹¹ In a suit in the Court of a Subordinate Judge to redeem certain land on payment of Rs 1,625, being a quarter of the debt for which it had been mortgaged with other land, a decree was passed for the redemption of part of the land, but the Court held that the plaintiff had not established his right to the rest. The plaintiff appealed to the High Court paying *ad valorem* Court fees computed on the value of the land exonerated only. Held, (1) that the *ad valorem* court fees should be computed on one fourth of the mortgage debt, and (2) that the appeal lay to the District Court, and the petition of appeal should be returned for presentation in that Court.¹² A suit to redeem a mortgage for Rs 3,500 and to recover a certain sum on account of rent was dismissed, so far as the prayer for redemption was concerned and also part of the claim for rent was disallowed. It did not appear that the arrears of rent were intended to be set-off against the mortgage debt. The plaintiff appealed. Held, that the Court-fee should be computed on the principal amount of the mortgage debt, and on the claim which had been disallowed on account of rent.¹³ Defendant No. 1, a Mahomedan mother, had executed a mortgage bond in plaintiff's favour, purporting to have been made for herself, and on behalf of her minor daughters, defendants Nos. 2 and 3. The lower Court held that defendant No. 1 was bound by it and defendants Nos. 2 and 3 were to make

¹ Bulo Ram v. Ram Narain, (1868) 10 W. R., 242. But the contrary has been held in Yakutunnissa v. Kishori Mohun, (1892) 19 Cal., 747. See also, Moti Sahu v. Chhatra Das, (1892) 19 Cal., 780.

² Bailri Prasad v. Kundan Lal, (1893) 15 All., 117.

³ Kasturi Chetti v. Deputy Collector Bellary, (1899) 21 Mad., 269.

⁴ Reference under Court Fees Act, s. 5, (1899) 22 Mad., 162.

⁵ Krishnasami v. Sundarappayyar, (1895) 18 Mad., 415.

⁶ Wali Alam v. Nasran, (1869) 3 B. L. R., App., 104; 12 W. R., 50.

⁷ Kammathi v. Kunhamed, (1892) 15 Mad., 288.

⁸ Chennappa v. Raghunatha, (1892) 15 Mad., 29.

⁹ Brahmayya v. Lakshminarasimham, (1893) 16 Mad., 310.

¹⁰ Maiden v. Janakiramayya, (1898) 21 Mad., 371.

¹¹ Reference, (1895) 17 All., 235.

¹² Vasudeva v. Madhava, (1893) 16 Mad., 326.

¹³ Rama Varma v. Kadar, (1893) 16 Mad., 415.

tionary power of the Court under s. 5 to excuse delay in presenting an appeal.¹ In calculating the time allowed by law for the presentation of an appeal to a District Court, an appellant is entitled to deduct the first day being a gazetted holiday, though the District Judge held his Court that day.²

Time requisite for obtaining a copy of the decree—S. 12, Act XV of 1877, (Act IX of 1933)³ and the requisite time is determined, when the copy is ready for delivery.⁴ The time between the date of an application of the copy of the judgment and the date of issue of such copy should be excluded.⁵ If the period of limitation prescribed for the presentation of an appeal expires on a day on which the Court is closed, and the appellant has not obtained copies of the decree and judgment before the closing of the Court and applies for them on the re-opening of the Court, whilst his right of appeal is still alive, he is entitled to the benefit of the time requisite for obtaining copies, and if his appeal be presented before the expiry of that time, it is not barred by limitation.⁶

Not sufficient cause—Miscalculation of the period is not a sufficient cause,⁷ and where an appellant withdrew his appeal, and thus prevented a cross appeal by the respondent, it was held that this did not constitute a sufficient reason for admitting the latter to appeal, after time.⁸ So, also, where a person merely pleaded illness, his application was rejected.⁹ Poverty is not a sufficient excuse¹⁰ nor is a mistake of law,¹¹ nor a mistake as to the Court in which the appeal would be prosecuted,¹² nor is a pending review, if the grounds are bad.¹³ And where two suits were brought by executors, one against the heir and another against mortgagees, and there was no agreement that the decision of one suit should decide the other, it was held the executors were bound by one of the decrees not appealed against in time.¹⁴

Sufficient cause—The illness of a mookhtar,¹⁵ or the fact that there

¹ *Shrinant Sagajirao v. Smith*, (1893) 20 Bom., 730.

² *Boyanmis v. Balajee Rao*, (1897) 20 Mad., 469.

³ *Bani Madhub v. Matungam*, (1886) 13 Cal., 104; *Ramey v. Broughton*, (1884) 10 Cal., 672; *Gunga Doss v. Ramoy*, (1886) 12 Cal., 30; *Kah Bankar v. Bankants Nath*, (1902) 7 Cal. W. N., 109; *Lal Gopal v. Padam Koonwur*, (1866) 5 W. R., 11; *Mis. 14*; *Gopal Nath v. Gopeenth*, (1866) 6 W. R., 109; *Beer Chunder v. Mahomed Asgar*, W. R., (1864), 145; *Chowdhry Mahomed Nizam, in the matter of*, (1872) 18 W. R., 512; *Becht v. Ahsanullah*, (1899) 12 All., 461; *Yamaji v. Antaji*, (1899) 23 Bom., 442.

⁴ *Gopal Chunder v. Brojo Behary*, (1891) 9 C. L. R., 203.

⁵ *Haji Hussam v. Nur Mahomed*, (1901) 23 Bom., 613.

⁶ *Siyadatunnissa v. Mahammad*, (1897) 19 All., 312; *Takaram v. Pandurang*, (1901) 25 Bom., 594; *Pandhari Nath v. Shankar*, (1901) 25 Bom., 586; *Amir Hossain v. Tulsi Dass*, (1903) 8 Cal. W. N., 141; *Samnatha v. Venkatasubba*, (1901) 27 Mad., 21.

⁷ *Zinbulnissa v. Kulsam*, (1876) 1 All., 250.

⁸ *Surbhai Dyalji v. Raghunathji*, (1873) 10 Bom. H. C., 397; see also, *Gour Hari v. Prem Nath*, (1893) 9 Cal., 733; *Digamber Mozoomdar v. Kally Nath*, 7 Cal., 651; *Corporation of Calcutta v. Anderson*, (1884) 10 Cal., 445, p. 472; *Chudasama v. Ishwagar*, (1892) 16 Bom., 219.

⁹ *Mazoom Ali v. Panchoo*, (1864) 1 W. R., 23.

¹⁰ *Hussam v. Collector of Muzaffargarh*, (1837) 9 All., 655.

¹¹ *Becht v. Ahsanullah*, (1899) 12 All., 437; *Ramjiwan v. Chand Mal*, (1898) 10 All., 597; but see *Krishna v. Chathappin*, (1899) 13 Mad., 269.

¹² *Dandibhal Musabhai v. Emnabhai*, (1904) 28 Bom., 235.

¹³ *Govinda v. Bhandari*, (1891) 14 Mad., 81.

¹⁴ *Thacker Vussonji v. Canji*, (1899) 14 Bom., 365.

Anand Moyee Doss v. Poorno Chunder Roy, (1861) 9 Moo. 1. A., 20.

reasonable,² is enough. If the judgment³ or has been misled required to obtain a copy of to which he should appeal,⁵ unless his attention has been drawn to it and he makes great delay in rectifying the mistake;⁶ or where there is a *bona fide* mistake in the calculation of time by the pleader,⁷ or if he has been misled by the opposite party filing an appeal to which he filed cross-objections upon which the opposite party withdrew his appeal,⁸ or is unable to produce stamp papers for copy of the judgment appealed against,⁹ it is sufficient.

Pauper—The doctrine of sufficient cause does not apply to an appeal in *forma pauperis*.¹⁰

Ex parte—An *ex parte* order admitting an appeal after time may be afterwards set aside for sufficient cause,¹¹ and if an appeal is transferred for hearing to a Subordinate Judge, he can decide the question of limitation.¹²

2. The appellant shall not, except by leave of the Court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal; but the Appellate Court, in deciding the appeal, shall not be confined to the grounds of objection set forth in the memorandum of appeal or taken by leave of the Court under this rule :

Provided that the Court shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of contesting the case on that ground.

Act XIV of 1882, sec. 542.

¹ Kuller Singh v. Jewan Singh, (1874) 22 W. R., 79; Nobbo Kissen Singh v. Kamines Dassce, (1863) B. L. R., F. B., 349; Brojendro Kumar, Roy, *in re*, (1863) B. L. R., F. B., 728; Golam Husan v. Musa Miya, (1884) 8 Bom., 260.

² Ahsanulla v. Collector of Dacca, (1888) 15 Calc., 242; Raman v. Hassan, (1886) 9 Mad., 247; Pundalik v. Achut, (1894) 12 Bom., 84.

³ Jagannath v. Shewratan, (1875) 15 B. L. R., 272; 24 W. R., 105.

⁴ Nobin Chunder v. Brojendro (1882) 12 C. L. R., 541; Dulah Bewa v. Saroda Kinkar, (1893) 3 Calc. W. N., 55.

⁵ Huro Chunder Roy v. Suranmoyi, (1886) 13 Calc., 266; Krishna v. Chathappan, (1890) 13 Mad., 269; Daddabhai v. Maneksha, (1897) 21 Bom., 552; *contra*, Bichi v. Ahsanullah, (1890) 12 All., 461.

⁶ Ram Narain v. Parmeswar, (1903) 30 Calc., 309.

⁷ Bishendut Tewari v. Nundan Prasad Babay, (1907) 12 Calc. W. N., 25.

⁸ Hurgovindas v. Jadavabon, (1899) 23 Bom., 692. For previous practice, see Horal Pattuck v. Bhowanee Ram, (1869) 21 W. R., 393; 15 B. L. R., 273, *note*; Sitarum v. Nimba, (1889) 12 Bom., 320; Jog Lal v. Har Narain, (1888) 10 All., 524; Rampwan v. Chand Mal, (1888) 10 All., 594.

⁹ Rameshaji Ayyangar v. Narayana Ayyangar, (1895) 19 Mad., 374.

¹⁰ *Becher v. ...* 499. As to what is sufficient cause sent by a person who previously in *forma pauperis*; see *Jumnabai v. ...* 576, and *Patcha Sahib v. Sub...* 78.

¹¹ Venkataswamy v. Nagala, (1886) 9 Mad., 450; Nobin Chunder v. Brojendro, (1892) 12 C. L. R., 541.

¹² *... v. Krishnaji*, (1890) 14 Bom., 594.

This rule applies to H C

It is a condition precedent to an advocate or vakil being heard that some duly certified ground or grounds of appeal should have been filed. When appellant filed the grounds of appeal himself and did not appear in person, but through a vakil, who declined to certify to the grounds of appeal, the appeal was dismissed.¹ Where a Court sees that the rights of one of two innocent parties must be sacrificed it is entitled to consider whether anything in the conduct of the party seeking relief has debarred him from seeking it. The Court is not precluded from basing its decision upon a ground not specifically pleaded by either of the parties,² but the appellant cannot claim this as of right,³ unless such objection is taken in his memorandum of an appeal an appellant cannot at the hearing question the validity of an order of remand under O. XLI, r. 23.⁴ An appellant in regular appeal cannot raise a contention of law expressly abandoned by him in the Court below and not contained in the memorandum of appeal.⁵ An appellant in second appeal raised orally at the hearing a plea not taken in his memorandum of appeal to the effect that the respondent's appeal to the lower Court had been barred by limitation held that the appellant was not entitled as of right to be heard in support of it without the leave of the Court.⁶ But a question of limitation when it arises upon the facts before a Court must be heard and determined whether or not it is directly raised in the pleadings or in the grounds of appeal.⁷ A vakil's general powers in the conduct of a suit include the power to abandon an issue, which in his discretion he thinks it inadvisable to press. When an issue of limitation is not raised either by the pleadings or by the evidence, it is not obligatory on the Judge to direct it to be raised, though he may have a discretion to do so.⁸ If the decree appears on the face of it illegal, it may as a rule, be impugned at the time of argument,⁹ provided the respondent has had a sufficient opportunity of meeting the case on that ground, and the Court does not go beyond the subject-matter of the appeal laid before it, but see *Bansidhar v Sita Ram*.¹⁰ A lower appellate Court should not dismiss a suit on a ground abandoned at the trial.¹¹

Fact—In . . .
cribed as once . . .
justification O . . .
acquired, held . . .
plication should not have been allowed.¹²

¹ *Kishen Chandra v. Hursish Chauder*, (1863) 3 W. R., 216.

² *Thakur v. Kundan*, (1895) 17 All., 280.

³ *Bansidhar v. Sita Ram*, (1891) 13 All., 331. At the time in appeal, see *Bom.*, 197; *Narendro Nath*, 374; and as to the others.

⁴ *Tilak Raj v. Chakardhari*, (1893) 15 All., 119.

⁵ *Pahlita Das v. Damodar*, (1871) 7 B. L. R., 697, note; (1875) 24 W. R., 397, note.

⁶ *Ahmad Ali v. Waris Husain*, (1893) 15 All., 123.

⁷ *Beebi v. Ahwunnillah*, (1890) 12 All., 461. See also, *Deo Narain v. Webb*, (1901) 28 Calc., 86; and *Baloram v. Mongta*, (1907) 34 Calc., 911.

⁸ *Venkata Narasimha v. Bhashya Karu*, (1902) 25 Mad., 367; L. R., 29 I. A., 76.

⁹ *Poran Soekhi v. Parbhutty*, (1878) 3 Calc., 612; *Lachman Prasad v. Bahadur Singh*, (1890) 2 All., 841.

¹⁰ *Bansidhar v. Sita Ram*, (1891) 13 All., 331.

¹¹ *Govindrav Krishna v. Balabin Monapa*, (1892) 18 Bom., 586.

¹² *Narayana v. Chengalamma*, (1893) 10 Mad., 1.

is a review pending,¹ if the grounds of review are reasonable,² is enough. If the appellant³ or has been misled by the opposite party in requiring to obtain a copy of the judgment appealed against,⁴ which he should appeal,⁵ unless his attention has been drawn to it and he makes great delay in rectifying the mistake;⁶ or where there is a *bona fide* mistake in the calculation of time by the pleader,⁷ or if he has been misled by the opposite party filing an appeal to which he filed cross-objections upon which the opposite party withdrew his appeal,⁸ or is unable to produce stamp papers for copy of the judgment appealed against,⁹ it is sufficient.

Pauper—The doctrine of sufficient cause does not apply to an appeal in *forma pauperis*.¹⁰

Ex parte—An *ex parte* order admitting an appeal after time may be afterwards set aside for sufficient cause,¹¹ and if an appeal is transferred for hearing to a Subordinate Judge, he can decide the question of limitation.¹²

2 The appellant shall not, except by leave of the Court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal; but the Appellate Court, in deciding the appeal, shall not be confined to the grounds of objection set forth in the memorandum of appeal or taken by leave of the Court under this rule:

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¹ Kuller Singh v. Jewan Singh, (1874) 22 W. R., 79; Nobbo Kiasen Singh v. Kaminee Dizee, (1863) B. L. R., F. B., 349; Brojendro Kumar, Roy, in re, (1867) B. L. R., F. B., 728; Golam Husan v. Musa Miya, (1834) 8 Bom., 260.

² Ahsanulla v. Collector of Dacca, (1898) 15 Cal., 242; Raman v. Hassan, (1896) 9 Mad., 217; Pundlik v. Achut, (1894) 18 Bom., 84.

³ Jagannath v. Shewratan, (1875) 15 B. L. R., 272; 24 W. R., 105.

⁴ Nobin Chunder v. Brojendro (1892) 12 C. L. R., 541; Dulali Bewa v. Saroda Kuikar, (1893) 3 Cal. W. N., 55.

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⁶ Ram Narain v. Parmeswar, (1903) 30 Cal., 399.

⁷ Bisheendut Tewari v. Nundan Prasad Dabry, (1907) 12 Cal. W. N., 25.

⁸ Hurgovindas v. Jadavaboo, (1899) 23 Bom., 692. For previous practice, see Hord Pattuck v. Bhovanes Ram, (1869) 21 W. R., 393; 15 B. L. R., 273, *note*; Sitarani v. Nimba, (1893) 12 Bom., 320; Jog Lal v. Har Narain, (1898) 10 All., 524; Ramjiwan v. Chand Mal, (1833) 10 All., 594.

⁹ Ramnaji Ayyangar v. Narayana Ayyangar, (1895) 18 Mad., 374.

¹⁰ Beehi v. Ahsanullah, (1890) 12 All., 461. 499. As to what is sufficient cause sent by a person who previously in *forma pauperis*; see Jumna Bai v. Collector of North Arcot, (1892) 15 Mad., 78.

¹¹ Venktrayalu v. Nagudu, (1896) 9 Mad., 450; Nobin Chunder v. Brojendro, (1892) 12 C. L. R., 541.

¹² Mulna v. Krishnaji, (1890) 14 Bom., 594.

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It is a condition precedent to an advocate or vakil being heard that some duly certified ground or grounds of appeal should have been filed. When appellant filed the grounds of appeal himself and did not appear in person, but through a vakil who declined to certify to the grounds of appeal, the appeal was dismissed.¹ Where a Court sees that the rights of one of two innocent parties must be sacrificed, it is entitled to consider whether anything in the conduct of the party seeking relief has debarred him from seeking it. The Court is not precluded from basing its decision upon a ground not specifically pleaded by either of the parties,² but the appellant cannot claim this as of right;³ unless such objection is taken in his memorandum of an appeal an appellant cannot at the hearing question the validity of an order of remand under O XL1, r 23.⁴ An appellant in regular appeal cannot raise a contention of law expressly abandoned by him in the Court below and not contained in the memorandum of appeal.⁵ An appellant in second appeal raised orally at the hearing a plea not taken in his memorandum of appeal to the effect that the respondent's appeal to the lower Court had been barred by limitation - *held* that the appellant was not entitled as of right to be heard in support of it without the leave of the Court.⁶ But a question of limitation when it arises upon the facts before a Court must be heard and determined whether or not it is directly raised in the pleadings or in the grounds of appeal.⁷ A vakil's general powers in the conduct of a suit include the power to abandon an issue.

trial 11

Fact-In
cribed as an
justification O
acquired; *held*
plication should not have been shown

¹ *Kishu n Chundra v Hurish Chunder*, (1865) 3 W. R., 216.

* *Thakuri v. Kundan*, (1895) 17 All. 280.

1. P_{30} then = $Q^2 \times D = 11000 \times 17.41 = 191510$ kg total testings taken for the cement.

* Tilak Raj v. Chakardhari, (1893) 15 All. 119.

* *Pabitra Das v. Dimudar*, (1871) 7 B. L. R., 697, note; (1875) 24 W. R., 397, note.

⁶ Ahmad Ali v. Waris Hussain, (1893) 15 All. 123.

⁷ Beehi v. Ahmaddullah, (1890) 12 All. 461. See also, Deo Narain v. Webb, (1901) 28 Cal., 86; and Balaram v. Mongta, (1907) 34 Cal., 941.

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* Poran Sookh v. Parbutty, (1978) 3 Cal., 612; Lachman Prasad v. Bahadur Singh, (1930) 2 All., 844

¹⁰ *Bansidhar v. Sita Ram*, (1891) 13 All., 381.

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⁹ Jagannath v. Shewraton, (1875) 15 B. L. R., 272; 24 W. R., 103.

¹⁰ Nobin Chunder v. Brojendro, (1882) 12 C. L. R., 541; Dalal Bewa v. Saroda Kinkar, (1898) 3 Cal. W. N., 53.

¹¹ Huro Chunder Roy v. Surnamoyi, (1886) 13 Cal., 266; Krishna v. Chathappan, (1890) 13 Mad., 269; Dattabhai v. Maneksha, (1897) 21 Bom., 552; *contra*, Bechi v. Ahsanullah, (1890) 12 All., 461.

¹² Bam Narain v. Parmeswar, (1903) 30 Cal., 309.

¹³ Bishendut Tewari v. Nundan Prasad Dabey, (1907) 12 Cal. W. N., 23.

¹⁴ Hurgovindas v. Jaidavaboo, (1899) 23 Bom., 692. For previous practice, see Horil Pattuck v. Bhowanee Ram, (1869) 21 W. R., 393; 15 B. L. R., 273, *note*; Sitaram v. Nimba, (1889) 12 Bom., 320; Jog Lal v. Har Narain, (1888) 10 All., 524; Ramjiwan v. Chand Mal, (1888) 10 All., 594.

¹⁵ Ramannu Ayyangar v. Narayana Ayyangar, (1895) 18 Mad., 374.

¹⁶ Peethi v. ...

499. As to what is sufficient cause presented by a person who previously in *forma pauperis* see Jumna Bai v. ... 576, and Patcha Sahab v. Sub...

¹⁷ Venktrajada v. Nagada, (1886) 9 Mad., 450; Nobin Chunder v. Brojendro, (1882) 12 C. L. R., 511.

¹⁸ Mulna v. Krishnaji, (1890) 14 Bom., 594.

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Fact—In a suit to set ascribed as ancestral in the p justification. On appeal, the acquired; *held* as the petition should not have been allowed.¹²

¹ Kishen Chandra v. Harish Chunder, (1867) 3 W. R., 216.

² Thakur v. Kandan, (1895) 17 All., 280.

³ Bansidhar v. Sita Ram (1891) 13 All., 381. As to objections taken for the first time in appeal, see Bombay Burmah Trading Co. v. Yarns Spinning Co., 1900 Bom., 197; Norendro Nath Pahari v. I.

⁴ *See* v. Gopal, (1907) 619; Jaggendra v. Bom. L. R., 661.

⁵ Tilak Raj v. Chakardhari, (1893) 15 All., 119.

⁶ Palitra Dasi v. Dimpalar, (1871) 7 B. L. R., 697, note; (1875) 21 W. R., 337, note.

⁷ Ahmad Ali v. Waris Hussain, (1893) 15 All., 123.

⁸ Bechi v. Ahsanullah, (1890) 12 All., 461. See also, Deo Narain v. Wells, (1901) 28 Cal., 86, and Balaram v. Mongta, (1907) 31 Cal., 941.

⁹ Venkata Narasimha v. Bhaskara Karu, (1902) 25 Mad., 307; L. R., 29 I. A., 74. Singh, (1897) 2 All., 894.

¹⁰ Bansidhar v. Sita Ram, (1891) 13 All., 381.

¹¹ Govindray Krishnar v. Balaban Monapa, (1892) 16 Bom., 696.

¹² Narayana v. Chengalamma, (1893) 10 Mad., 1.

4. Where there are more plaintiffs or more defendants than one in a suit, and the decree appealed from proceeds on any ground common to all the plaintiffs or to all the defendants, any one of the plaintiffs or of the defendants may appeal from the whole decree, and thereupon the Appellate Court may reverse or vary the decree in favour of all the plaintiffs or defendants, as the case may be.

Act XIV of 1882, sect. 544.

This rule applies to H. C.

This rule relates only to cases where one or more of the parties arrayed on the same side appeal against a decree passed on a ground common to all, and not to cases where either of two opposite parties appeals from a part of the decree upon a court-fee sufficient for an appeal for the whole.¹

Ground common to all.—The general rule is, that a judgment should be reversed as to the appellant without affecting the judgment as to those parties who do not appeal, when a several judgment could have been properly made in the first Court.²

This rule declares that where the appellant appeals against the whole decree,³ and the decree of the lower Court, whether *ex parte* or not,⁴ has proceeded upon some ground common to all, and in such cases only,⁵ the appellate Court may reverse the whole decree on the appeal of only one of the parties.⁶ It is only

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Substitution.—An application for substitution was made out of time and refused. *Held*, that the remaining plaintiffs were not entitled to a decree for the whole land sued for.⁶

Cases within the rule.—A sued B and a minor C for debts due by them

was decreed. The intervenor alone appealed against the whole decree, and it was set aside as against both.¹⁰ In a suit for partition the lower Court gave a decree

¹ Cheds Lal v. Badullah, (1889) 11 All. 35.

² Koolada Pershad v. Goura Chand, (1872) 17 W. R., 353; and on this point, see Doyamoyee v. Eshur Chunder, (1861) 1 W. R., 203; Abdool Ali v. Syed Banoo, (1865) 2 W. R., 287; Ram Mohun v. Jaded Sircar, (1876) 6 W. R., Act X, 82.

³ Ram Chunder v. Omora Churn, (1872) 18 W. R., 26; Chunder Mones v. Modhoo Dey, (1875) 23 W. R., 166.

⁴ Sreenath Choudhry v. Grey, (1870) 13 W. R., 114.

⁵ Mash'iq v. ... 13; Rangayya v. Kadizala, (1890) 388 12 Bom., 371.
W. R., 227; Babaji v. Collector of

⁶ Paran Mal v. Krant Singh, (1898) 20 All., 8; see Annamally I. Pitchu, (1905) 23 Mad., 122.

⁷ Protap v. Durga, (1905) 9 Cal. W. N., 106.

⁸ Joy Kristo Cowar v. Nittysund, (1878) 3 Cal., 733.

⁹ Dyal Chunder v. Nobin Chunder, (1871) 16 W. R., 235; 8 B. L. R., 180; Kanhyo Roy v. Hyder, (1876) 25 W. R., 29.

for the plaintiffs. Two of the defendants preferred a joint appeal. One died, but her representatives were not brought on the record. The surviving appellant proceeded with the appeal and was successful. The plaintiffs preferred a second appeal, *held*, that as the two defendants had appealed on ground common to them both, the appellate Court had power to deal with the whole suit.¹ A brought a suit against B, C, D and others for recovery of possession of certain immoveable property on declaration of title thereto, alleging that he was dispossessed by all the defendants together. B, C, and D appeared and contested the suit, mainly on the grounds that it was bad for misjoinder of parties and that the plaintiff had no title to the land in dispute. The Court of first instance decreed the suit. B and C alone appealed. The lower Court allowed it, finding that the plaintiff had not proved the title set up by him. On an objection by the plaintiff that as D did not appeal he could not have the benefit of it. *Held*, that as it proceeded on grounds common to all the defendants, the Court was right in allowing the appeal in favour of D also.² And where A sued B, C, and D for possession of land on the strength of a mortgage-bond executed by B and C, who denied execution, and D claimed under them by purchase, the case was dismissed against them all on the appeal of D, on the ground that the bond was false.³ Where the first Court dismissed the suit as barred by limitation, this rule was held to apply.⁴

The tenant's appeal, and the decree for mesne profits was set aside, as the Court had no jurisdiction to make the partition.⁵ And in a suit under s. 9, Act VI (B.C.), 1862, to measure the lands of several ryots who all denied the plaintiff's title, where the suit was decreed on the ground that plaintiff's vendor was proprietor, and had received the rents up to the date of sale, the decree was set aside in favour of all on the appeal of some.⁶

A decree was passed for the plaintiff in a suit to redeem a *lanam* brought against various persons, most of whom disclaimed all interest. An appeal was premised. The first prosecuted since the as right in idants was ded to the Court of first instance under O. XL, r 23. One of the defendants appealed against the order of remand to the High Court, which set aside the order of remand and restored the decree of the first Court. *Held*, that the defendants who had not appealed were entitled to take out execution of the decree of the first Court for costs awarded to them by it.⁸ When a plaintiff obtains a decree

¹ *Chuntaman v Gangabai*, (1900) 27 Bom., 284.

² *Ram Kamal Shaha v Ahmad Ali*, (1903) 30 Cal. , 429.

³ *Jadumani Dasi v. Fudia*, (1871) 7 B. L. R., App., 28.

⁴ *Rung Lall v. Gourree Mundul*, (1868) 10 W. R., 296.

* Nagamma v Subba, (1888) 11 Mad , 197

* Doorga Chunder v. Mahomed Abbas, (1870) 14 W. R., 121. See also, Chunder Kulla v. Jotendro Mohun, (1866) 6 W. R., 104; Kristarthomoyes v. Khetternath, (1868) 9 W. R., 472; Brind Singh v. Chatterjee, (1868) 9 W. R., 558.

* Srimanta Vekraman & Rayan, (1893) 16 Mad., 293

* *Mul Chand v. Ram Ratan*, (1878) 20 All. 193. See also, *Luchmeeput v. Khoobunnissa*, (1870) 14 W. R. 208, and *Kishen Sahai v. Collector of Allahabad*, (1882) 4 All. 137.

the appeal either in the lower appellate Court or in the High Court, if the plaintiff does not bring in the heirs on the record of the second appeal as respondents. The decree obtained on second appeal under such circumstances cannot be executed against those persons¹. In a suit for contribution, although the

one of the
Plaintiffs
was that
defendant
missed the

suit. *Held*, that the decree of the first Court proceeded on a ground common to all the defendants and that the decree of the appellate Court enured for the benefit of the defendants who did not appeal².

Cases not within the rule.—In the case of *Boydonath Surmah v. Ojan*,³ A sued five persons, not co-sharers, for possession, asserting, a distinct title and ouster by the defendants jointly. Defendants pleaded limitation, and denied the plaintiff's title. The first Court decreed the suit, and on the appeal of one defendant, the first appellate Court found that plaintiff had no title, that the

delivered a judgment which proceeded on grounds common to each of the defendants; but on the real merits of the case, that is, on the question of title, the grounds which had hitherto been in one sense common to all the defendants, became at once distinct for each of these defendants;⁴ but see, *Nagamma v. Subba*.⁵ This provision presupposes a common ground of decision affecting property, in which both those who have appealed and those who have not appealed have an interest direct or indirect. A District Judge has no power under this rule to reverse the decree of a lower Court, given for a plaintiff

in which
the Court
it proposes

to base its decision is common to all the defendants, but only when it finds the decision of the lower Court has proceeded on such common ground⁷. This

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Limitation.—Where a decree for possession of certain property is made against three persons jointly, one of whom appeals against the decree only so far as it affects himself and not against the whole decree, and the decree does not relate to property in respect to which the defendants have a common interest and a common defence, so that an appeal by one would imperil the whole decree, then the fact of one defendant having appealed will not prevent limitation from running in favour of the others, against the execution of the decree.⁸ When an appellate Court altered on appeal a decree presented after time by an appellant the delay on grounds personal to himself, *held*, that the Court was wrong and this rule did not apply¹⁰.

¹ *Asibunnessa v. Wali Ahammed*, (1903) 1 Cal. L. J., 144.

² *Rup Jaun v. Abdul Kadir*, (1904) 31 Cal., 613; 8 Cal. W. N., 496.

³ *Annamsay Chettiar v. Pitchu Ayyar*, (1905) 23 Mad., 122.

⁴ *Boydonath Surmah v. Ojan*, (1869) 11 W. R., 218.

⁵ *Nagamma v. Subba*, (1898) 11 Mad., 197.

⁶ *Hussain v. Madan Khan*, (1894) 17 Mad., 265.

⁷ *Protib Chunder v. Koorbanmusa*, (1870) 14 W. R., 120.

⁸ *Chajju v. Umrao Singh*, (1900) 22 All., 386.

⁹ *Ror Panchad v. Faayet*, (1878) 2 C. L. R., 471.

¹⁰ *Vishwanath v. Vaseley*, (1901) 25 Bom., 609.

Court-fee—Where several appellants take a ground of appeal which goes to the root of the respondent's case and which, if successful, would deprive him of his decree as a whole, a court-fee sufficient to cover the whole relief obtainable on such ground must be paid¹

Revision—Where a party did not appeal to the first Court and the Judge decided the case on a ground common to all, but refused to disturb the decree against the party who had not appealed on the ground that he had no power to do so *held*, the decree was subject to revision²

Stay of proceedings and of execution.

5 (1) An appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the Appellate Court may order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree but the Appellate Court may for sufficient cause order stay of execution of such decree.

(2) Where an application is made for stay of execution of an appealable decree before the expiration of the time allowed for appealing therefrom, the Court which passed the decree may on sufficient cause being shown order the execution to be stayed.

(3) No order for stay of execution shall be made under sub-rule (1) or sub-rule (2) unless the Court making it is satisfied,—

- (a) that substantial loss may result to the party applying for stay of execution unless the order is made;
- (b) that the application has been made without unreasonable delay; and
- (c) that security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him.

(4) Notwithstanding anything contained in sub-rule (3), the Court may make an *ex parte* order for stay of execution pending the hearing of the application.

Act XIV of 1882, sect. 545

This rule applies to H. C.

Proceedings under a decree—This rule gives express power to the appellate Court to stay all proceedings under a decree whether they are in execution or otherwise. With the introduction of preliminary decrees this express

¹ *Bajhawan v. Mukund Lal*, (1893) 15 All., 112

² *Seshadri v. Krishnan*, (1885) 8 Mad., 192. Approved in, *Dhuttabar v. Paldi-gantam*, (1907) 30 Mad., 470.

power will probably prove very useful although such a power might possibly have been implied.¹ Under the old Code it was held that an application to set aside an *ex parte* decree (O IX, r 13) was not even a proceeding in a suit.²

Stay of execution.—This rule does not apply where the decree has been executed,³ or where no appeal has been preferred against the decree in the original suit.⁴ No order can be made restraining a receiver from paying with funds in his hands;⁵ but the Court of appeal can in a proper case grant an injunction to restrain parties from parting with the property till the hearing of the appeal.⁶ This rule applies to decrees for movable and immovable property,⁷ which are not pending appeal to the Privy Council;⁸ or are not final and non-appealable.⁹ Before making an application under this rule a pleader should verify that the statements made to him were made by the proper parties.¹⁰

Notice.—A final order staying execution should not be made without notice. The application should be supported by affidavit.¹¹

Grounds of application.—The winning party is not prohibited from executing his decree on the ground that the period for appealing has not expired;¹² and if the time for preferring an appeal has expired, the Court cannot refuse execution.¹³ But the appellate Court, after an appeal has been filed, or the Court of first instance, if the application is made before the period of appeal has expired and an appeal lies, but no other Court,¹⁴ may, in its discretion;¹⁵ stay execution if sufficient cause is shown,¹⁶ but only on condition that the applicant has not been guilty of great delay;¹⁷ and will suffer great injury unless the application is granted.¹⁸ The statement of defendant that he has brought another suit for the purpose of getting his right to possession declared, is not a sufficient reason for staying execution in a decree for eject-

¹ Balkishen Sahu v. Khagna, (1904) 31 Cal., 722.

² Babui v. Sheo, (1905) 0 Cal., W. N., 123.

³ Brij Coomaree v. Ram Rick Dass, (1900) 5 Cal., W. N., 781.

⁴ Pasupati v. Nanda Lali, (1901) 28 Cal., 734; Haroshankar, in the matter of, (1876) 1 All., 178.

⁵ Dhurram Singh v. Kishen Singh, (1893) 12 C. L. R., 532.

⁶ Bhagwat Raj Koer v. Sheo Golam Sahu, (1904) 31 Cal., 1081; 9 Cal., W. N., 123.

⁷ Yamaund Dowlah v. Amed Ali Khan, (1834) 21 Cal., 561.

⁸ Wilson v. Church, (1879) 11 C. D., 576; 12 Ch. D., 454.

⁹ Jamul Koor, in the matter of, (1868) 9 W. R., 448; B. L. R., Sup. Vol., 1007.

¹⁰ Mutterlaunmil v. Chellayammil, (1869) 5 Mad. H. C., 98.

¹¹ Amir Hasan v. Ahmad, (1887) 9 All., 36.

¹² Sreenath Roy, pleader, (1872) 17 W. R., 403.

¹³ Multinchand v. Kharsedje, (1891) 15 Bom., 535.

¹⁴ Deputy Collector, Sonthal Pergunnahs v. Binode Ram, (1866) 5 W. R., Mis., 53.

¹⁵ Ishan Chunler v. Ashanoollah, (1881) 10 Cal., 817.

¹⁶ Barlow v. Alsdool Haje, (1872) 17 W. R., 311.

¹⁷ Wise v. Rajkrishna Roy, (1864) B. L. R., F. D., 550.

¹⁸ Jamul Koor, in the matter of, (1868) 9 W. R., 448.

¹⁹ Leslie, petitioner, (1872) 17 W. R., 160.

²⁰ Gaikwar Sukar v. Ghandi, (1901) 25 Bom., 213.

ment,¹ nor is it sufficient that the day fixed for sale in execution is near the latest sale day for the payment of revenue, and the petitioner might thereby suffer material injury.² It is competent to an appellate Court to stay proceedings in execution merely by reason of an appeal having been preferred against an order of refusal of the Court below to set aside the decree under O IX, r. 13.³

Enquiry into security—When proceedings are ordered to be stayed on giving security, the judgment debtor must be allowed a reasonable opportunity to show that the security offered is sufficient.⁴ Where a defendant gave a security-bond under this rule to account for mesne profits, and execution was stayed, he was held to be estopped from subsequently asserting that execution could not issue for the mesne profits, or that plaintiff should seek his remedy in a regular suit.⁵

Security bond The nature and extent of the liability depends on the words of the bond. In a suit in which security was given under Act VIII of 1859, that if the appeal were dismissed the surety would pay, and the decree was reversed on appeal by a Division Bench, it was held that the liability of the surety ceased, although an appeal had been preferred to a Full Bench;⁶ but where the bond was to obey and fulfil all orders and decrees passed in appeal it was held that the obligation extended to the final decree passed after remand by the High Court in special appeal.⁷ If the decree is upheld, then the creditor may realise the amount due even after more than three years from the date of any proceedings taken in execution.⁸ When the execution of a decree was taken out against both judgment-debtor and surety, it was ordered that the property produced in Court by the judgment-debtor should be first applied to the satisfaction of the decree, and if the decree-holder did not obtain complete satisfaction in this way, the money paid in by the surety should then be made available.⁹ The relation between a decree-holder and a judgment-debtor who has executed a security-bond mortgaging certain properties, is not that of mortgagee and mortgagor, and the decree-holder can realise his decretal money by sale without instituting a suit under s. 67 of the Transfer of Property Act.¹⁰ When a surety has become security under this rule the security-bond cannot be enforced in execution but a separate suit must be brought.¹¹

Review—The Court making an order under this rule can cancel or modify it at any time.¹²

¹ *Mahomed Hossein v. Looft Ali*, (1873) 20 W. R., 302.

² *Ahmed Reza, petitioner*, (1870) 13 W. R., 231.

³ *Bhagwat Raj v. Sheo Golam Saha*, (1901) 9 Cal. W. N., 123; 31 Calo., 1081.

⁴ *Bhoorta Doodhma v. Jumabur Lall*, (1873) 20 W. R., 52.

⁵ *Sadasiva Pillai v. Ramalinga*, (1874) L. R., 2 I. A., 219; *followed in Kamizuddin v. Fauzdar* (1906) 4 Calo. L. J., 311.

⁶ *Ameer Ali, in the matter of*, (1870) 13 W. R., 403.

⁷ *Shivlal v. Apaji*, (1878) 2 Bom., 654; 3 Bom., 201; compare, *Suleman v. Shivram*, (1888) 12 Bom., 71.

⁸ *Sheo Gholam Sahoo v. Rahut Hossein*, (1879) 4 Calo., 6.

⁹ *Gopal Nana Shet v. Joharmal*, (1895) 19 Bom., 578. As to the difference between security given under this rule and under O. XXXVIII, r. 6, see the case of *Suleman v. Shivram*, (1888) 12 Bom., 71.

¹⁰ *Shyam Sundar Lal v. Bajpai Jamarayan*, (1903) 30 Calo., 1060; 7 Calo. W. N., 914.

¹¹ *Tokhan Singh v. Udwant Singh*, (1895) 22 Calo., 25; *Arunachellam v. Arunachellam* (1892) 15 Mad., 203; *Subjoodas v. Balmakund*, (1896) 23 Calo., 212; *not so*.—*Bans Bahadur Singh v. Mughla Begam*, (1880) 2 All., 604; *Janki Kuari v. Saenp Rani*, (1895) 17 All., 99; *Jamesji v. Bawabhai*, (1901) 25 Bom., 409. See also, *Tokhan v. Omdar*, (1905) 1 Calo. L. J., 118.

¹² *Ameer Ali, in the matter of*, (1870) 13 W. R., 403; *Amir Hasan v. Ahmad*, (1869) 9 All., 36.

power will probably prove very useful although such a power might possibly have been implied.¹ Under the old Code it was held that an application to set aside an *ex parte* decree (O IX, r. 13) was not even a proceeding in a suit.²

Execution.—“ ” to be done to be executed a grant of and stay of execution of such decree can be granted under this rule.³ The appellate Court has power to stay execution when an appeal from an order in execution-proceedings is pending before that Court.⁴

Stay of execution.—This rule does not apply where the decree has been executed,⁵ or where no appeal has been preferred against the decree in the original suit.⁶ No order can be made restraining a receiver from parting with funds in his hands,⁷ but the Court of appeal can in a proper case grant an injunction to restrain parties from parting with the property till the hearing of the appeal.⁸ This rule applies to decrees for movable and immovable property,⁹ which are not pending appeal to the Privy Council;¹⁰ or are not final and non-appealable.¹¹ Before making an application under this rule a pleader should verify that the statements made to him were made by the proper parties.¹²

Notice.—A final order staying execution should not be made without notice. The application should be supported by affidavit.¹³

Grounds of application.—The winning party is not prohibited from executing his decree on the ground that the period for appealing has not expired;¹⁴ and if the time for preferring an appeal has expired, the Court cannot refuse execution.¹⁵ But the appellate Court, after an appeal has been filed, or the Court of first instance, if the application is made before the period of appeal has expired and an appeal lies, but no other Court,¹⁶ may, in its discretion;¹⁷ stay execution if sufficient cause is shown;¹⁸ but only on condition that the applicant has not been guilty of great delay;¹⁹ and will suffer great injury unless the application is granted.²⁰ The statement of defendant that he has brought another suit for the purpose of getting his right to possession declared, is not a sufficient reason for staying execution in a decree for eject-

¹ Balkrishen Sahu v. Khagna, (1904) 31 Calc., 722.

² Babur v. Sheo, (1905) 9 Calc. W. N., 123.

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⁴ Pasupati v. Nanda Lall, (1901) 28 Calc., 734; Haroshankar, in the matter of, (1876) 1 All., 178.

⁵ Dharam Singh v. Kishen Singh, (1883) 12 C. L. R., 632.

⁶ Bhagwat Raj Koer v. Sheo Golam Sahu, (1901) 31 Calc., 1081; 9 Calc. W. N., 123.

⁷ Yaminud-Dowlah v. Amed Ali Khan, (1894) 21 Calc., 561.

⁸ Wilson v. Church, (1879) 11 C. D., 376; 12 Ch. D., 454.

⁹ Ismail Koser, in the matter of, (1869) 9 W. R., 443; D. L. R., Sup. Vol., 1007.

¹⁰ Mutteramma v. Chellayamma, (1869) 5 Mad. H. C., 98.

¹¹ Amir Hasan v. Ahmad, (1887) 9 All., 36.

¹² Sreenath Roy, pleader, (1872) 17 W. R., 403.

¹³ Multanchand v. Kharsedji, (1891) 15 Bom., 536.

¹⁴ Deputy Collector, Sonthal Pergunnahs v. Binode Ram, (1866) 5 W. R. M., 53.

¹⁵ Ishan Chunder v. Ashanoollah, (1881) 10 Calc., 817.

¹⁶ Barlow v. Alkool Haje, (1872) 17 W. R., 341.

¹⁷ Wise v. Rajkrishna Roy, (1864) D. L. R., F. D., 550.

¹⁸ Ismail Koser, in the matter of, (1869) 9 W. R., 443.

¹⁹ Leslie, petitioner, (1872) 17 W. R., 160.

²⁰ Gokwar Sirkar v. Ghandi, (1901) 25 Bom., 243.

ment,¹ nor is it sufficient that the day fixed for sale in execution is near the latest sale day for the payment of revenue, and the petitioner might thereby suffer material injury.² It is competent to an appellate Court to stay proceedings in execution merely by reason of an appeal having been preferred against an order of refusal of the Court below to set aside the decree under O. IX, r. 13.³

Enquiry into security—When proceedings are ordered to be stayed on giving security, the judgment debtor must be allowed a reasonable opportunity to show that the security offered is sufficient.⁴ Where a defendant gave a security-bond under this rule to account for mesne profits, and execution was stayed, he was held to be estopped from subsequently asserting that execution could not issue for the mesne profits, or that plaintiff should seek his remedy in a regular suit.⁵

Security bond The nature and extent of the liability depends on the words of the bond. In a suit in which security was given under Act VIII of 1859, that if the appeal were dismissed the surety would pay, and the decree was reversed on appeal by a Division Bench, it was held that the liability of the surety ceased, although an appeal had been preferred to a Full Bench;⁶ but where the bond was to obey and fulfil all orders and decrees passed in appeal it was held that the obligation extended to the final decree passed after remand by the High Court in special appeal.⁷ If the decree is upheld, then the creditor may realise the amount due even after more than three years from the date of any proceedings taken in execution.⁸ When the execution of a decree was taken out against both judgment-debtor and surety, it was ordered that the property produced in Court by the judgment-debtor should be first applied to the satisfaction of the decree, and if the decree-holder did not obtain complete satisfaction in this way, the money paid in by the surety should then be made available.⁹ The relation between a decree holder and a judgment-debtor who has executed a security-bond mortgaging certain properties, is not that of mortgagee and mortgagor, and the decree-holder can realise his decretal money by sale without instituting a suit under s. 67 of the Transfer of Property Act.¹⁰ When a surety has become security under this rule the security-bond cannot be enforced in execution but a separate suit must be brought.¹¹

Review—The Court making an order under this rule can cancel or modify it at any time.¹²

¹ Mahomed Hossein v. Looft Ali, (1873) 20 W. R., 302.

² Ahmed Reza, *petitioner*, (1870) 13 W. R., 281.

³ Bhagwat Raj v. Sheo Goham Saha, (1901) 9 Calc. W. N., 123; 31 Calc., 1081.

⁴ Bhootia Dookhma v. Jumahir Lall, (1873) 20 W. R., 52.

⁵ Sadaviva Pillai v. Ramalinga, (1874) L. R., 2 I. A., 219; *coll.* in, Kamazuddi v. Fauzdar (1906) 4 Calc. L. J., 311.

⁶ Ameer Ali, *in the matter of*, (1870) 13 W. R., 403.

⁷ Shivalal v. Apaji, (1878) 2 Bom., 654, 3 Bom., 201; *compare*, Suleman v. Shivrarn, (1883) 12 Bom., 71.

⁸ Sheo Gholam Sahoo v. Rahut Hossein, (1879) 4 Calc., 6.

⁹ Gopal Nana Shet v. Joharnul, (1893) 19 Bom., 578. As to the difference between security given under this rule and under O. XXXVIII, r. 6, see the cause of Suleman v. Shivrarn, (1883) 12 Bom., 71.

¹⁰ Shyam Sundar Lal v. Bajpai Jainarayan, (1903) 30 Calc., 1000; 7 Calc. W. N., 914.

¹¹ Tokhan Singh v. Udwant Singh, (1895) 22 Calc., 25; Arunachellam v. Arunachellam (1892) 15 Mad., 203; Subjoodas v. Balmakund, (1896) 23 Calc., 212; *not* in *the matter of*, Subjoodas v. Balmakund, (1896) 23 Calc., 604; Janki Kuar (1901) 25 Bom., 111.

¹² Ameer Ali, *in the matter of*, (1870) 13 W. R., 403; Amir Hasan v. Ahmad, (1869) 9 All., 36.

Not stayed—A civil Court cannot stay execution in cases in which an appeal has been made to the Privy Council against a decree of the High Court;¹ nor release a surety from security taken from him by the High Court to enable a decree-holder to execute his decree.² The plaintiff obtained a decree which was set aside on appeal, and the Judge ordered execution of his own decree to be stayed pending a special appeal: *held*, that this was an improper order, and it was set aside by the High Court in the exercise of its extraordinary jurisdiction.³

Sale held—If a property is sold before an order under this rule is communicated, the sale is not void.⁴ But the order dates from the day of pronouncement and not from the day on which the Lower Court receive notice of it.⁵

Ex parte—It is noteworthy that this order may now be obtained *ex parte* O. XXI, r 63. When a regular suit has been brought to contest an order passed under O. XXI, r 63, and a decree has been obtained declaring the subject-matter of the suit liable to sale, the property can be sold, pending appeal from the decree, unless the execution is stayed under this rule.⁶

Stamp duty.—Where a bond is given under the orders of a Court as security by one party for costs of another, it is subject to two duties—(a) an *ad valorem* stamp under the Stamp Act, art 13 Sched. I, (b) and a Court fee of eight annas under the Court Fees Act, art. 6, Sched. II.⁷

Appeal.—An order staying or refusing to stay execution was held to be appealable under s 244 of the former Code (s 47).⁸ But *contra*, no appeal lies.⁹

Costs.—The applicant who has asked for stay of execution should be made to pay costs, even if successful, as it is an indulgence.¹⁰

6. (1) Where an order is made for the execution of a decree from which an appeal is pending, the Court which passed the decree shall, on sufficient cause being shown by the appellant, require security to be taken for the restitution of any property which may be or has been taken in execution of the decree or for the payment of the value of such property and for the due performance of the decree or order of the Appellate Court, or the Appellate Court may for like cause direct the Court which passed the decree to take such security.

(2) Where an order has been made for the sale of immoveable property in execution of a decree, and an

¹ *Muttealaummal v. Chellayammal*, (1869) 5 Mad. H. C., 93.

² *Abedoonissa v. Ameroonissa*, (1872) 17 W. R., 464.

³ *Kavaaji Bhumji v. Dhondiraj*, (1873) 10 Bom. H. C., 411.

⁴ *Besawari v. Horo Sundar*, (1896) 1 Cal. W. N., 226. See *contra*, *Mian Jan v. Man Singh*, (1880) 2 All., 686.

⁵ *Hukum Chand v. Kamalanand*, (1906) 33 Cal., 627.

⁶ *Syed Fathula v. Munjappa*, (1883) 6 Mad., 93.

⁷ *Kulwanta v. Mahabir*, (1889) 11 All., 16.

⁸ *Ghazalin v. Fakir Bakhsh*, (1885) 7 All., 73; *Udayadeta Deb v. Gregson*, (1886) 12 Cal., 624; *Kristo Mohiny v. Bima Charan*, (1881) 7 Cal., 733; *Musaji v. Damodar*, (1888) 12 Bom., 279; *Ishwargar v. Chudasama*, (1888) 12 Bom., 30.

⁹ *Ram Chandra v. Balimkund*, (1905) 29 Bom., 71; and see O. XLIII.

¹⁰ *Chuni Lal v. Anantram*, (1888) 23 Cal., 893.

appeal is pending from such decree, the sale shall, on the application of the judgment-debtor to the Court which made the order, be stayed on such terms as to giving security or otherwise as the Court thinks fit until the appeal is disposed of.

Act XIV of 1882, and sect. 546.

This rule applies to H. C.

his rule unless an
has been taken
some probability
able to recover it
before the appeal
has been filed, special cause must be shewn, such as that the property was being wasted or improperly dealt with.² The wording of this rule has been altered to make it clear that security may be required even if the property has previously been taken in execution.⁴

Security taken under this rule is not confined in its operation to the first appellate Court, it includes whatever order may be passed on appeal, whether, on the first appeal, or by the High Court on special appeal.⁵

An application under para 2 of this rule to stay the sale of immoveable property in execution of a decree for money against which an appeal has been filed must be made to the Court which passed the decree and not to the appellate Court.⁶

Money decree.—Generally, where a decree orders payment of money, execution should be stayed if the losing party deposits the amount in Court; but if the winning party gives security for payment, execution should issue.⁷ A decree for rent is a decree for money within the meaning of the last para of this rule.⁸ The applicant must satisfy the Court on affidavit that substantial loss may result to him unless execution is stayed.⁹

Does not apply.—This rule does not apply to cases in appeal from the High Court to the Privy Council, but when the lower Court is informed that there has been an appeal to the Privy Council from the decree, it should exercise a discretion and allow time to the parties to apply to the High Court to stay execution or to require security from the party in possession, before issuing execution, unless there should be some danger that the property would be made away with in the interval.¹⁰ Nor does it justify a Court in staying execution of

² Bhugwan Chunder Ghose, (1886) 6 W. R., 15; Amir Hasan v. Ahmad, (1887) 9 All., 36. See the case of Otto v. Landford, (1881) 18 C. D., 394, and of Wilson v. Church, (1879) 11 C. D., 576, referred to under r. 5.

³ Sukhee Monee v. Brojraj, (1872) 17 W. R., 69.

⁴ Compare, Jarietool Butool v. Hoseineo Bogum, (1863) 10 Moo. I. A., 196; Mansukhrari Purshotam v. Javarevohu, (1870) 7 Bom. H. C., A. C. J., 122; Juggo Lal v. Jankee, (1872) 17 W. R., 521.

⁵ Hukum Chand v. Kamlanand, (1906) 33 Calc., 927; 3 Calc. L. J., 67; dissenting from Bessesswari v. Horro Sandar, (1892) 1 Calc. W. N., 226.

⁶ Narayan Dev v. Gajanan, (1873) 10 Bom. H. C., 1; compare, Shivlal v. Apaji, (1878) 2 Bom., 655; 3 Bom., 204 and the cases cited under "Security Bond," p. 983, *supra*.

⁷ Muradunnessa, in the matter of, (1893) 15 All., 196; Kunj Lal v. Bahitram, (1903) 8 Calc. W. N., 381. See "Does not apply," *infra*.

⁸ Dhunjibhoj v. Lisboa, (1889) 13 Bom., 211.

⁹ Banku Behary Sanyal v. Syama Churn Bhattacharjee, (1888) 25 Calc., 322.

¹⁰ Gaikwar v. Ghandi, (1901) 25 Bom., 213.

¹¹ Wise v. Rajkrishna Roy, (1861) B. L. R., (P.B.), 541.

a decree, unless it is the Court which passed the decree in which the proceedings are pending.¹

Restitution.—When a decree is reversed, the lower Court is bound to restore the defendants to the property out of which they had been turned in execution, whether the appellate decree expressly directed it or not,² and where a Judge refused to realize an amount paid in execution, and directed the defendant to bring a regular suit, the High Court compelled him under the Charter Act to enforce restitution, and execute that part of the appellate decree giving costs.³ A refund carries interest,⁴ but not interest on costs,⁵ unless the property of paying such interest has been submitted to the Court.⁶ When an erroneous decree of a District Court is reversed by the High Court and the decree of the original Court is restored, the successful party has a right to be replaced in the same position; as if the District Court had not made an erroneous decree. If in obtaining this right, he is restored to the possession of *vatan* land, such a restoration does not fall within the scope of s. 10, Bombay Act III of 1874.⁷

Appellate Court.—An application to the appellate Court is not by way of appeal from an order in the Court below.⁸

An appellate court cannot pass an order under this rule until an order has been made for the execution of the decree.⁹

The appellate Court can exercise the power given by rule (2).¹⁰

Appeal.—An order requiring security was appealable;¹¹ but see, O XLIII

7. No such security as is mentioned in rules 5 and 6 shall be required from the Secretary of State for India in Council or where the Government has undertaken the defence of the suit, from any public officer

No security to be required from the Government or a public officer in certain cases

¹ *Money Poree v. Cura Pershad*, (1885) 11 Cal., 146, p. 149. See also, *Ghazidin v. Fakir Bakhsh*, (1885) 7 All., 73, p. 76, and *supra*, lines 1-4.

² *Rajkishen Singh, in the matter of*, (1861) B. L. R., (F. B.), 605; 6 W. R., Misc., 111; *Lati Koorer v. Sahodra Koorer*, (1877) 2 C. L. R., 75.

³ *Gobind Koomar Chowdhry, in the matter of*, (1865) B. L. R., (F. B.), 714.

⁴ *Wooma Soonduree v. Cooroo Pershad*, (1871) 15 W. R., 74.

⁵ *Rodger v. Comptoir d'Escompte de Paris*, L. R., 3 P. C., 465.

⁶ *Forester v. Secretary of State*, (1877) L. R., 4 I. A., 137.

⁷ *Venkatesh v. Govindrao*, (1897) 21 Bom., 55.

⁸ *Cropper v. Smith*, (1883) 24 C. D., 305.

⁹ *Janardan v. Nilkanth*, (1901) 25 Bom., 593.

¹⁰ *Tribeni v. Bhagwat*, (1907) 11 Cal. W. N., (F. B.), 1030.

¹¹ *Luchmeput Singh v. Sita Nath*, (1901) 8 Cal., 477; *Ghazidin v. Fakir Bakhsh*, (1885) 7 All., 73.

¹² *Venkapa v. Balingappa*, (1888) 12 Bom., 411, and note to s. 145, p. 376, *ante*, and as to appeals from such orders,—*Suleman v. Shivrām*, (1889) 12 Bom., 71; *Thirumalai v. Rameswar*, (1890) 13 Mad., 1; see in regard to what it is necessary to show in an application to the Court of Appeal, after refusal by the Court of first instance, *Monk v. Bartram*, 1 Q. B., (1891) 316.

¹³ *Subj. Daa v. Balakund Daa*, (1906) 23 Cal., 212; but see, *Jamsedji v. Bawathai*, (1901) 25 Bom., 403.

sued in respect of an act alleged to be done by him in his official capacity.

Act XIV of 1882, sect. 547

This rule applies to H. C.

8 The powers conferred by rules 5 and 6 shall be exercisable where an appeal may be or has been preferred not from the decree but from an order made in execution of such decree.

Exercise of powers in appeal from order made in execution of decree.

This rule has been added to meet the cases in which the appellant desires to appeal from an order in execution rather than from the decree itself.¹

Procedure on admission of appeal.

9 (1) Where a memorandum of appeal is admitted, the Appellate Court or the proper officer of that Court shall endorse thereon the date of presentation, and shall register the appeal in a book to be kept for the purpose.

Registry of memorandum of appeal

(2) Such book shall be called the Register of Appeals.

Register of Appeals

Act XIV of 1882, sec. 548

This rule applies to H. C.

The registration of an appeal is a proceeding of a purely ministerial character.²

Appeals from the decisions of single Judge exercising Vice-Admiralty jurisdiction are governed by this Code.³

An appellant has no power to withdraw an appeal which has been regularly registered without the permission of the Court.⁴

Form.—For form of register, see App. H, No. 15

10 (1) The Appellate Court may in its discretion, either before the respondent is called upon to appear and answer or afterwards on the application of the respondent, demand from the appellant security for the costs of the appeal, or of the original suit, or of both :

Appellate Court may require appellant to furnish security for costs.

Provided that the Court shall demand such security in all cases in which the appellant is residing out of British India, and is not possessed of any sufficient immoveable property

Where appellant resides out of British India.

¹ See Report of Special Committee ; *Pasupati v. Nanda Lall Boso*, (1901) 23 Cal., 734

² *Jaifer v. Mahomed Amir*, (1869) 4 B. L. R., App., 103 ; 13 W. R., 351.

³ "Champion," in the matter of, (1890) 17 Cal., 66.

⁴ *Kareem Beo v. Begam Beo*, (1867) 3 Mad. H. C., 308.

within British India other than the property (if any) to which the appeal relates.

(2) Where such security is not furnished within such time as the Court orders, the Court shall reject the appeal.

Act XIV of 1222, sect. 542.

in *Lecky v. Blauenz*,¹ in which it was ruled that an order rejecting an appeal under this rule was not appealable, either as an order or as a decree. See Q XLIII, *Cost*.

The Court can require an appellant from an order under s. 47 in execution of a decree to give security of the costs of the appeal and of the original suit. ■

If the appellant has appealed in *forma pauperis*, this rule will not apply,³ but where the merits of the case appear to be in favour of the respondent;⁴ or the appellant is the assignee of an insolvent debtor,⁵ or his conduct in not paying the costs given against him in the first Court is vexatious;⁶ or the parties have so agreed,⁷ security should be demanded. But where the respondent is admittedly the heir, he should not be required to give security.⁸

Letters Patent Appeals—This rule does not apply to letters patent appeals.

Bond—A party allowed two months to furnish security, tendered by petition a *darpatni* on the last day, and on the next day put in an unregistered security-bond. The judge rejected the bond, but his order was set aside, and he was directed to enquire into the sufficiency of the security, on the ground that it was not necessary to register the bond, until the security had been accepted.¹⁰

A sued B, and was compelled to deposit security for costs, as he resided out of British territory. He got a decree; B appealed. It was held that A could not ask that the deposit should be retained in Court to meet the costs of the appeal.¹¹

Enforcement—A bond given as security for costs may be enforced in a summary way by process of execution.¹²

Such time --The Court may extend the time either before its expiry, or afterward, ¹³

Shall reject.—The appeal cannot be rejected if the order demanding security has been made without notice to the other side;¹⁴ notice of a rule to show cause is not sufficient.¹⁵

¹ *Lekha v Bhauna*, (1923) 18 All. (F B.), 101; followed in *Firoz Begam v. Abdul Latif Khan*, (1909) 30 All. 143.

* Daglu & Chandrabhan, (1999) 24 Bom, 314.

* Nussereooddeen Biswas v. Ujjal Biswas, (1871) 17 W. R., 68, not followed, Seshayya v. Jamulavadin, (1878) 3 Mad., 69.

* *Mazhar Hossain v. Dena Bundhoo, Bourke, 119; Waddell v. Blockey,*
(1879) 10 C. D., 416

* *Herralal Seal v. Caramet*, (1870) 13 W. R., 431.

* Ahmed v. Feay, (1859) 13 Bom., 458.

⁷ *Elias v. Chuckerbutty*, (1866) 1 Ind., Jur., N. S., 223.

* Bhugobatty Churn v. Issur Chunder, (1871) 16 W. R., 311.

* *Sesha Ayyar v. Nagarathna Lala*, (1904) 27 Mad., 121.

¹⁰ *Dunne v. Amereoonnissa Khatoon*, (1879) 13 W. R., 41.

¹¹ *Fleming v. Shearman*, (1869) 4 B. L. R., (O. C.), 92; *Hurruckman v. Modhoooodan*, (1869) 12 W. R. F. B., 16; 3 B. L. R. F. B., 45.

¹² *Abdul Wahed v. Fareedunnissa*, (1889) 16 Cal. 323; *Chutterdharee v. Ram-belash*, (1878) 3 Cal. 318, and see the cases under s. 145, p. 376.

Calc., 512; Jumna-
bairon for extending
Calc., 516; L. R.

¹⁴ Sirajulhuq & Khadim, (1883) 5 Ali, 380.

¹⁸ *Tinnam v. Deva Rai*, (1882) 5 Mad, 265. See also, *Soorj mukhi Koer*, *in re*, (1877) 2 Calo., 272.

within British India other than the property (if any) to which the appeal relates.

(2) Where such security is not furnished within such time as the Court orders, the Court shall reject the appeal.

Act XIV of 1882, sect. 549

This rule applies to H. C.

Application of rule.—This rule does not apply to appeals from orders of a Judge sitting as a Commissioner of the insolvent Court.¹

Practice.—The Court can act only on an application of the respondent but once the application has been filed, the Court may demand security under the first paragraph, and is bound to do so under the second, at any time before the hearing of the appeal.² for the costs in either or both Courts. At the same time, a respondent should be careful, if security has not been given, to object

in the hands of others.³ In Bombay it is not the practice to require security commensurate with the estimated costs of the appeal. Rupees 500 is, speaking generally, the rule in all cases.⁴ It is doubtful whether in a case in which the appellant is not residing out of British India, the High Court has authority to demand security for costs from the appellant after the issue of notice of the appeal.⁵ When a Court acting under this rule orders an appellant to give security for costs, it is not necessary that any specific sum for which security is to be given should be named in the order for security.¹⁰ If neither party appears on the day fixed for hearing the rule and it is discharged, it can be restored if a sufficient reason for the non-appearance of the applicant is shown.¹¹

The usual procedure is for the respondent to obtain a rule nisi on affidavit as to the fact; on the day fixed for hearing the appellant shows cause and the respondent then replies.¹²

Appeal.—Under the former Code, an order dismissing a suit under this rule has been held to be a decree,¹³ and a special appeal lay from such an order on the usual grounds.¹⁴ But *Sirajulhaq v. Khadim* on this point was overruled

¹ Ramselack Mitter, in the matter of, (1870) 5 B. L. R., 179, but apparently it does not apply to appeals from interlocutory orders—Ahmed v. Essa, (1889) 13 Bom., 458.

² Setting aside Jogendra Deb, in the matter of, (1872) 13 W. R., 102; overruling Calcutta and S. L. Ry. Co., (1867) 8 W. R., 217.

³ Wise v. Jugobundoo Bose, (1857) 7 Moo. I. A., 431; Thakur Das v. Kishori Lal, (1847) 9 All., 161.

⁴ Phobonath v. Radha Prosad, (1900) 5 Cal. W. N., 119.

⁵ Jwan Ali Beg v. Basa Mal, (1886) 8 All., 203; Akhanulla v. Solomon, (1887) 14 Cal., 533; see, however, Seshayangar v. Jamulavadin, (1878) 3 Mad., 66.

⁶ Hewetson v. Deas, (1891) 21 Cal., 526.

⁷ Akhanulla v. Solomon, (1887) 14 Cal., 533. See "APPEAL," *infra*.

⁸ Ahmed v. Essa, (1889) 13 Bom., 458.

⁹ Hafizuteodh v. Hameedhur, (1866) 6 W. R., Mis., 123.

¹⁰ Lakha v. Bhaunna, (1896) 18 All., 101.

¹¹ Lakshmi Chand v. Gatto, (1885) 7 All., 512.

¹² Ramasundari Das v. Ramnarayan, (1871) 7 B. L. R., App., 59; Sirajulhaq v. Khadim, (1883) 5 All., 380.

¹³ Sirajulhaq v. Khadim, (1883) 5 All., 380.

¹⁴ Copal Khundee Rao v. Deokeo Nandan, (1874) 6 All. H. C., 172.

in *Lekha v. Bhatnagar*,¹ in which it was ruled that an order rejecting an appeal under this rule was not appealable, either as an order or as a decree. See O. XLIII, *post*.

The Court can require an appellant from an order under s. 47 in execution of a decree to give security of the costs of the appeal and of the original suit.²

If the appellant has appealed in *forma pauperis*, this rule will not apply,³ but where the merits of the case appear to be in favour of the respondent;⁴ or the appellant is the assignee of an insolvent debtor;⁵ or his conduct in not paying the costs given against him in the first Court is vexatious,⁶ or the parties have so agreed,⁷ security should be demanded. But where the respondent is admittedly the heir, he should not be required to give security.⁸

Letters Patent Appeals.—This rule does not apply to letters patent appeals.⁹

Bond.—A party allowed two months to furnish security, tendered by petition a *darpatni* on the last day, and on the next day put in an unregistered security-bond. The judge rejected the bond, but his order was set aside, and he was directed to enquire into the sufficiency of the security, on the ground that it was not necessary to register the bond, until the security had been accepted.¹⁰

A sued B, and was compelled to deposit security for costs, as he resided out of British territory. He got a decree, B appealed. It was held that it could not ask that the deposit should be retained in Court to meet the costs of the appeal.¹¹

Enforcement.—A bond given as security for costs may be enforced in a summary way by process of execution.¹²

Such time.—The Court may extend the time either before its expiry, or afterwards.¹³

Shall reject.—The appeal cannot be rejected if the order demanding security has been made without notice to the other side;¹⁴ notice of a rule to show cause is not sufficient.¹⁵

¹ *Lekha v. Bhatnagar*, (1895) 19 All. (F.R.), 101; followed in *Firozi Begam v. Abdul Latif Khan*, (1904) 30 All., 143.

² *Dagdu v. Chandrabhan*, (1900) 24 Bom., 314.

³ *Nusseerooddeen Bhowat v. Ujjal Bhowat*, (1871) 17 W. R., 68, not followed, *Seshayyengar v. Jainulavadin*, (1878) 3 Mad., 66.

⁴ *Muzhar Hossain v. Deno Bundhoo*, *Boutke*, 119; *Waddell v. Blockey*, (1878) 10 C. D., 416.

⁵ *Heeralal Seal v. Carapret*, (1870) 13 W. R., 431.

⁶ *Ahmed v. Feroz*, (1889) 13 Bom., 458.

⁷ *Elias v. Chuckerbutty*, (1866) 1 Ind., *Jur.*, N. S., 223.

⁸ *Bhugobutty Churn v. Issur Chunder*, (1871) 16 W. R., 311.

⁹ *Sesha Ayyar v. Nagarathna Lala*, (1901) 27 Mad., 121.

¹⁰ *Dunne v. Amereoonnissa Khatoon*, (1870) 13 W. R., 41.

¹¹ *Fleming v. Shearman*, (1869) 4 B. L. R., (O. G.) 92; *Hurruckman v. Modhoo-soolan*, (1869) 12 W. R., F. B., 16; 3 B. L. R., F. B., 45.

¹² *Abdul Wahid v. Fareedoonnissa*, (1889) 16 Cal., 323; *Chuttertharee v. Ram-belashi*, (1878) 3 Cal., 318, and see the cases under s. 145, p. 376.

¹³ *Be-lal Narsin v. Shoo Koer* (1880) 1 R. 17 I. A. 1; 17 Cal. 519; *Yamun* v. *Yamun*, (1880) 1 R. 17 I. A. 1; 17 Cal. 519.

¹⁴ *Sirajulhuq v. Khadim*, (1833) 5 All., 380.

¹⁵ *Tamim v. Deva Rai*, (1882) 5 Mad., 265. See also, *Soorjmutki Koer*, *in re*, (1877) 2 Cal., 272.

No separate application to dismiss the suit is necessary;¹ but where an order to give security was passed, and the respondent on the case being called on, asked that it should be dismissed, his application was refused on the grounds that the amount of the security had not been ascertained, and the Court was not the same which had made the order.²

Restore.—An appeal can be restored on the appellant giving proper security.³

11. (1) The appellate Court, after sending for the record if it thinks fit so to do, and after fixing a day for hearing the appellant or his pleader and hearing him accordingly if he appears on that day, may dismiss the appeal without sending notice to the Court from whose decree the appeal is preferred and without serving notice on the respondent or his pleader.

(2) If on the day fixed or any other day to which the hearing may be adjourned the appellant does not appear when the appeal is called on for hearing, the Court may make an order that the appeal be dismissed.

(3) The dismissal of an appeal under this rule shall be notified to the Court from whose decree the appeal is preferred.

Act XIV of 1882, s. 551.

This rule applies to H. C.

It applies to second appeals which have been admitted⁴

does not relieve a lower appellate Court from the necessity of writing a judgment.⁵ The dismissal of an appeal under this rule leaves untouched the decree of the lower Court, which can amend it or bring it into accordance with the judgment.⁶

But when a decree has been affirmed, the lower Court has no jurisdiction to review it.¹⁰

¹ *Muhammadbhat v. Bhanji Topan*, (1865) 3 Bom. H. C., 64.

² *Thakur Das v. Kishori Lal*, (1887) 9 All., 164.

³ *Balwant Singh v. Daulat Singh*, (1896) 8 All., 315; L. R., 13 I. A., 57.

⁴ *Rudr Prasad v. Bajnath*, (1893) 15 All., 367.

⁵ *Thakur of Masula v. Widows of Thakur of Nandwara*, (1879) 2 All., 819.

⁶ *Royal Reddi v. Linga*, (1878) 3 Mad., 1.

⁷ *Uma Sundari Devi v. Bindu Bashini*, (1897) 24 Cal., 759.

⁸ *Rami Deka v. Brojo Nath Sankia*, (1898) 25 Cal., 97; 1 Cal. W. N., 692.

⁹ *Bapu v. Vajra*, (1877) 21 Bom., 514.

¹⁰ *Prady Mohan Mookerjee v. Mohendra*, (1906) 4 Cal. L. J., 566; *Ramappa v. Sharma*, (1906) 8 Bom. L. R., 812. See, *Rakhal v. Satindra*, (1907) 5 Cal. L. J., 314.

Stamp — As to dismissal on the ground that the plaint has not been properly stamped, see *Kammathi v. Kunhamed*¹

12 (1) Unless the Appellate Court dismisses the appeal under rule 11, it shall fix a day for hearing the appeal.

(2) Such day shall be fixed with reference to the current business of the Court, the place of residence of the respondent, and the time necessary for the service of the notice of appeal, so as to allow the respondent sufficient time to appear and answer the appeal on such day,

Act XIV of 1882, sec. 532

This rule applies to H. C.

13. (1) Where the appeal is not dismissed under rule 11, the Appellate Court shall send notice of the appeal to the Court from whose decree the appeal is preferred.

(2) Where the appeal is from the decree of a Court, the records of which are not deposited in the Appellate Court, the Court receiving such notice shall send with all practicable despatch all material papers in the suit or such papers as may be specially called for by the Appellate Court.

(3) Either party may apply in writing to the Court from whose decree the appeal is preferred, specifying any of the papers in such Court of which he requires copies to be made; and copies of such papers shall be made at the expense of, and given to, the applicant.

Act XIV of 1882, s. 550

This rule applies to H. C.

If there is any part of the record not sent up which the appellant wishes to bring before the appellate Court, it is his duty to ask the Court to send for it before the day of trial.²

Form of notice—App. G, No. 5.

14 (1) Notice of the day fixed under rule 12 shall be affixed in the Appellate Court-house, and a like notice shall be sent by the Appellate Court to the Court from whose decree the appeal is preferred, and shall be served on the

¹ *Kammathi v. Kunhamed*, (1392) 15 Mad., 298.

² *Buksh Ali v. Joyant*, (1869) 11 W. R., 249.

Act XIV of 1882, sec. 555.

This rule applies to H. C.

The irregularity of deciding an appeal before the day fixed will not be interfered with in special appeal if the pleaders were present and argued the case.¹

If it appears that the rules of Court relating to appeals have not been complied with and no adequate excuse is offered, the appeal should be dismissed.² For procedure to be adopted in the hearing of a case in which the records of the original Court have been almost wholly destroyed.³

17. (1) Where on the day fixed, or on any other day to which the hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, the Court may make an order that the appeal be dismissed.

(2) Where the appellant appears and the respondent does not appear, the appeal shall be heard *ex parte*.

Act XIV 1882, s. 556

This rule applies to H. C.

In the absence of the appellant the case must be dismissed, provided the case is tried on the day to which the hearing may have been adjourned or on a day of which the appellant had notice,⁴ unless the pleaders appeared and argued the case.⁵ And this should appear in the order.⁶ And if a judge, instead of dismissing the suit for default, goes into the merits of the case and gives judgment against the appellant, the appeal must be considered as dismissed for default, and an application for re-admission and rehearing cannot be treated as one for review, but must be entertained under r. 19.⁷

Default—If a pleader who has signed the memorandum of appeal refuses to argue the case on the grounds that he is unable and unprepared,⁸ or if the appellant files the appeal in person and subsequently appears by a pleader who refuses to certify the memorandum of appeal,⁹ the case should be dismissed for default,¹⁰ but it has recently been held that the appearance of a pleader instructed only to apply for an adjournment is not an appearance within the meaning of this rule.¹¹

No default—When a decree is passed, partly in favour of and partly against a plaintiff and one of the defendants alone appeals making the co-defendant respondent, the latter need not appear or interest himself in the result.¹²

¹ Hakeemunnissa v. Muckdoonum, (1864) 1 W. R., 246.

² Bhimji Girdhar v. Morgan, (1885) 3 Bom. H. C., 63.

³ Hara Kumar v. Asiatulla, (1908) 3 Cal. W. N., xxiii.

⁴ Shib Chunder v. Alisd Monee, (1866) 5 W. R., 22.

⁵ Hakeemunnissa v. Muckdoonum, (1864) 1 W. R., 246.

⁶ Huro Chunder v. Ram Coomar, (1865) 2 W. R., 254.

⁷ Mohesh Chunder v. The Bank of Bengal, (1877) 10 W. R., 127; 11 Cal. W. N., 329; Manawar, (1886) 1.

⁸ Bhatia v. Monee, (1866) 5 W. R., 22.

⁹ Bhatia v. Monee, (1866) 5 W. R., 22.

¹⁰ Bhatia v. Monee, (1866) 5 W. R., 22.

¹¹ Bhatia v. Monee, (1866) 5 W. R., 22.

¹² Bhatia v. Monee, (1866) 5 W. R., 22.

¹⁰ Watson & Co. v. Ambica Dass, (1899) 4 Cal. W. N., 237; 27 Cal., 529.

¹¹ Satish v. Aparaj, (1907) 34 Cal., 403; 5 Cal. L. J., 247; 11 Cal. W. N., 329; 101, Cooke v. Equit. Coal Co., (1904) 8 Cal. W. N., 621.

¹² Goomonnee Doss v. Parbatty, (1863) 10 W. R., 326.

Thus, where two appeals are tried together and the plaintiff is called upon to attend in one of these cases and fails to attend, judgment cannot be given against him in the other case.¹

Where a Court after eleven months' delay and without fixing any day for the disposal of the appeal dismissed it for default, the High Court set aside the order as erroneous, on the ground that the law only applied to cases of voluntary failure to comply with the Court's order,² so, where a case was appointed to be heard before the Doorga Poojah holidays, but was not, and after the holidays it was decided without appointing a day for hearing, the case was remanded for re-hearing.³

Where a case is remanded and the appellant took no steps to get the Judge was writing his decision, his pleader's instructions; held, that the case was properly dismissed for the non-appearance of the parties after it had been remanded on appeal, can be re-instituted, if not barred by limitation.⁴

Paper Book—Under para. 367 of the rules framed for the original side, if the appellant does not file the paper book, the appeal may be dismissed.⁵

Appeal—As to whether an appeal lay from a decree passed under the corresponding section of Act XIV of 1882, the decisions conflicted.⁷

No appeal lies under the Letters Patent, s. 10, from an order dismissing an appeal for default.⁸

18. Where on the day fixed, or on any other day to which the hearing may be adjourned, it is found that the notice to the respondent has not been served in consequence of the failure of the appellant to deposit, within the period fixed, the sum required to defray the cost of serving the notice, the Court may make an order that the appeal be dismissed:

Dismissal of appeal where notice not served in consequence of appellant's failure to deposit costs.

Provided that no such order shall be made although the notice has not been served upon the respondent, if on any such day the respondent appears when the appeal is called on for hearing.

Act XIV of 1882, s. 557.

This rule applies to H. C.

Within the period fixed.—Act XXIII of 1861, s. 2, contained similar words, and it was held that, unless a time was fixed within which process-fees

¹ *Arunichelli v. Venkatachalli*, (1882) 5 Mad. H. C., 239.

² *Soolhamonee Dossie v. Gooroo Pershad Dutt*, W. R., 1864 p. 176.

³ *Jeeban Monce v. Tarinee Churn*, (1865) 3 W. R., Act X, 164.

⁴ *Trikake Chunder v. Ankul Chunder*, (1869) 21 W. R., 65.

⁵ *Rughoonath Singh v. Ram Coomur*, (1870) 14 W. R., 81, 5 B. L. R., App., 61.

⁶ *Kabul v. Bhul*, (1890) 17 Cal., 289.

⁷ *Modaktha*, (1878) 2 Mad., 75; *Ram Chandra v. Madhav*, (1892) 16 Bom., 23; *Badha Nath Singh v. Chandi Singh*, (1893) 39 Cal., 669; 7 Cal. W. N., 456; *not so*, *Nand Ram v. Muhammad Bakhsh*, (1879) 2 All., 616; *Kanali Lal v. Nand Lal*, (1889) 3 All., 519; see *ord. r. XLIII*.

⁸ *Pohkar Singh v. Gopal*, (1892) 14 All., 361; *Manab Ali v. Nihal Chand*, (1893) 15 All., 359.

should be paid into Court, the suit could not be dismissed on the ground of failure to deposit.¹

An appeal should not be dismissed for default before the date fixed for hearing simply because the appellant has failed to explain his failure to deposit *tala-fana* in time and without ascertaining whether after such deposit there was time to serve notice upon the respondents.²

19. Where an appeal is dismissed under rule 11, sub-rule (2), or rule 17 or rule 18, the appellant may apply to the Appellate Court for the re-admission of the appeal; and, where it is proved that he was prevented by any sufficient cause from appearing when the appeal was called on for hearing or from depositing the sum so required, the Court shall re-admit the appeal on such terms as to costs or otherwise as it thinks fit.

Act XIV of 1882, sec. 558

This rule applies to H. C.

Jurisdiction.—The application must be made to the Court dismissing the appeal, and a District Judge has no power to admit a case disposed of by a Subordinate Judge.³

Case referred.—In Bombay, if a Judge refers an appeal for trial to an Assistant Judge, an application under this rule must be made to the latter officer only.⁴

Scope of rule.—The rule applies to appeals which have been dismissed with costs *ex parte*, and to appeals dismissed under rule 11, sub-rule (2), or rule 17 or rule 18.

It was held that an application for re-admission of an appeal dismissed under rule 17 of the High Court Rules, Part II, Code of Civil Procedure, 1882, in preparation of the paper-book is in time, and the law of limitation does not apply. *Case of Fatmunnissa v. Deoki Persad*.⁵ Code there are only two ways by which a judgment and decree of a Division Bench can be set aside. These two methods are described in ss 558 and 623,⁶ [i.e. this rule and s 114.]

Review.—*Quare.*—If an application under this rule is the same as a review.⁷

Any Sufficient cause.—Such as being unaware that the case had been transferred from the file of one Judge to that of another.⁸

¹ *Purshadee Lall v. Umbika Pershad*, (1869) 11 W. R., 290; 3 B. L. R., App., 25.

² *Chundra Nath Dass v. Kalprasanna*, (1908) 35 Cal., 535.

³ *Kisto Pershad Dutt v. Cowie*, W. R., 1964, p. 315.

⁴ *Sakharam v. Govind Joti*, (1891) 15 Bom., 107.

⁵ *Tara Chand Ghose v. Anund Chunder*, (1869) 10 W. R., 450.

⁶ *Ram Hori Sahu v. Madan Mohan Mitter*, (1896) 23 Cal., 339.

⁷ *Fatmunnissa v. Deoki Persad*, (1887) 21 Cal., 330; 1 Cal. W. N., 21.

⁸ *Hirdhamun v. Jinghoor*, (1880) 5 Cal., 711. See "EX PARTE DECREE," s 114.

⁹ *Narain Singh v. Bhairab Churn*, (1881) 8 C. L. R., 350.

¹⁰ *Shomoad Ali v. Eusoof Khan*, (1871) 15 W. R., 80.

It has been held in a recent Calcutta case, however that a respondent should not be placed on the record after the time for appealing against him has expired.¹ In *Rup Jan v. Abdul Kadir*,² which was also a suit for contribution, it was ruled by a Full Bench of the Calcutta High Court that in such a suit as the present, an appellate Court, where a decree has been given against one defendant only, can alter the decree so as to render liable another defendant against whom the plaintiff has preferred no appeal.

The Court can make a person respondent who in the original suit was arrayed on the same side as the appellant.³

Effect of non-joinder—Where in an appeal by the defendant against a decree for arrears of rent passed jointly in favour of all the plaintiffs, the heirs of one of the plaintiffs who died subsequently to the date of the delivery of judgment, were not made parties, it was held that the appeal must fail for defect of parties.⁴

Consent order—An appellant like a plaintiff is the person interested in procuring the name of the person against whom he is to proceed,⁵ but if he consents, there is no harm in placing a person on the record, although he may not be the legal representative of a deceased party.⁶

Limitation—There is nothing in the Limitation Act, XV of 1877, (Act IX of 1908), to control this provision.⁷

21. Where an appeal is heard *ex parte* and judgment

is pronounced against the respondent, he may apply to the Appellate Court to re-hear the appeal; and, if he satisfies the Court that the notice was not duly

Re-hearing on application of respondent against whom *ex parte* decree made

served or that he was prevented by sufficient cause from appearing when the appeal was called on for hearing, the Court shall re-hear the appeal on such terms as to costs or otherwise as it thinks fit to impose upon him.

Act XIV of 1882, S. 560

This rule applies to H. C.

Ex parte—This rule applies whether the respondent has or has not entered appearance.⁸

The Court is bound to enquire into the truth of an application made under this rule, and it must be accompanied by evidence in support of the allegation on which the petition is founded.⁹

¹ *Ram Ratan v. Jogesh Chandra*, (1903) 12 Cal. W. N., 625.

² *Rup Jan v. Abdul Kadir*, (1901) 31 Cal. 643; 8 Cal. W. N., 496.

³ *Sonali v. Khalak*, (1891) 13 All., 78; *Kanagappa v. Sakkalinga*, (1892) 15 Mad., 362. But see *contra*, *Paya Matathil v. Kovamel Amina*, (1890) 19 Mad., 151.

⁴ *Bejoy Gopal v. Umesh Chandra*, (1901) 6 Cal. W. N., 196; *fol. in*, *Tarip v. Khotejanwasi*, (1906) 19 Cal. W. N., 981.

⁵ *Lakshmi Bai v. Balkrishna*, (1890) 4 Bom., 654.

⁶ *Lakshmi Bai v. Santapa*, (1889) 13 Bom., 22.

⁷ *Girish v. Sasi*, (1906) 33 Cal., 329. See note (9), p. 996, *supra*.

⁸ *Esab v. Krishna Narayan*, (1882) 11 C. L. R., 164; see also, *Shoo Churn v. Hoera Lal*, (1882) 11 C. L. R., 537.

⁹ *Miselbruch, petitioner*, (1866) 6 W. R., 43; *Mahomed Kalun v. Dinomoyee Dasha*, (1881) 8 C. L. R., 112; *Anunda Shaha Biswas v. Kema*, (1881) 6 Cal., 548.

Sufficient cause.—Illness of a pleader's clerk, who had the papers of the case, is sufficient cause.¹

It is sufficient to give notice to the party's pleader, who is not entitled to refuse it.²

An application for re-hearing of an appeal presented originally within time, but returned for amendment and presented after amendment after time cannot be rejected as being out of time.³

Appeal.—An appeal will lie from an order refusing to re-hear an appeal under this rule;—O. XLIII, r 1, (t); and an appeal will also lie against the decree.⁴

A defendant who did not appear in the first appellate Court, although his interests were identical with those of the plaintiffs, cannot appeal specially against the judgment passed in favour of his co-defendants.⁵

Review.—Respondent may also apply for a review of the judgment.⁶

22 (1) Any respondent, though he may not have

Upon hearing, respondent may object to decree as if he had preferred separate appeal.

appealed from any part of the decree, may not only support the decree on any of the grounds decided against him in the Court below, but take any cross-objection to the

decree which he could have taken by way of appeal, provided he has filed such objection in the Appellate Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the Appellate Court may see fit to allow.

(2) Such cross-objection shall be in the form of a memo-

Form of objection and provisions applicable thereto

randum, and the provisions of rule 1, so far as they relate to the form and contents of the memorandum of appeal, shall

apply thereto

(3) Unless the respondent files with the objection a written acknowledgment from the party who may be affected by such objection or his pleader of having received a copy thereof, the Appellate Court shall cause a copy to be served, as soon as may be after the filing of the objection, on such party or his pleader at the expense of the respondent.

(4) Where, in any case in which any respondent has under this rule filed a memorandum of objection, the origin-

¹ Kailash Chunder Das v. Rama Nath Chaudhuri, (1897) 2 Cal. W. N., 414; Mohendra Nath v. Rakshit Chandra, (1899) 4 Cal. W. N., xxxv.

² Har Prasad v. Abdul, (1905) A. W. N., 41.

³ Shama Prasad Ghose v. Taki Mullik, (1911) 5 Cal. W. N., 810.

⁴ Ajudhia v. Balmukand, (1886) 8 All., 351.

⁵ Jugunmuth Chatterjee v. Gordon Stuart & Co., (1866) 6 W. R., 36.

⁶ Amir Hasan v. Ahmad, (1857) 9 All., 38.

al appeal is withdrawn or is dismissed for default, the objection so filed may nevertheless be heard and determined after such notice to the other parties as the Court thinks fit

(5) The provisions relating to pauper appeals shall, so far as they can be made applicable, apply to an objection under this rule

Act XIV of 1852, s 561.

This rule applies to H. C., but it is not applicable to appeals under s 10 of the Letters Patent.¹

To entitle a respondent to support a decree upon a particular ground, it is not necessary that that ground should have been in express terms decided against him.²

Object of cross-appeal—A party may be satisfied with the decree of the lower Court and may be willing to allow it to stand unimpeached if his opponent does not think it necessary to appeal, but he may not be willing to have the decree modified or altered upon appeal in favour of his opponents without having the whole of the case set right. Suppose a defendant sets up two defences to a claim brought against him, and the lower Court determines in his favour as to one of them and against him as to the other, the plaintiff's claim would be dismissed. The lower Court might be wrong as to both defences, and ought to have decided in the defendant's favour the defence which was decided against him, and *vice versa*. If the plaintiff, were to appeal and to reverse the decision of the lower Court upon the defence decreed in the defendant's favour, it would be unjust not to

be wrong in point

might thereby be

dismissing the plain

in other words, "he may support the decree on any of the grounds decided against him in the lower Court." On the other hand, the respondent who fails to

file a petition under

by the lower Court,⁴

not,⁵ any objection

if he had preferred a :

that the points decided against him should have been decided in his favour,⁶

but the appellant should not be put in a worse position by his own appeal, and

the most unfavourable order against him that should be passed is to dismiss the appeal.⁷

In an appeal from an order dismissing a suit for want of jurisdiction the respondent was held not entitled to go into the merits;¹⁰ but the omission to

¹ *Kansah v. Gulab Kuar*, (1899) 21 All., 297.

² *Shrish Chandra Roy v. Mungra Bawa*, (1904) 9 Calc. W. N., 14.

³ *Ishore Ghose v. Hills*, (1862) W. R., Sp. No., 49; (1862) Marsh., 151, p. 153.

⁴ *Bhagaji v. Bapuji*, (1899) 13 Bom., 75; *Gowri Sunker v. Janki*, (1862) L. R., 17 I. A., 57, 17 Calc., 809.

⁵ *Kamat v. Kamat*, (1894) 8 Bom., 368.

⁶ *Mirza Hummat Bahadur, in the matter of*, B. L. R., (F. B.), 429.

⁷ *Bilak Tewari v. Kausl Mir*, (1882) 4 All., 491; *Jamiatunnissa v. Lutfunnissa*, (1885) 7 All., 606.

⁸ *Hills v. Ishore Ghose*, (1862) Marsh., 151.

⁹ *Hem Chunder v. Ahmed Raza*, (1863) Marsh., 332. But see, *Bikramajit v. Husam Begam*, (1889) 3 All., 613; referred to in *Agibul v. Dino Nath*, (1907) 34 Calc., 996.

¹⁰ *Kameekhi Persad v. Larmour*, (1863) W. R. F. B., 86.

appeal against an order of remand does not preclude a respondent on appeal from taking an objection to the order of remand as erroneous.¹

Does not apply—This principle does not cover any questions decided between the co-respondents, and only extends to the contention between the respondent and the appellant who has forced him into Court.² So where A sued B for possession of land and made C a co-defendant, alleging collusion with B, and the Court decreed the suit against B, but dismissed it against C, holding that she had been long in possession as ryot and there was no collusion, it was held, on an appeal by B, that the plaintiff A should not be allowed to take a cross-appeal as regards the dismissal of his case against C;³ as the right of a respondent to urge cross-objections should be limited to his urging them against the appellant only.⁴ And when A sued B and C, and the suit was dismissed against C, it was held that A could not raise the question of appeal of B.⁵ Both parties appealed from the dismissal of the suit, and the appeals were dismissed. Plaintiff then defendant could not, by way of cross-objection, object to the Court dismissing his appeal.⁷

A respondent can only take such objections as have reference to the party appealing. If he wishes to raise objections against parties who do not appeal, he must do so by independent appeal.⁸ A defendant or respondent cannot be heard by way of cross-appeal against a co-defendant or co-respondent;⁹ for they cannot be allowed to interplead.¹⁰ In a later case A, B and C sued D and others for possession of 3 kanees of land. The suit was dismissed as to one-half against A and B, decreed as to one-half in favour of B and C under a different title; A and B appealed as regards the portion disallowed, and it was held that D could not raise any question as regards the portion decreed to B and C jointly, as C was not before the Court.¹¹ This certainly appears to unduly limit the provision. In any case if it were considered necessary to have the absent party present, the Court should have given the respondent an opportunity to procure his attendance.¹² So in a suit against several persons for damages the single defendant who last appealed, and in appeal the plaintiff objected that the damages were insufficient, and that the other defendants should have been made

¹ Kishen Chunder v. Breeshtes Dhur, (1867) 8 W. R., 203.

² Raniji Das v. Ajudhia Prasad, (1867) 23 All., 628.

³ Baloo Choto Lall v. Kishun Suhay, S. D., N. W., 1863, p. 360.

⁴ Auwar Jan v. Azmut Ali, (1871) 15 W. R., 26.

⁵ Bhabubuddin v. Deemooat Koer, (1907) 30 Cal., 655; Kalla v. Manni, (1901) 23 All., 63.

⁶ Anunto Dass Sein v. Ram Joy, (1869) 11 W. R., 435; Greesh Chunder v. Gour Mohun, (1867) 7 W. R., 49; and see, Hossein Buksh v. Baroo Beparee, (1866) 5 W. R., 50.

⁷ Ganga Prasad v. Gajadhar, (1859) 2 All., 651. See, however, Kamat v. Kamat, (1844) 8 Bom., 364; Timmayya v. Lakshmana, (1831) 7 Mad., 215.

⁸ Ganesh Pandurang v. Gangadhar, (1869) 6 Bom. H. C., 244.

⁹ Tarucknath Roy v. Tuloorunnissa, (1867) 7 W. R., 39; Goonoomonee Dossia v. Parbutty, (1868) 10 W. R., 326; Burroda Sundari v. Nobogopal, W. R., (1864) 294; Khermukures v. Nilambur, (1863) 2 W. R., 227; Guladhar v. Mon Mohunee, (1867) 7 W. R., 368.

¹⁰ Mulhoo Ali v. Zur Banoo, (1863) 9 W. R., 78; but see, Timmayya v. Lakshmana, (1831) 7 Mad., 215.

¹¹ Molzunissa v. Mootaree Dhur, (1874) 22 W. R., 314. See also, Lall Chand v. Kudmoo Koonwar, (1867) 7 W. R., 532.

¹² Mahomed Amcer v. Pran Kishore Deb, (1874) 21 W. R., 339.

jointly liable *held*, the Court was justified in bringing the other parties before it, in increasing the damages, and assessing them jointly on the original appellant and one of the acquitted defendants.¹ As a general rule the right of a respondent to urge cross-objections should be limited to his urging them against the appellant, and it is only by way of exception to this general rule that one respondent may urge a cross-objection against another respondent, the exception holding good among other cases in those in which the appeal of some of the parties opens out questions which cannot be disposed of completely without matters being allowed to be opened up as between co-respondents.²

Where the defendant does not appeal against nor file objections to the amount awarded to the plaintiff by the Court of first instance, the appellate Court has no power to reduce it.³ A respondent, not having filed a cross-appeal, can only be heard to support the decree. He can only alter it by means of a cross appeal.⁴ Where respondent fails to give notice, it is not open to appellate Court to grant him relief where such relief is not incidental to the relief granted to appellant.⁵ The plaintiffs sued to recover possession of lands demised on *karom* in Malabar. The defendants were the representatives of the mortgagee and one (defendant No 20) claimed title to part of the land sought to be recovered. As to the last-mentioned part of the land, the plaintiffs obtained a decree for a portion of it only. The plaintiffs preferred an appeal, bringing on to the record only defendant No. 20, who preferred a memorandum of objections. The appeal was dismissed for the reason that the mortgagee's representatives were not joined. *held*, that the appeal had been heard under this provision, and accordingly the memorandum of objections should be heard.⁶

Practice—A respondent may file before the hearing of the appeal a written notice with the Registrar of the objections which he intends to take at the hearing.⁷

Holiday—When the time for filing objections expires on a holiday, they may be filed on the day the Court re-opens.⁸

Objections not allowed.—A respondent cannot insist on his objections being heard when the appeal is dismissed for default,⁹ or if the appellant withdraws from the appeal before the hearing has begun,¹⁰ or generally when the appeal is dismissed

has been called on,
by withdrawing his appeal.
objections heard is no ground for admitting the latter to appeal after time,¹¹ and see "NOT SUFFICIENT CAUSE" and "SUFFICIENT CAUSE," OXLI, r. 1.

¹ Anund Chunder v. Mohesh Chunder, (1864) 1 W. R., 229; but see the case of Babtoollah Meah v. Roshin Dewan, (1868) 9 W. R., 273.

² Bishun Churn Roy v. Jogendra Nath Roy, (1899) 26 Cal., 114; foll. in, Abdul Gham v. Mahammad Fasih, (1906) 28 All., 95; (1905) All W. N., 200. See also, Ram Lal v. Tara Soondurce, W. R., 1864, 3.

³ Nyanchandra v. Narayan, (1880) 4 Bom., 291.

⁴ Caspersz v. Kishori Lal, (1896) 23 Cal., 922, p. 929; 1 Calo W. N., 12.

⁵ Kalai Kada v. Viswanatha, (1901) 28 Mad., 229.

⁶ Kombi Achen v. Kochunni, (1898) 21 Mad., 332.

⁷ Madhobee Dossee, in the matter of, (1866) 6 W. R., 102.

⁸ Baghelin v. Mathura Prasad, (1882) 4 All., 430.

⁹ Buroda Kant v. Pearce Mohun, (1875) 23 W. R., 57.

¹⁰ Bahadoor v. — (1875) 2 W. R., 210; Di Maktab (1895) 17 All., 518. Watson, W. R., m., 28; Singh,

¹¹ Ramjiwan v. Chand Mal, (1888) 10 All., 587.

¹² Ram Pershad Ojha v. Bhurosa, (1868) 9 W. R., 328.

¹³ Surbhai Dayaji v. Raghunathji, (1873) 10 Bom. H. C., 397.

If once the hearing has commenced, the respondent can insist on having his objection heard and determined;¹ if it is brought forward before the respondent has closed his case;² even though it should be ultimately decided that an appeal would not lie.³ An application to file a cross appeal was rejected, firstly, because a written memorandum of its grounds had not been filed previously; secondly, because the objection, when taken, was not filed on the regulated stamp; and lastly, because the ground urged had not been advanced as an objection in a regular appeal previously filed.⁴ When no cross-objections have been filed, an appellant can withdraw his appeal any time before judgment. When cross-objections have been filed, the appellant must withdraw before the hearing of the appeal has commenced.⁵

Second appeals.—In Bengal this rule applies to special appeals.⁶ An appellant, who files objection in the Court below can appeal from the findings on them.⁷

Court Fees—A cross appeal must be accompanied by a stamp of the proper value; it must be accompanied by a proper stamp and the appellant must pay the Court fees at the time of hearing.⁸

Form of decree in cross-appeals—See *Rangachariar v. Yegna* ¹²

One month from date of service—An appeal should not be set down for hearing on a date less than one month from the date of service ¹³

Extension of time—Where the respondent in order to save costs delayed instructing counsel within the prescribed period to draw up objections to the decree until they had received the paper-books, the Court declined to extend the time.¹⁴

23 Where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the Appellate Court may, if it thinks fit, by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded, and shall

¹ *Venkataramanaya v. Kuppi*, (1867) 3 Mad. H. C., 302; *Poreah Narain v. Watson*, (1875) 23 W. R., 229; *Dhondi Jagannath v. Collector of Salt Bevenue*, (1883) 9 Bom., 28.

² *Thakoor Das v. Gopeo Kisto*, (1871) 15 W. R., 18.

³ *Kamat v. Kamat*, (1884) 8 Bom., 369.

⁴ *Hoolis Koorree v. Saleehun*, (1867) 8 W. R., 379.

⁵ *Kalyan Singh v. Bahmu*, (1901) 23 All., 130.

⁶ *Hills v. Ishore Ghose*, (1862) Marsh. p. 153; *Mirza Hummat Bahadur, in the matter of*, (1861) B. L. R., F. B., 429: not so in Madras—*Makulu Ravallan v. Mastan*, (1862) 1 Mad. H. C., 102.

⁷ *Ganapati v. Sitharama*, (1887) 10 Mad., 292.

⁸ *Narayana v. Krishna*, (1885) 8 Mad., 214; *Rahaji v. Rajivram*, (1886) 1 Bom., 75.

⁹ *Shirodi Sona Buroo v. Gobind Monee*, (1873) 21 W. R., 179.

¹⁰ *Profeshwari Das v. Guroo Churn*, (1885) 11 Cal., 735, and see s. 16, Act VII of 1870.

¹¹ Reference under the Court Fees Act, 25 Mad., 21.

¹² *Rangachariar v. Yegna*, (1890) 13 Mad., 521; *Rughoobun v. Adoo*, (1877) 20 W. R., 291.

¹³ *Sundaram v. Annungar*, (1890) 13 Mad., 402.

¹⁴ *Sulleman v. Jo-mah*, (1890) 14 Bom., 111.

send a copy of its judgment and order to the Court from whose decree the appeal is preferred, with directions to re-admit the suit under its original number in the register of civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand.

Act XIV of 1852, s 562

This rule applies to H. C.

The Court can remand, whether evidence has or has not been excluded,¹ subject to the general rule, that under no circumstances can a case be remanded on account of any error, defect or irregularity in the decision or procedure, unless the error, defect or irregularity affects the merits of the case, or the jurisdiction of the Court—s 99. To justify a remand it must be shown that the lower Court has committed some error in law or that the case comes in some other way within the terms of this rule.² In remanding a case, the issues which the lower Court is required to decide must be specifically stated.³

Remand allowed—It is competent for an appellate Court to remand a case when the Court of first instance records evidence on all the issues and at the final hearing decides the suit erroneously on some particular point without expressing any opinion on the others.⁴ Where a District Munsiff without entering into the merits of a case dismissed a suit on the ground that the plaintiff had no cause of action and on appeal the appellate Court reversed his decree and remanded the case, *held*, that the order of remand was right.⁵

Remand was allowed when the first Court rejected an application to summon witnesses by a party who had not closed his case and who could produce them in time,⁶ or when the oral evidence taken fell short of the requirements of s 63 of the Evidence Act, because the witnesses were not properly questioned,⁷ or where no issues,⁸ or no material issues were framed;⁹ or, when framed, were not decided, unless the absence of such decision is due to the failure of the parties to give evidence upon the issue,¹⁰ or when the lower Court had decided the suit on a point which did not properly arise,¹¹ or had come to no decision on a point raised by the plaintiff, even though very trifling,¹² or when the finding was based on irrelevant matters;¹³ or on the deposition of a person appointed by agreement of the parties as referee, not fully covering the questions in issue, under ss 10 and 11 of the Oaths Act (X of 1873);¹⁴ or when the case was decided on a preliminary

¹ *Muhammad v Muhammad*, (1888) 10 All., 299.

² *Hurish Chunder v. Hurish Chunder*, (1876) 25 W. R., 325.

³ *Girish Chunder v. Soshi Shikhariswar*, (1900) 4 Cal. W. N., 631.

⁴ *Bamrichandra v. Kassim*, (1893) 16 Mad., 207. Followed in, *Mata Din v. Jamma Dass*, (1905) 27 All., 69; (1905) A. W. N., 159; see also, *Sheoambar Singh v. Lallu Singh*, (1886) 9 All., 30.

⁵ *Kanakammal v. Rangachariar*, (1897) 20 Mad., 25.

⁶ *Brojo Nath v. Protap Chunder*, (1874) 22 W. R., 296.

⁷ *Lochan Singh v. Het Narain*, (1875) 24 W. R., 232.

⁸ *Jogeshur v. Doolun*, (1870) 2 All. H. C., 183.

⁹ *Sheo Sahoy v. Bechun Singh*, (1874) 22 W. R., 31.

¹⁰ *Ram Prasad v. Abdul Karim*, (1887) 9 All., 513.

¹¹ *Sabir Khan v. Ram Luckhee*, (1869) 10 W. R., 438.

¹² *Mullick Amanut v. Ukloo Passer*, (1876) 25 W. R., 110.

¹³ *Palakdhar v. Manners*, (1896) 23 Cal., 179.

¹⁴ *Mahabir Prasad v. Mahadeo Dat*, (1891) 13 All., 386.

If once the hearing has commenced, the respondent can insist on having his objection heard and determined,¹ if it is brought forward before the respondent has closed his case;² even though it should be ultimately decided that an appeal would not lie.³ An application to file a cross-appeal was rejected, firstly, because a written memorandum of its grounds had not been filed previously; secondly, because the objection, when taken, was not filed on the regulated day;⁴ and thirdly, because the objection, when taken, was not filed on the regulated day.⁵ When no cross-objections have been filed, the appellant must withdraw before the hearing of the appeal has commenced.⁶

Second appeals.—In Bengal this rule applies to special appeals.⁷ An appellant, who files objection in the Court below can appeal from the findings on them.⁸

Court Fees.—A cross-appeal is treated as a separate appeal for the purpose of the Court Fees Act.⁹ It must be accompanied by a proper stamp and the appellant must pay the Court fees on the day of filing the appeal.¹⁰

Form of decree in cross-appeals.—See *Rangachariar v. Yegna*.¹¹

One month from date of service.—An appeal should not be set down for hearing on a date less than one month from the date of service.¹²

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is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the Appellate Court may, if it thinks fit, by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded, and shall

¹ Venkataswami v. Kuppi, (1867) 3 Mad. II C, 302; Poreh Narain v. Watson, (1875) 23 W. R., 222; Bhoudi Jagannath v. Collector of Salt Revenue, (1883) 9 Bom., 28.

² Thakoor Dass v. Gopeo Kristo, (1871) 15 W. R., 18.

³ Kamat v. Kamat, (1881) 8 Bom., 368.

⁴ Hoolis Kooner v. Safoochun, (1867) 8 W. R., 379.

⁵ Kalyan Singh v. Rahmu, (1901) 23 All., 130.

⁶ Hills v. Ishore Ghose (1852) Marsh., p. 153; Mirza Hummat Bahadur, in the matter of, (1861) B. L. R., F. B., 429; and see in Mysore—Miskuda Ravullin v. Mastan, (1862) 1 Mad. II C, 102.

⁷ Ganapati v. Sutharam, (1887) 10 Mad., 292.

⁸ Narayana v. Krishna, (1885) 8 Mad., 214; Babaji v. Rajaram, (1876) 1 Bom., 75.

⁹ Sharda Soodhree v. Gobind Monee, (1873) 21 W. R., 179.

¹⁰ Brishwar Das v. Gurao Churn, (1885) 11 Cal., 735, and see s. 16, Act VII of 1870.

¹¹ Reference under the Court Fees Act, 25 Mad., 21.

¹² Rangachariar v. Yegna, (1891) 13 Mad., 521; Raghobhaya v. Aslo, (1873) 20 W. R., 291.

¹³ Kalyaram v. Annungar, (1890) 13 Mad., 492.

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send a copy of its judgment and order to the Court from whose decree the appeal is preferred, with directions to re-admit the suit under its original number in the register of civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand.

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Remand allowed—It is competent for an appellate Court to remand a case when the Court of first instance records evidence on all the issues and at the final hearing decides the suit erroneously on some particular point without expressing any opinion on the others.⁴ Where a District Munsiff without entering into the merits of a case dismissed a suit on the ground that the plaintiff had no cause of action and on appeal the appellate Court reversed his decree and remanded the case, *held*, that the order of remand was right.⁵

Remand was allowed when the first Court rejected an application to summon witnesses by a party who had not closed his case and who could produce them in time,⁶ or when the oral evidence taken fell short of the requirements of s 63 of the Evidence Act, because the witnesses were not properly questioned,⁷ or where no issues,⁸ or no material issues were framed,⁹ or, when framed, were not decided, unless the absence of such decision is due to the failure of the parties to give evidence upon the issue,¹⁰ or when the lower Court had decided the suit on a point which did not properly arise,¹¹ or had come to no decision on a point raised by the plaintiff, even though very trifling,¹² or when the finding was based on irrelevant matters,¹³ or on the deposition of a person appointed by agreement of the parties as referee, not fully covering the questions in issue, under ss 10 and 11 of the Oaths Act (X of 1873),¹⁴ or when the case was decided on a preliminary

¹ *Muhammad v Muhammad*, (1883) 10 All., 239

² *Hurish Chunder v Hurish Chunder*, (1876) 25 W. R., 325

³ *Girish Chunder v Soshi Shikhariswar*, (1900) 4 Calo W. N., 631

⁴ *Ramachandra v Kassim*, (1893) 16 Mad., 207. Followed in, *Mata Din v Jamna Das*, (1905) 27 All., 69; (1905) A. W. N., 159, see also, *Sheoambar Singh v. Lallu Singh*, (1886) 9 All., 30

⁵ *Kanakammal v Rangaabaiar*, (1897) 20 Mad., 25.

⁶ *Brojo Nath v. Protap Chunder*, (1874) 22 W. R., 296

⁷ *Lochun Singh v. Het Narain*, (1875) 24 W. R., 232

⁸ *Jogeshur v. Doolun*, (1870) 2 All. H. C., 183

⁹ *Sheo Sahoy v. Bechun Singh*, (1874) 22 W. R., 31

¹⁰ *Ram Prasad v. Abdul Karim*, (1897) 9 All., 513

¹¹ *Sabir Khan v. Ram Luckhen*, (1868) 10 W. R., 438.

¹² *Mullick Amanut v. Ukloo Passer*, (1876) 25 W. R., 110

¹³ *Palakdhar v. Manners*, (1896) 23 Calo., 179

¹⁴ *Mahabir Prasad v. Mahadeo Dat*, (1891) 13 All., 386.

If once the hearing has commenced, the respondent can insist on having his objection heard and determined,¹ if it is brought forward before the respondent has closed his case,² even though it should be ultimately decided that an appeal would not lie.³ An application to file a cross appeal was rejected, firstly, because a written memorandum of its grounds had not been filed previously; secondly, because the objection, when taken, was not filed on the regulated stamp; and lastly, because the ground urged had not been advanced as an objection in a regular appeal previously filed.⁴ When no cross-objections have been filed, an appellant can withdraw his appeal any time before judgment. When cross-objections have been filed, the appellant must withdraw before the hearing of the appeal has commenced.⁵

Second appeals.—In Bengal this rule applies to special appeals.⁶ An appellant, who files objection in the Court below can appeal from the findings on them.⁷

Court Fees.—A cross-appeal raising an objection cannot be in *formal propriis*,⁸ it must be in the form of a memorandum of appeal, should bear the proper stamp and cannot be heard until the stamp shall have been paid;⁹ nor can the Court remit the stamp-duty.¹⁰ Stamp duty need not be paid till the time of hearing.¹¹

Form of decree in cross-appeals.—See *Rangachariar v. Yegna*.¹²

One month from date of service.—An appeal should not be set down for hearing on a date less than one month from the date of service.¹³

Extension of time.—Where the respondent in order to save costs delayed instructing counsel within the prescribed period to draw up objections to the decree until they had received the paper-books, the Court declined to extend the time.¹⁴

23 Where the Court from whose decree an appeal

Remand of case by is preferred has disposed of the suit upon Appellate Court. a preliminary point and the decree is reversed in appeal, the Appellate Court may, if it thinks fit, by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded, and shall

¹ Venkataswamy v. Kuppi, (1867) 3 Mad. H. C., 302; Poreah Narain v. Watson, (1875) 21 W. R., 229; Dinoh Jiginath v. Collector of Salt Revenue, (1885) 9 Bom., 28.

² Thakoor Das v. Gupee Kristo, (1871) 15 W. R., 18.

³ Kamat v. Kamat, (1881) 8 Bom., 368.

⁴ Hooley Kowree v. Saferhan, (1867) 8 W. R., 370.

⁵ Kalyan Singh v. Bahmu, (1901) 27 All., 130.

⁶ Hills v. Ishore Ghose (1852) Marsh., p. 133; Mirza Himmatt Bahadur, in the matter of, (1854) B. L. R., F. B., 429; not so in Madras—Makuda Ravulan v. Martin, (1862) 1 Mad. H. C., 102.

⁷ Ganapati v. Satharam, (1887) 10 Mad., 292.

⁸ Narayan v. Krishna, (1885) 8 Mad., 211; Ashaji v. Rajaram, (1876) 1 Bom., 75.

⁹ Sharda Sankar v. Gobind Monee, (1873) 21 W. R., 170.

¹⁰ Brajeshwar Das v. Guroo Churn, (1885) 11 Cal., 735, and see s. 16, Act VII of 1870.

¹¹ Reference under the Court Fees Act, 25 Mad., 21.

¹² Rangachariar v. Yegna, (1899) 13 Mal., 521; Raghubair v. Ashoo, (1873) 20 W. R., 294.

¹³ Kishoram v. Annungar, (1899) 13 Mal., 492.

¹⁴ K. Ram v. Jeebh, (1899) 14 Bom., 111.

send a copy of its judgment and order to the Court from whose decree the appeal is preferred, with directions to re-admit the suit under its original number in the register of civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand.

Act XIV of 1882, s. 562

This rule applies to II C.

The Court can remand, whether evidence has or has not been excluded;¹ subject to the general rule, that under no circumstances can a case be remanded on account of any error, defect or irregularity in the decision or procedure, unless the error, defect or irregularity affects the merits of the case, or the jurisdiction of the Court—s. 99. To justify a remand it must be shown that the lower Court has committed some error in law or that the case comes in some other way within the terms of this rule.² In remanding a case, the issues which the lower Court is required to decide must be specifically stated.³

Remand allowed—It is competent for an appellate Court to remand a case when the Court of first instance records evidence on all the issues and at the final hearing decides the suit erroneously on some particular point without expressing any opinion on the others.⁴ Where a District Munsiff without entering into the merits of a case dismissed a suit on the ground that the plaintiff had no cause of action and on appeal the appellate Court reversed his decree and remanded the case, *heli*, that the order of remand was right.⁵

Remand was allowed when the first Court rejected an application to summon witnesses by a party who had not closed his case and who could produce them in time,⁶ or when the oral evidence taken fell short of the requirements of s. 63 of the Evidence Act, because the witnesses were not properly questioned,⁷ or where no issues,⁸ or no material issues were framed;⁹ or, when framed, were not decided, unless the absence of such decision is due to the failure of the parties to give evidence upon the issue,¹⁰ or when the lower Court had decided the suit on a point which did not properly arise,¹¹ or had come to no decision on a point raised by the plaintiff, even though very trifling;¹² or when the finding was based on irrelevant matters,¹³ or on the deposition of a person appointed by agreement of the parties as referee, not fully covering the questions in issue, under ss. 10 and 11 of the Oaths Act (X of 1873),¹⁴ or when the case was decided on a preliminary

¹ *Muhammad v. Muhammad*, (1888) 10 All., 289.

² *Hurish Chunder v. Hurish Chunder*, (1876) 25 W. R., 325.

³ *Girish Chunder v. Soshi Shikhataswar*, (1900) 4 Cal. W. N., 631.

⁴ *Ramachandra v. Karam*, (1893) 16 Mad., 207. Followed in *Mata Din v. Jamna Dass*, (1903) 27 All., 69; (1905) A. W. N., 159; see also, *Sheoambar Singh v. Lallu Singh*, (1886) 9 All., 30.

⁵ *Kanakammal v. Rangachariar*, (1897) 20 Mad., 25.

⁶ *Brojo Nath v. Protap Chunder*, (1874) 22 W. R., 296.

⁷ *Lochun Singh v. Het Narain*, (1875) 24 W. R., 232.

⁸ *Jogeshur v. Doolen*, (1870) 2 All. H. C., 183.

⁹ *Sheo Sahoy v. Bechun Singh*, (1874) 22 W. R., 31.

¹⁰ *Ram Prasad v. Abdul Karim*, (1887) 9 All., 513.

¹¹ *Sabir Khan v. Ram Luckhee*, (1868) 10 W. R., 439.

¹² *Mullick Amanut v. Ukloo Passer*, (1876) 25 W. R., 140.

¹³ *Palakdhari v. Manners*, (1896) 23 Cal., 179.

¹⁴ *Mahabir Prasad v. Mahadeo Dat*, (1891) 13 All., 396.

issue in such a way as to cause an absence of material evidence bearing upon the issue on the merits.¹

On a date to which the hearing had been adjourned, the plaintiff failed to appear and the suit was dismissed for default *held*, that the appellate Court was right in remanding the suit to be disposed of under O.XVII, r. 3.²

On an appeal being called on for hearing in a District Court, the appellant's pleader asked for an adjournment which was refused and the appeal was dismissed. The High Court remanded the case on the ground that though it was open to the District Judge to refuse the adjournment, he was bound to write a judgment and dispose of the appeal. He could not dismiss it for default.³ When in a summary suit under the Madras Rent Recovery Act (VIII of 1865), the Sub-Collector holding a *patish* to be improper, released certain property from attachment, the District Judge was held to be right in reversing the finding and remanding the case for disposal according to law.⁴

In an appeal from an order refusing to set aside an order under O.IX, r. 13

Remand not allowed.—No remand should be allowed if the decision of the first Court has been upheld in great part;⁵ or is such that the lower Court cannot properly come to a different decision than that to which it has already come;⁶ though there may be occasional obscurity in its judgment;⁷ since it

¹ *Soolhi Narain v. Narsingh Narain*, (1873) 20 W. R., 148; *Jong Maya v. Ram Chunder*, (1864) 10 W. R., 378.

² *Badam v. Nathu Singh*, (1907) 25 All., 191.

³ *Patilbare v. Vellur Krishnan*, (1903) 26 Mad., 267.

⁴ *Veeratwamy v. Manager, Pattapur Estate*, (1907) 26 Mad., 518.

⁵ *Radhya Kichen v. Collector of Jaunpore*, (1900) 5 Cal. W. N., 153; 23 All., 230; L. R., 29 L. A., 28.

⁶ *Perumbra Nayar v. Subrahmanian Pattar*, (1900) 23 Mad., 415; followed in *Sadhu v. Kuppam*, (1907) 29 Mad., 51. But see, *Seshan Pattar v. Seshan Pattar*, (1900) 23 Mad., 417.

⁷ *Madhub Chunder v. Ram Dyal*, (1867) 8 W. R., 303.

⁸ *Bonomalee v. Shoromp*, (1870) 14 W. R., 60.

⁹ *Deoyo Nath v. Soorja Kant*, (1876) 25 W. R., 276.

¹⁰ *Ketali Kichen v. Ambala*, (1867) 7 W. R., 326.

¹¹ *Banwari v. Samman*, (1889) 11 All., 489; followed in *Mohesh Prasad v. Ranjor Singh*, (1906) 27 All., 167; *Langammal v. Chenna*, (1883) 6 Mad., 239; *Kanchan Mohi v. Raj Nath*, (1892) 19 Cal., 333; *Majurajba v. Magaulal*, (1893) 19 Bom., 303.

¹² *Haider*, (1885) 7 All.,

¹³ 281.

¹⁴ *Anji*, (1890) 14 Bom., 6; and see *Rakhit v.*

¹⁵ *Mani v. Manooar*, 1 W. R., 32; but

¹⁶ *Mani v. Manooar*, 1 W. R., 32; but

¹⁷ *Mani v. Manooar*, 1 W. R., 32; but

¹⁸ *Mani v. Manooar*, 1 W. R., 32; but

¹⁹ *Mani v. Manooar*, 1 W. R., 32; but

²⁰ *Mani v. Manooar*, 1 W. R., 32; but

procedure has been approved of by the Privy Council.¹ A remand should not be granted even to take additional evidence,² on the ground that the Judge below failed to try one of the issues,³ or to take evidence and admit documents improperly rejected,⁴ or to re-settle issues, the issues being wrong;⁵ or to amend the plaint.⁶ Nor can a case be remanded because the evidence has been imperfectly recorded,⁷ nor to enable the plaintiff to make up the deficit stamp duty on a plaint in a suit for pre-emption,⁸ nor for defect of parties;⁹ nor because an intervenor has been refused permission to come in as a party;¹⁰ nor because several distinct cases have been tried together;¹¹ nor for erroneous valuation, but if the valuation affected jurisdiction, the suit should be dismissed.¹² Much less should a case be remanded when the applicant asserts that he has proved his case;¹³ or there has been a local investigation;¹⁴ or when the evidence has been recorded, and the case should have been dealt with under r. 23, *infra*.¹⁵ An appellate Court has no authority to remand a case, when it has before it all the evidence which the parties wish to adduce.¹⁶ In some cases remands have been allowed on the ground of surprise;¹⁷ or that the Court mistook the nature of the case,¹⁸ or to try an issue not properly tried.¹⁹ A District Judge set aside an *ex parte* decree and remanded the suit on the ground that an adjournment should have been granted. The High Court set aside the decree, holding that the case had not been tried on its merits, but that under this provision, but in a District Judge reversed a revised finding on the merits, *held*, that the procedure was *ultra vires* and illegal, and that the provisions of s. 99 were inapplicable.²¹ In a suit by mortgagees to redeem a prior mortgage, issues were framed and tried as to whether the plaintiff's

¹ Tarakant Banerjee v. Puddomoney Dossee, (1866) 5 W. R., P. C., 63.

² Mohesh Chunder v. Madhub Chunder, (1870) 13 W. R., 85.

³ Fuzzeelun v. Omdah, (1863) 10 W. R., 469.

⁴ Jadunath Mookerjee, v. Hari Pada Mookerjee, (1896) 1 Cal. W. N., lxxx.

⁵ Futehoolah v. Omdanissa, (1870) 14 W. R., 69; otherwise, Muhammad v. Muhammad, (1893) 10 All., 289.

⁶ Farzand Ali v. Yusuf Ali, (1830) 2 All., 669; not followed—Lingammal v. Chinna, (1890) 6 Mad., 239. But see, Majraja v. Maganlal, (1895) 19 Bom., 303.

⁷ Mohesh Chunder v. Madhub Chunder, (1870) 13 W. R., 83.

⁸ Mewa Lal v. Beharee, (1870) 14 W. R., 193.

⁹ Gonesh v. Bhikaji, (1896) 10 Bom., 393; Bhoobun Dass v. Bilsamony, (1878) 1 C. L. R., 415; but see, *contra*, Mihin Lal v. Imtiaz Ali, (1896) 18 All., 332.

¹⁰ Khondkar Kefaetoolah v. Mahomed Kabel, (1863) 9 W. R., 345.

¹¹ Snadden v. Todd, Finlay & Co., (1867) 7 W. R., 313.

¹² Angopur & Chowdhri v. Meah Bibee, (1868) 10 W. R., 207.

¹³ Gopal Chunder v. Juggodumba, (1868) 10 W. R., 411; Mahomed Ashan v. Mahomed Yasun, (1864) 9 W. R., 100.

¹⁴ Jeebun Kissen Roy v. Dwarkanath, W. R., 1861, 363.

¹⁵ Chunnilal v. Mohiji Singh, (1896) 1 Cal. W. N., 340; but see, Narain Pal v. Kali Kishore Biswas, (1896) 1 Cal. W. N., xix.

¹⁶ Ramjoy v. Nundomoyee, (1863) 10 W. R., 374.

¹⁷ Shib Pershad v. Nubo Kishen, (1872) 17 W. R., 416.

¹⁸ Juggur Nath v. Chuttur Narain, (1872) 17 W. R., 410.

¹⁹ Ram Chand v. Kameessoo Debee, (1863) 10 W. R., 236; Muhammad v. Muhammad, (1893) 10 All., 239; but see, Umbika Churn v. Ramdhan, (1869) 11 W. R., 35.

²⁰ Parvati Shankar v. Bai Naval, (1883) 17 Bom., 733.

²¹ Mallikarjuna v. Pathaneni, (1896) 19 Mad., 479.

issue in such a way as to cause an absence of material evidence bearing upon the issue on the merits.¹

On a date to which the hearing had been adjourned, the plaintiff failed to appear and the suit was dismissed for default *held*, that the appellate Court was right in remanding the suit to be disposed of under O.XVII, r. 3.²

On an appeal being called on for leave to appeal to the District Court, the appellant's pleader asked for an adjournment. The High Court refused to open to the District Judge judgment and dispose of the appeal. He could not dismiss it for default.³ When in a summary suit under the Madras Rent Recovery Act (VIII of 1865), the Sub-Collector holding a *pattah* to be improper, released certain property from attachment, the District Judge was held to be right in reversing the finding and remanding the case for disposal according to law.⁴

In an appeal from an order refusing to set aside an order under O IX, r. 13 O IX, r. 13, and not Court held that not-power not only to reverse a decree passed on evidence given by the plaintiff only, the defendant being *ex parte*, but also to direct a retrial of the case.⁵

Remand not allowed—No remand should be allowed if the decision of the first Court has been upheld in great part;⁷ or is such that the lower Court cannot properly come to a different decision than that to which it has already come,⁸ though there may be occasional obscurity in its judgment,⁹ since it

grant a remand, although the lower Court may have confined its decision to limitation,¹⁰ or to one or two issues without finding on the rest;¹¹ and this

¹ Soobh Narain v. Nursingh Narain, (1873) 20 W. R., 148; Joog Maya v. Ram Chunder, (1868) 10 W. R., 378.

² Badam v. Nathu Singh, (1903) 25 All., 104.

³ Patinhare v. Vellur Krishnan, (1904) 26 Mad., 267.

⁴ Veeraswamy v. Manager, Pittapur Estate, (1903) 26 Mad., 518.

⁵ Radha Kishen v. Collector of Jaunpore, (1900) 5 Calc. W. N., 153; 23 All., 220, L. R., 28 L. A., 23.

⁶ Perumbra Nayar v. Subrahmanian Pattar, (1900) 23 Mad., 445; followed in Sadhu v. Kuppan, (1907) 30 Mad., 51. But see, Seshan Pattar v. Seshan Pattar, (1900) 23 Mad., 447.

⁷ Madhub Chunder v. Ram Dyal, (1867) 8 W. R., 303.

⁸ Bonomalee v. Shorooop, (1870) 14 W. R., 60.

⁹ Erojo Nath v. Soorja Kant, (1876) 25 W. R., 276.

¹⁰ Kebul Kishen v. Ambala, (1867) 7 W. R., 326.

¹¹ Banwari v. Samman, (1889) 11 All., 488; followed in Mohesh Prasad v. Ranjor Singh, (1903) 27 All., 163; Lingammal v. Chinna, (1883) 6 Mad., 239; Kanachan Modi v. Baij Nath, (1892) 19 Calc., 333; Majirajba v. Maganlal, (1895) 19 Bom., 303.

¹² Haidar, (1885) 7 All.,

¹³ , 284.

¹⁴ anji, (1890) 14 Bom.,

¹⁵ 12 C. L. R., 136; and see Rakhit v.

¹⁶ n Ali v. Manoowar,

¹⁷ 1 W. R., 32; but

¹⁸ 1 Calc., 164; Banwari v. Samman, (1889) 11 All., 488; Amma v. Kun-

huni, (1886) 9 Mad., 355.

then it will be set aside, provided it has prejudiced the merits of the case or the jurisdiction of the Court,¹ but not otherwise.² On an appeal from an order of remand the High Court is bound to accept the findings of fact of the Court which made the remand, provided there is evidence to support them; but where the High Court has decided a question of law in an appeal from an order under this rule that decision will be final in the suit and in any appeal that may subsequently be made.³ An order of remand is not a final order, but when a decree decides a cardinal point in issue, e.g., the validity of a will, it is final notwithstanding that it remands the case for the decision of subordinate points.⁴

An appeal against an order of remand does not abate because the order has been carried out.⁵

New evidence.—When a case is remanded, no express order is necessary to take evidence.⁶ Where the order is general, and for a new trial it opens up the whole case,⁷ and evidence may be received from defendants who did not appear at the former trial,⁸ save so far as the case has been decided by the appellate Court.⁹ The plaintiffs in the Court of first instance produced both documentary and oral evidence in support of their claim. The Court being satisfied with the documentary evidence declined to record the evidence of the witnesses tendered by the plaintiffs. The defendants appealed, and the lower appellate Court reversed the decree of the Court of first instance, but in its turn declined to allow the plaintiffs' arguments to produce fresh evidence before it. On appeal by the plaintiffs to the High Court, the proceedings of both Courts were set aside and the case remanded to the Court of first instance to re-try the case after admitting all admissible evidence.¹⁰ Where a case was remanded for trial on the merits, it was held that the lower Court had jurisdiction to decide on the plea of limitation,¹¹ though ordinary remand to try on the merit excludes all questions of limitation and *res judicata*,¹² and jurisdiction,¹³ and binds the parties to the issues laid down,¹⁴ and unless an application for review be made, an order for remand made on special appeal is conclusive determination of the point of law involved, and the correctness of law so laid down cannot be questioned on a second appeal.¹⁵

¹ *Nawaz v. Mulla* (1893) 2 W. R., 181; *Nasiruddin Hossein v. Lal Mahomed*, (1870) 13 W. R., 234.

² *Ganga Monee v. Israr Chunder*, (1872) 17 W. R., 465, and compare *Chunderbhai v. Ramnath*, (1864) 1 W. R., 69.

³ *Govind Shankar v. Karam*, (1893) 15 All., 413.

⁴ *Mahar Hasan v. Bopha Bin*, (1895) 17 All., 112; L. R., 22 I. A., 1.

⁵ *Baba Lal v. Ram Kahi* (1903) A. W. N. 28.

⁶ *Kisto Churn v. Muggan*, (1865) 10 W. R., 491; *Ram Sunkur Sein v. Nilkant Biswas*, (1864) 9 W. R., 392. See also, *Kamalakshi v. Ramasami*, (1896) 19 Mad., 127.

⁷ *Tarinee Kant v. Koonj Beharee*, (1859) 12 W. R., 112; *Gadhadr Dutt v. Shushree Munee*, (1874) 21 W. R., 7.

⁸ *Koonj Beharee v. Tarinee Kant*, (1867) 8 W. R., 285.

⁹ *Judobhaujee Kooer v. Asman*, (1870) 14 W. R., 370; and the decision was necessary to support the remand—*Dookishen v. Bansi*, (1886) 8 All., 172; but see, *Girdhari Lal v. Crawford*, (1887) 9 All., 147.

¹⁰ *Durga Dhill v. Anoraji*, (1895) 17 All., 29; *Ganga Prasad v. Lal Bahadur*, (1895) 17 All., 117.

¹¹ *Taj Kishen Roy v. Shub Chunder*, (1855) 3 W. R., Act X., 158.

¹² *Shen Sahoy v. Ram Pershad*, (1875) 21 W. R., 333; *Sahib Tewarie v. Kishore Sahoy*, *id.*, 339; *Moru v. Gopal*, (1878) 2 Bom., 129; *Dattu v. Kasai*, (1881) 8 Bom., 535.

¹³ *Temulji Rustamji v. Fardunji*, (1867) 5 Bom. H. C., 138.

¹⁴ *Gungiram Dutt v. Choudhry Jasmajoy*, (1877) 1 C. L. R., 144; *Suraj Dutt v. Chatter*, (1891) 3 All., 755.

¹⁵ *Ramkrishna v. Damodhar*, (1890) 6 Bom. H. C., 146; See, however, *Muhammad Zahur v. Cheda Lal*, (1892) 14 All., 141.

A party cannot change the nature of his case after remand.¹

When a case is remanded by one Judge, and subsequently comes before another of equal jurisdiction,² or the Judge's successor,³ the latter officer cannot set aside the order of remand. So, where a Judge remanded a case to be tried on a certain issue, and directed the Munsiff to give plaintiff a decree according to the al before ; whether

Appeal—An appeal lies from an order of remand,—O. XLIII, r. 1 (u).⁴ and this right is not restricted by s. 102.⁵ In such an appeal the High Court may enter into the merits of the case and if it finds the order defective may still allow the party who won in the first Court to retain the benefit of his decree.⁷ An appeal does not lie against an order of remand which is itself an appeal from an order allowed by s. 102.⁸ It is competent to a High Court in an appeal from an order of remand to pass a decree dismissing the appeal preferred to the lower Court from the date of the order of remand.⁹ Act XII of 1881 makes this rule a District Judge, and when in of remand an appeal will lie from ¹⁰ Where the Deputy Commi- ed by limitation, but at the same time also came to a definite decision on each of the other issues, and the Commissioner in appeal setting aside the finding as to limitation, remanded the case under this provision, *held*, that, under Government Notification No. ⁶²⁹ VI—5693, order of remand,¹¹ and a case under ng the finding of the

Sub-Collector.

Objection to the order of remand being a District Judge's order, of sub- and in-

¹ Radha Kishore v Mahtab Chund, (1865) 3 W. R., 185; Norendro Coomars Dutt v. French, (1865) 3 W. R., 193.

² Brojo Soondar v. Juggat Chunder, (1874) 21 W. R., 199; Kharag Prasad v. Durdhar, (1892) 14 All., 348.

³ Laleet Pandey v. Byjnath Singh, (1870) 14 W. R., 285.

⁴ Bodun Eurooah v. Abdul Gunny, (1873) 19 W. R., 281. See also, Saraj Din v. Chatter, 3 All., 755.

⁵ Ram Prasad v. Sachi Dass, (1902) 6 Calc. W. N., 536.

⁶ Mahadev Narsingh v. Ragho Keshav, (1893) 7 Bom., 292; Gulam Husen v. Musa Miya, (1884) 8 Bom., 260; Kirto Mahaldar v. Ramjan, (1884) 10 Calc., 523; Collector of Bijoor v. Jafar Ali, (1890) 3 All., 18; Narain Pal v. Kali Kishore Biswas, (1896) 1 Calc. W. N., xxix.

⁷ Lohi Mahto v. Aghore, (1890) 5 Calc., 144; Abraham v. Abraham, (1890) 17 Calc., 169; Badam v. Imrat, (1891) 3 All., 675; Bhau Bala v. Bapaji, (1890) 14 Bom., 14; see O. XLIII, it cannot do so—Sohan Lal v. Aziz-un-nissa, (1885) 7 All., 136; Noumoffah v. Grish Naram, (1892) 8 Calc., 674; it can—Deekishen v. Banai, (1886) 8 All., 172.

⁸ Mathura Nath v. Nobin Chandra, (1897) 1 Calc. W. N., 674; 24 Calc., 774; Kishna Ram v. Narsingh Sevak, (1891) 3 All., 853; Jhanday Lal v. Sarman Lal, (1899) 21 All., 221; Chinnasami v. Karupa, (1898) 21 Mad., 234, but see, Bindeshri v. Nandla, (1890) 3 All., 456.

⁹ Hasan Ali v. Siraj Husain, (1891) 16 All., 232.

¹⁰ Partap Singh v. Narain Das, (1894) 16 All., 375.

¹¹ Hafiz Abdul Rahim v. Hari Raj, (1900) 22 All., 405.

¹² Veeraswamy v. Manager, Pittapur Estate, (1903) 26 Mad., 518.

able, (2) that no appeal lay to the Subordinate Judge.¹ An order under this rule is not ordinarily capable of being the subject of an appeal to the Privy Council, though it may possibly be so, if it has the effect of deciding finally the cardinal point in the suit.² When an appellate Court directs a Court of first instance to do what could be directed only under this rule but the decree of the first Court is not set aside, the order is appealable.³

Effect of order being set aside—Where an order of remand is set aside in second appeal, as not warranted by this rule, the High Court cannot decide any of the questions of fact raised in the suit.⁴ When an order of remand is set aside proceedings subsequent to the order fall with it.⁵

Practice after remand—When a case is remanded, the lower Court should fix a reasonable date for the parties to appear and carry on the suit,⁶ and if they do not appear, the case should be dismissed.⁷ No fresh vakalatnama is necessary.⁸ Costs of the appellate Court can be recovered only when the order of remand provides for them.⁹

When a case is remanded to a District Judge, he should not transfer it to another officer.¹⁰ Where a case was remanded for reconsideration of the whole evidence with the exception of one specified point, and the Judge after consideration of the whole evidence found the original finding erroneous, it was held that the District Judge had no jurisdiction to transfer the case to another officer.

If a party, who is offered a remand, elects to go on with the case as it stands, he is stopped from impugning the decision on that point.¹³ Where a case came on before a Court on remand, and the Judge observed that the evidence of witnesses would be unnecessary, the plaintiffs were held justified in not applying to summon any.¹⁴

If on the return of the case, it appears that the remand order has not been carried out, the Court, in remanding it a second time, should point out the manner in which the carrying out of the previous order seemed defective.¹⁸

A review was granted for the purpose of seeing whether a chitta should be admitted and the case remanded for re-hearing *held*, it was too late to object to the admission of the chitta in special appeal from the whole decree.¹⁸

¹ *Krishnan Chetti v. Muthu Palandi*, (1879) 22 Mad., 172.

* *Halab unniisa v. Munawar-unniisa*, (1903) 25 All., 692.

² Ramasaran Lal v. Nem Narain Singh, (1991) 6 Cal. W. N., 326.

* *Deokishen v. Bansi*, (1896) 8 All., 172.

* *Jatinga Valley Co. v. Chera Co.*, (1881) 12 Cal., 45, dist., *Madhu v. Kamini*, (1905) 32 Cal., 1023; 9 Cal. W. N., 895.

* Haradhun Chuckerbutty v. Protap Naram, (1870) 14 W. R., 401; Watson & Co. v. Kunhve Bahadoor, (1863) 9 W. R., 294.

* *Kalce Mohun Dass, re. (1872)* 17 W. R., 70.

* *Nobin Monee v. Joy Gopal*, (1861) 1 W. R., 276.

* Digamber Chatterjee v. Ram Roodra, (1870) 13 W. R., 39

¹⁰ *Hamedoolah v. Muteesoonessy*, (1871) 15 W. R., 574; *Sitaram v Nanni Dulaiya*, (1899) 21 All. 230

¹⁴ *Huree Nath v. Issur Chunder*, (1875) 21 W. R., 316.

¹² *Bhyrub Sheet v. Khettur Mohun*, (1866) 5 W. R., 124; *Bhoyro Lal v. Mokoond*, (1865) 2 W. R., 275; *Manek Sett v. Khettur Mohun*, (1866) 1 Ind. Jur., N. S., 101; but see, *Babaji v. Kasim Elahi*, (1865) 3 Bom. H. C., A. C., 80.

¹ Nobbo Lall Khan v. Odheerance Neramee, (1865) 3 W. R., 5.

¹⁴ *Ram Jowun v. Radha Pershad*, (1871) 16 W. R., 102.

²⁶ Radhaballab v. Anundmoyee, W. R., *Mis.*, 1864, p. 39.

¹⁰ *Makhun Kooer v. Tincowree Dutt*, (1870) 14 W. R., 22.

N. W. P. Rent Act.—See *Girwar Singh v. Sita Ram*,¹

24 Where the evidence upon the record is sufficient to enable the Appellate Court to pronounce judgment, the Appellate Court may, after resettling the issues, if necessary, finally determine the suit, notwithstanding that the judgment of the Court from whose decree the appeal is preferred has proceeded wholly upon some ground other than that on which the Appellate Court proceeds.

Where evidence on record sufficient, Appellate Court may determine case finally.

Act XIV of 1882, s. 565

This rule applies to H. C.

If the evidence on the record is sufficient, the Court should decide the case; if insufficient, then the Court should proceed under the next rule.²

Determine the suit—This does not enable the Court of appeal to determine a question of fact on the evidence on the record, unless the case which it is Court. Thus, where A sued for a dismissed, he got a declaration as was set aside by the Privy Council.³ by the issues and there is evidence to decide them, there cannot be a remand.⁴

Second appeal.—This does not empower the High Court on second appeal to try a question of fact,⁵ though it may interfere with the decision of the lower appellate Court, even though it is a question of fact, if it is found that certain material facts have been omitted to be considered by it,⁶ and in *Pryag Lal v. Jai Narayan*,⁷ it has been held that the entire case including the order of remand is open to consideration. The High Court cannot remand a case and direct the lower appellate Court to submit a revised finding on the facts.⁸

25. Where the Court from whose decree the appeal is preferred has omitted to frame or try any issue, or to determine any question of fact, which appears to the Appellate Court essential to the right decision of the suit upon the merits, the Appellate Court may, if necessary, frame issues, and refer the same for trial to the Court from whose decree the appeal is preferred, and in such case shall direct such Court to take the additional evidence required;

Where Appellate Court may frame issues and refer them for trial to Court whose decree appealed from.

¹ *Girwar Singh v. Sita Ram*, (1889) 11 All., 31.

² *Bandi Subbayya v. Madalaspalli*, (1878) 3 Mad., 96.

³ *Official Trustees v. Krishna Chunder*, (1834) L. R., 12 L. A., 166; 12 Cal., 239.

⁴ *Radha Pershad v. Lal Sahab*, (1839) L. R., 17 L. A., 150, 156; 13 All., 53. See note under r. 25, *infra*.

⁵ *Sheo Rattan v. Lappu Kuar*, (1833) 5 All., 14; *Sohawan v. Babu*, (1887) 9 All., 26, p. 30; *Girdhari Lal v. Crawford*, (1837) 9 All., 147.

⁶ *Denanath v. Hari Dass*, (1893) 11 Cal., 499.

⁷ *Pryag Lal v. Jai Narayan*, (1893) 22 Cal., 419.

⁸ *Venkata Varatha v. Anantha Chariar*, (1893) 16 Mad., 299.

and such Court shall proceed to try such issues, and shall return the evidence to the Appellate Court together with its finding thereon and the reasons therefor.

Act XIV of 1882, s. 566

This rule applies to H. C.

The expression "determine any question of fact" means in a legal manner.¹

If the first Court has entered on the merits of the case, has fixed the proper issues and taken sufficient evidence (r. 24) or has not fixed the proper issues, but taken sufficient evidence (r. 24) the appellate Court must decide the appeal without further delay.² Two other cases still remain. The lower Court may have omitted to try a certain issue essential to the right decision of the case set up in the first Court,³ or it may not have been guilty of any such omission, but decided the case on insufficient evidence. The latter case falls within r. 27;⁴ the former within the present rule.⁵ And under it the appellate Court may at its discretion and on its own motion,⁶ frame the issues which are essential and send them to the lower Court for trial, but should not remand and direct the lower Court to frame the issues.⁷ This is also the course which should be pursued, if the appellate Court thinks further inquiry necessary, in spite of abundant evidence;⁸ if the first Court has not formally settled issues and has failed to pass a satisfactory judgment on any important point raised before it;⁹ and if by the raising of a new issue one of the parties is taken by surprise,¹⁰ or if the investigation has been wholly irregular and incomplete.¹¹ But it is always dangerous to allow parties to make a new case in the mofussil appellate Courts,¹² and the Court should be cautious in raising an issue unasked;¹³ and should never allow a point not appearing in the plaint or pleading, or raised in any other way in the first Court, to be framed into an issue.¹⁴

¹ Nivath Singh v. Bhikk Singh, (1885) 7 All., 655.

² But see Rama Chandra v. Kassim, (1893) 16 Mad., 207.

³ Official Trustee v. Krishna Chandra, (1884) L. R., 12 I. A., 166; 12 Cal., 239; Mora Joshi v. Ramchandra, (1891) 15 Bom., 24; but see, Chandi Din v. Narain, (1892) 14 All., 366.

⁴ Gooroo Pershad v. Sreenath, (1871) 15 W. R., 314.

⁵ Rupal Singh v. Joy Munzul, (1869) 11 W. R., 106; Tiluck Chunder v. Brojo Soondur, (1875) 21 W. R., 121. See also, Kales Sunkur v. Kisto Doolal, W. R., (1864) 295.

⁶ Chotay Lal v. Chunno Lal, (1878) 3 C. L. R., p. 468.

⁷ Chundernath Surina v. Ramanath, (1864) 1 W. R., 69.

⁸ Ramchunder v. Bhagessur, W. R., (1864) 357; Luchman v. Hursahoy, W. R., W. R., 6 Herrikosima man, (1876) 25 W. R., 35; R., 47; Goluck Chunder

⁹ Greesh Chunder v. Bhuggobutty Deba, (1869) 13 Moo. I. A., 419; Brojo Soondur v. Fatuck Chunder, (1872) 17 W. R., 407; see also, Mitna v. Fuzi Rub, (1869) 13 Moo. I. A., 573.

¹⁰ Ahmedabad Municipality v. Maulal Udenath, (1895) 19 Bom., 212.

¹¹ Umer Ali v. Rumzan Ali, (1875) 23 W. R., 347.

¹² Hurrpurshad v. Sheo Dyal, (1875) L. R., 3 I. A., 279.

¹³ Sreenan Chunder Dey v. Gopal Chuckerbutty, (1866) 11 Moo. I. A., 48; Sreenath Biswas v. Luckhee Naren Aich, (1875) 24 W. R., 268.

¹⁴ Ram Narain Roy v. Nil Monee Adhikaree, (1875) 23 W. R., 169; Pran Kishore Deb v. Mahomed Ameer, (1874) 21 W. R., 338; Ustoorn v. Mohun Lal, (1874) 21 W. R., 333; Brojo Soondur v. Fatuck Chunder, (1872) 17 W. R., 407; Bhikk Singh v. Pakiamar v. Kuti Kunhamed, (1894) 17 Mad., 69. See also the remarks of Lord Westbury in Caton v. Caton, (1867) L. R., 2 H. L., at p. 144. See "DETERMINE THE CASE" r. 24, *supra*.

N. W. P. Rent Act.—See *Girwar Singh v Sita Ram*,¹

24 Where the evidence upon the record is sufficient to enable the Appellate Court to

Where evidence on record sufficient, Appellate Court may determine case finally.

ing that the judgment of the Court from whose decree the appeal is preferred has proceeded wholly upon some ground other than that on which the Appellate Court proceeds.

Act XIV of 1882, s. 565

This rule applies to H. C.

If the evidence on the record is sufficient, the Court should decide the case; if insufficient, then the Court should proceed under the next rule.²

Determine the suit.—This does not enable the Court of appeal to determine a question of fact on the evidence on the record, unless the case which it is
 A sued for a
 declaration as
 Privy Council³
 there is evidence

to decide them, there cannot be a remand.⁴

Second appeal.—This does not empower the High Court on second appeal to try a question of fact,⁵ though it may interfere with the decision of the lower appellate Court, even though it is a question of fact, if it is found that certain material facts have been omitted to be considered by it,⁶ and in *Pryag Lal v. Jai Narayan*,⁷ it has been held that the entire case including the order of remand is open to consideration. The High Court cannot remand a case and direct the lower appellate Court to submit a revised finding on the facts.⁸

25. Where the Court from whose decree the appeal

Where Appellate Court may frame issues and refer them for trial to Court whose decree appealed from.

is preferred has omitted to frame or try any issue, or to determine any question of fact, which appears to the Appellate Court essential to the right decision of the suit upon the merits, the Appellate Court may, if necessary, frame issues, and refer the same for trial to the Court from whose decree the appeal is preferred, and in such case shall direct such Court to take the additional evidence required;

¹ *Girwar Singh v. Sita Ram*, (1839) 11 All., 31.

² *Bandi Subbayya v. Madalapalli*, (1878) 3 Mad., 96.

³ *Official Trustee v. Krishna Chunder*, (1884) L. R., 12 L. A., 166; 12 Cal., 239.

⁴ *Radha Pershad v. Lal Sahib*, (1839) L. R., 17 L. A., 150, 150; 13 All., 53. See note under r. 25, *infra*.

⁵ *Sheo Rattan v. Lappu Kuar*, (1833) 5 All., 14; *Sohawan v. Babu*, (1887) 9 All., 23, p. 39; *Girdhari Lal v. Crawford*, (1887) 9 All., 147.

⁶ *Denanath v. Hari Dasi*, (1893) 11 Cal., 499.

⁷ *Pryag Lal v. Jai Narayan*, (1893) 22 Cal., 419.

⁸ *Venkata Varatha v. Anantha Chariar*, (1893) 16 Mad., 292.

In a suit for damages for negligence, where the Court may take two or more different views as to the proper measure of damages, the plaintiff must come prepared with evidence as to the proper amount of damages according to the view which the Court adopts; and if he neglects to do so, the appellate Court is not bound to take additional evidence itself, or to send the case back for re-trial.¹

When a Judge proceeds under this rule he should not reverse the decree of the lower Courts and remand the suit.² But he should frame the necessary issues and send them down for trial,³ and keep the suit pending till the return of the first Court's finding on the issues with the record of the trial.⁴ In a suit for money due under a bond, the plaintiff tendered three witnesses in the Court of first instance to prove the execution of the bond. That Court examined only one of such witnesses, and gave the plaintiff a decree. On appeal, the lower appellate Court reversed the decree of the first Court, *held*, that it was competent to the High Court in second appeal to refer an issue as to the execution of the bond to the lower appellate Court.⁵

Effect of order.—The effect of such an order is not re-hearing, and, save as to the issue sent down, the first Court has no power to deal with the case;⁶ such as referring the case to arbitration.⁷ The successor of a Judge, who has fixed an issue and sent it down to be tried, cannot go behind the order.⁸ The object of a remand under this rule is not that the Judge should try the issues on the evidence already taken;⁹ but that the parties should have the fullest opportunity to produce their evidence.¹⁰

A Court to which a case is remanded for re-trial on a particular issue amongst others, cannot allow that issue to be abandoned and proceed to try the case upon the other issues raised.¹¹ Similarly, upon an order of remand from the Privy Council the High Court cannot go behind the order and re-open what had previously been decided,¹² nor can the Court refer the case to an arbitrator,¹³ and when the High Court acts under this rule the issues cannot be sent to the first Court for decision.¹⁴

Issues remitted for trial are triable only by the Court originally seised of the case.¹⁵

Shall return its finding.—Where a Judge has heard the argument on some of the issues and expressed his decision upon them, he is not bound to hear the whole case on the return made to another issue framed under this rule.¹⁶

¹ *Anundo Lall v. Boycaunt Ram*, (1879) 4 C. L. R., 473; 5 Cal., 283.

² *Bancharce Ghose v. Afnooddeen Biswas*, (1875) 24 W. R., 137; but see, *Umbika* val
go

³ *Narasimharay Krishnaray v. Antaji Varupaksh*, (1864) 2 Bom. H. C., 61.

⁴ *Wiso v. Ishan Chunder*, (1870) 14 W. R., 380.

⁵ *Ganga Prasad v. Lal Bahadar*, (1905) 17 All., 117.

⁶ *Dowlat Geer v. Bissessur*, (1874) 22 W. R., 207.

⁷ *Nand Ram v. Fakir Chand*, (1885) 7 All., 523.

⁸ *Wise v. Ishan Chunder*, (1879) 14 W. R., 380; *Kali Kristo Tagore v. Jodoo Lall*, (1875) 24 W. R., 20. See, however, *Lachman v. Jamna*, (1888) 10 All., 162.

⁹ *Abdool Khyrat v. Jumalooddeen*, (1868) 10 W. R., 244.

¹⁰ *Latoo Mundal v. Bhoolun Mohun*, (1872) 17 W. R., 361.

¹¹ *Shib Chand Lahiri v. Joyimala*, (1880) 7 C. L. R., 103.

¹² *Court of Wards v. Leelanund*, (1876) 25 W. R., 157.

¹³ *Nand Ram v. Fakir Chand*, (1886) 7 All., 526.

¹⁴ *Sabri v. Ganeshi*, (1892) 14 All., 23.

¹⁵ *Ali Sher v. Ahmad-Ullah* (1907) A. W. N., 209.

¹⁶ *Lachman v. Jamna*, (1888) 10 All., 162.

Where an appellate Court has made an order of reference under this rule the return to such order must be made to the same Court and such Court is not competent to transfer the appeal for disposal elsewhere.¹ The finding upon issues remanded by the High Court in second appeal cannot be challenged upon the evidence as in first appeals.²

Appeal—There is no appeal from an order referring issues for trial;³ but apparently it would be liable to review.⁴

26 (1) Such evidence and findings shall form part of the record in the suit; and either party may, within a time to be fixed by the Appellate Court present a memorandum of objections to any finding.

Findings and evidence
to be put on record
Objections to finding

(2) After the expiration of the period so fixed for presenting such memorandum the Appellate Court shall proceed to determine the appeal.

Determination of ap-
peal

Act XIV of 1882, s. 567.

This rule applies to H. C.

The appellate Court, on the return of the finding and evidence,⁵ should fix a reasonable time for the parties to file their objections, one day is not sufficient.⁶ After the period has expired, the Court may at its discretion receive or decline to receive any written objection,⁷ but in any case it proceeds to determine the appeal,⁸ and is bound itself to consider the finding of lower Court on the merits; it is not precluded from hearing arguments for and against the finding at the hearing of the appeal,⁹ but if no objection is raised by either party within the period allowed, neither has a right to be heard; though the Court has discretion to allow objections afterwards and if no objection be raised then or at the hearing, the appellate Court is not bound to amend the finding.¹⁰ In case of an unnecessary remand under r. 25, it is competent to the Judge before whom the appeal subsequently comes to disregard the finding or the order of remand.¹¹

Objection: second appeal—Where an issue has been directed to be tried in second appeal and the finding and evidence returned, a second appellant

¹ *Udit Narain v. Jhanda*, (1933) 15 All. 315; *Kumarasami Reddiar v. Subbaraya Reddiar*, (1900) 23 Mad. 314.

² *Bal Kishen v. Jasoda Kuar*, (1885) 7 All. 765. But see, *Akhari Begam v. Wilayat Ali*, (1880) 2 All. 908.

³ *Kali Kinto Pal v. Ram Chunder*, (1881) 9 C. L. R. 461.

⁴ *Matto v. Ilahi Begam*, (1881) 6 All. 65; *Hanthur v. Buddu*, (1882) 13 C. L. R., 254.

⁵ *Shumboo Chunder v. Russick Chunder*, (1871) 15 W. R. 346.

⁶ *Bukhtouree v. Meheen Lall*, (1868) 3 Agra. 96.

⁷ *Damodar Das v. Gokal Chaml*, (1895) 7 All., 79.

⁸ *Chotay Lall v. Chunnoo Lall*, (1878) 3 C. L. R., p. 408; 4 Calc., 744; *Lachman v. Janna*, (1888) 10 All. 162.

⁹ *Umed Ali v. Sahma*, (1881) 6 All., 333; *Woomesh Chunder v. Jonardun Hajrah*, (1871) 15 W. R. 235; *Akhari Begum v. Wilayat Ali*, (1879) 2 All. 908; but see *Ashrafounnissa Begum v. Stewart*, (1868) 9 W. R. 438.

¹¹ *Sham Lal v. ...*

cannot take an objection going to the merits, such as that the finding is contrary to the evidence. The objection must be such as would form a ground of second appeal,¹ and if no objection is taken to the finding on the new issue in the first

27. (1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if—

Production of additional evidence in Appellate Court.

(a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

(b) the Appellate Court requires any document to be produced or any witness to be examined² to enable it to pronounce judgment, or for any other substantial cause,

the Appellate Court may allow such evidence or document to be produced, or witness to be examined.

(2) Wherever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission.

Act XIV of 1882, s. 568.

This rule applies to H. C.

The corresponding section of Act XIV of 1882 was amended by Act XII of 1891, Sched. II.

Additional evidence — See "EFFECT OF ORDER," r. 28 *infra*.

New case — It is always dangerous to allow parties to make a new case and call fresh evidence upon an issue on which they have failed upon the evidence originally adduced in support of it, and more especially so in the Mofussil Courts in India,³ and the power given under this rule should be exercised very sparingly by the Courts, except at the instance of the parties; because, when it is done not at the instance of the parties, but at the suggestion of the Court itself witnesses may be called who are not the witnesses, the parties themselves would have thought

¹ *Cirdhari Lal v. Crawford*, (1887) 9 All., 147; *Gopal Singh v. Jhakri*, (1886) 12 Cal., 37.

² *Hinds v. Ponnath Brayan*, (1884) 7 Mad., 52; and see, *Gopal Singh v. Jhakri*, (1886) 12 Cal., 37; *Cirdhari Lal v. Crawford*, (1887) 9 All., 147.

³ *Muhammad v. Sheo Bishal*, (1883) 10 All., 23.

⁴ In *...*

examined in the second sentences of the first paragraph of the rule insert "or such enquiry to be made." See *...* (XVIII of 1894), as amended and s. 78 of the N. W. F. (VII of 1901) — *Note, Legis*

⁵ *Harpurshad v. Sheo Dyal*, (1875) L. R., 3 I. A., 259, p. 279; *Sangram Singh v. Rajan Bai*, (1896) 12 Cal., 219; L. R., 12 I. A., 183; *Ramdas v. Official Liquidator*, (1887) 9 All., 366.

fit to adduce, and it is possible that the new enquiry may be itself imperfect and not sufficiently extensive to answer the purposes of justice,¹ and in the under noted case,² the Privy Council said that there was great danger in the Court of ultimate appeal lightly introducing evidence which had not been under the consideration of the Courts below and which the parties had had no means of testing. Even on the

speaking, it is only when a Court sees that, from some inadvertence, mistake or surprise, a party has not adduced evidence which he was capable of adducing, and that he is likely to be prejudiced by the omission, that the Court should allow further evidence to be taken,⁴ but an appellant who had ample opportunity of giving evidence in the Court below, and elected not to do so, but to rest his case on the evidence as it stood, ought not to be allowed to give evidence which he could have given below,⁵ either oral or documentary.⁶ It can exercise the power even after the case has been remanded on special appeal.⁷ It is not necessary that the party before applying to the appellate Court under this rule should have sought for a review of the original Court's judgment, and asked it to reverse the evidence.⁸ The test as to whether additional evidence should be admitted under this rule is whether the appellate Court requires the evidence to enable it to pronounce judgment or for any other substantial cause. Of this, the appellate Court is the sole judge.⁹

Documents—An application to admit fresh documents, the genuineness of which can be tested with certainty stands on a much more favourable footing than an application to admit fresh parol evidence after the pinch and pressure of the case has been sustained,¹⁰ but they should not be admitted if the appellant cannot show sufficient cause,¹¹ or if, having had an opportunity of tendering them in the Court below, he omitted to do so,¹² or resisted their production;¹³ or if they do not bear on the issues tried by the Court of first instance; an affidavit explanatory of appellant's conduct in carrying on the case is inadmissible.¹⁴ When the defendant's pleader deposed on oath in the lower Court of the loss of all the documents of his client by fire, the appellate Court was held not justified in admitting a *putah* produced before it by the defendant without taking evidence as to its genuineness.¹⁵

Evidence taken—Where the first Court refused plaintiff's application for a postponement to summon five of his witnesses, but postponed the case for ten

¹ *Steemanclunder Dey v. Gopaulehunder*, (1866) 11 Moo. L. A., 23, p. 41; 7 W. R., (P. C.), 10;

² *Gobind Sundari v. Jagadamba*, (1869) 3 B. L. R., (P. C.) 25.

³ *Ram Pershad Nookul v. Rajunder Sahoy*, (1866) 6 W. R., 263.

⁴ *Gowhur Ali Khan v. Sakheena Khanum*, (1871) 15 W. R., 507.

⁵ *Ramdas v. Official Liquidator*, (1887) 9 All., 66.

⁶ *Velayet Ali v. Matadin*, (1869) 10 W. R., 402.

⁷ *Kali Kristo Tagore v. Jadoo Lall*, (1875) 24 W. R., 20.

⁸ *Ram Lall v. Rung Lall*, (1872) 17 W. R., 47; see note under r. 25.

⁹ *Prem Chand Moonshiee, in the goods of*, (1894) 21 Cal., 494.

¹⁰ *Wiltshire Iron Company, in re*, 3 Ch. App., 419.

¹¹ *Nadair Chand v. Chunder Sikhar*, (1883) 15 Cal., 765.

¹² *Iwaso, ex parte*, 6 Ch. App., 58; *Zibrah v. Bhugwan*, (1871) 16 W. R., 211.
See also *Dwarka Nath v. Ram Lochun*, (1869) 10 W. R., 92.

¹³ *Manohar v. Lakshmiram*, (1839) 12 Bom., 217.

¹⁴ *Leslie v. Allender*, (1872) 17 W. R., 390.

¹⁵ *Serajool Huq v. Keramutoollah*, (1873) 19 W. R., 88.

days as 15 witnesses were present, new evidence was allowed;¹ and so, where plaintiff was not examined on a certain point, and at the close of the defendant's evidence, the Judge refused to allow him, and it was of such a nature that the Court in appeal allowed rebutting evidence in the lower Court till the Judge had framed the issues, and where a Munsif, without framing issues or examining the plaintiff, passed a decree in his favour upon an admission made by the defendant and upon the inspection of a document that was upon the record of a former suit, and the Judge in appeal reversed the decision on account of the want of evidence, it was held that the Judge should have proceeded under this rule since the Munsif, though asked, did not take the plaintiff's evidence.³ When the Court of first instance had excluded evidence, and the appellate Court had reversed the decision, and the appellate Court does wrong if it refuses to allow evidence adduced, and the appellate Court in a suit upon a hypothecation of property, where the endorsement of part payment of the principal was on the bond, and the Court of first instance held that the endorsements on the bond were genuine. The Court of first appeal remanded the suit for further evidence to be taken with regard to the endorsements and directed the Court to record an opinion on the question of the handwriting of the endorsements and held upon the return of the evidence that the endorsements were forgeries and dismissed the suit. Held, that the evidence taken on the remand was legally admitted.⁵ An appellate Court should not reverse the decree of the first Court without allowing the defendant to give evidence which the first Court declined to take.⁶ A local enquiry may be ordered under this rule.⁷ The improper reception of evidence under this rule is not sufficient to reverse a decision, if, independently of that evidence, there is sufficient evidence on the record.⁸ After a review has been admitted fresh evidence may be taken under this rule.⁹

and when a Court so doing should be open Court in the reception of the evidence, so that the omission to do so would not render the evidence inadmissible.¹⁴ The requirements of the law are sufficiently fulfilled if

¹ *Abelakh Roy v. Guggon Bhuggut*, (1874) 22 W. R., 268.

² *Bushby v. Dickinson*, (1876) 4 C. D., 24; and see, *Komuroodden v. Money Mundul*, (1871) 16 W. R., 220.

³ *Appa v. Vithoba*, (1869) 6 Bom. H. C., A. C. J., 88.

⁴ *Brijasundar v. Kaimoonnisa*, (1875) 23 W. R., 63; see also, *Khuda Bakersh v. Imam Ali*, (1887) 9 All., 339.

⁵ *Srinivasachariar v. Rangammal*, (1895) 18 Mad., 91.

⁶ *Arjun v. Shankar*, (1895) 22 Bom., 253.

⁷ *Roy Sooltan v. Laloo Koor*, (1872) 17 W. R., 300.

⁸ *Jagadindra Banwari v. Phabatarini*, (1870) 5 B. L. R., Appo. 54; 14 W. R., 19.

⁹ *Beharee Lall v. Troyluckho Moree*, (1869) 12 W. R., 223; *Gunesh Ram Surmah v. Rohinee*, (1870) 14 W. R., 236.

¹⁰ *Sooknah v. Nand Coomar*, (1876) 25 W. R., 246.

¹¹ *Seeramechunder v. Gopal Chunder*, (1865) 11 Moo. I. A., 23, p. 49; 7 W. R., (P. C.) 10; *Shib Chunder v. Kasheenath*, (1869) 12 W. R., 245; *Hur Parshad v. Sheo Dyal*, (1873) L. R., 3 I. A., 259; *Lova Jha v. Bisseshur Singh*, (1869) 11 W. R., 6.

¹² *Ganpat Roy v. Ram Deour*, (1874) 21 W. R., 416.

¹³ *Gunga Gohind Mandal v. Collector of 24 Perganahs*, (1866) 11 Moo. I. A., 368; 11 W. R., 6.

¹⁴ *Singh v. Jhakri*, (1871) 11 Cal., 139; 11 W. R., 223. As to *Radhanath v.*

the Court records that it considers the examination of a party to be necessary.¹ The discovery of fresh evidence outside the Court must be brought in under sect. 114 and not under this rule.²

In England, a person desiring to produce further documentary evidence should give notice to the other side that he will apply at the hearing for leave to produce it,³ but if he wishes to examine witnesses, he must apply for leave by motion previous to the hearing of the appeal.⁴

Second Appeal—A special appeal will not lie from an order refusing to admit additional evidence,⁵ or from an order admitting it; but both may be reviewed in an appeal from the final decree, unless the appellant has taken advantage of the order, and so cannot subsequently impugn it in appeal.⁶ If it be found that evidence has been improperly admitted, the appellate Court may, apparently, reject it.⁷

" . . . the first appellate Court it does not justify the the case

The refusal by an appellate Court to exercise the discretion vested in it by this rule would be an error or defect in procedure within the meaning of s. 100. A refusal in the exercise of discretion to admit additional evidence is not such an error or defect.⁸

Appeal to Privy Council—The rejection of an application under this rule does not give a right of appeal to the Privy Council.¹⁰

28 Wherever additional evidence is allowed to be produced, the Appellate Court may either take such evidence, or direct the Court from whose decree the appeal is preferred, or any other subordinate Court, to take such evidence and to send it when taken to the Appellate Court.

Act XIV of 1882, s. 569

This rule applies to H. C.

The lower Court taking evidence under this rule acts in a ministerial capacity, and the parties may object to the admissibility of the evidence recorded before it without objection, when it is submitted for the consideration of the appellate Court.¹¹

¹ *Hafiza v. Azhar Hossein*, (1870) 13 W. R., 328. But see, *Juggut Indur Gunwatee v. Bhabho Tartat*, (1870) 14 W. R., 19.

² *Kessonji v. G. I. P. Ry.* (1907) 31 Bom., 581; 6 Calc. L. J., 5; followed in *Krishnama v. Narasimha*, (1908) 31 Mad., 144.

³ *Hastie v. Hastie*, (1876) 1 C. D., 562; *Hyde v. Warden*, (1877) 3 Ex. D., 74.

⁴ *Dicks v. Brooks*, (1880) 13 C. D., p. 653. See also, *Jones v. Khennell*, (1878) 8 C. D., at p. 505.

⁵ *Kulpo Singh v. Thakoor Singh*, (1871) 15 W. R., 429, *Golam Mukdoom v. Hafeezoomissa*, (1861) 7 W. R., 489; the remedy is by review—*Ram Lall v. Rung Lall*, (1812) 17 W. R., 47; *Mohesh Chunder Sheet v. Shoshee Mookhee*, (1866) 6 W. R., 196.

⁶ *Damoodur Dass v. Ritto Singh*, (1875) 24 W. R., 325.

⁷ See, *Juggut Indur*

⁸ *Singh v. Jhakri*, Calc., 98. See

¹⁰ *Prem Chand, in the matter of*, (1894) 21 Calc., 494.

¹¹ *Ram Joy Sutmah v. Frankishen Singh*, (1866) 2 W. R., 80.

Effect of order.—If the order is for particular evidence, the lower Court cannot go beyond it. If the order directed the examination of A, the lower Court could not examine A and B.¹ But in a case where A was directed to be examined and was ill, his agent was allowed to be examined in his place.² In certifying to the High Court the findings on issues sent back on remand and found by the C any own As
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to local inspections by the judges of an Appellate Court, see Lord Robertson in *Kessowji v. G. I. P. Rly. Co.*,⁴ where the practice is strongly deprecated.

29. Where additional evidence is directed or allowed to be taken, the Appellate Court shall specify the points to which the evidence is to be confined, and record on its proceedings the points so specified

Act XIV of 1882, s. 570

This rule applies to H. C.

Form of order.—See *Ramjoy Surmah v. Puran Kishen*,⁵

Judgment in appeal.

30. The Appellate Court, after hearing the parties or their pleaders and referring to any part of the proceedings, whether on appeal or in the Court from whose decree the appeal is preferred, to which reference may be considered necessary, shall pronounce judgment in open Court, either at once or on some future day, of which notice shall be given to the parties or their pleaders.

Act XIV of 1882, s. 571.

This rule applies to H. C.

Hearing.—When a case is called up for hearing in regular appeal, the Court should allow the parties or their pleaders to submit the evidence on the record and to comment on it.⁶ The senior pleader present has entire control of the appeal.⁷ Appellants will ordinarily be restricted to their written grounds of appeal;⁸ and where a written ground is not referred to, when the appeal comes on, the Court did not notice it.⁹ An objection that no appeal would lie could not be entertained after appellant's argument was concluded.¹⁰

¹ *Badaken Lall v. Radha Singh*, (1861) 1 W. R., 357.

² *Abmed Rizza v. Ernst Hosseln*, (1861) 1 W. R., 330.

³ *Harnchand v. Sonu Soolashly*, (1895) 19 Bom., 351. See *Bhagvan v. Kesur Kuvjerji*, (1893) 17 Bom., 424; *Ummed Ali v. Salma*, (1881) 6 All., 383; *Mumtaz v. Panch Hurain*, (1881) 6 All., 391.

⁴ *Kessowji v. G. I. P. Rly. Co.*, (1907) 31 Bom., 391, at p. 392.

⁵ *Ram Joy Surmah v. Puran Kishen*, (1862) 1 W. R., 8p. No. 123.

⁶ *Juggesur v. Olopal Lall*, (1871) 15 W. R., 51.

⁷ *Harnchand Roy v. Umlika Churn*, (1869) 12 W. R., 375.

⁸ *MacIntosh v. Watson*, (1865) 3 W. R., Act X, 123.

⁹ *Yusuf Ali v. Pyramulla Khatoon*, (1871) 15 W. R., 290.

¹⁰ *Chunder Nath v. Sirlar Khan*, (1872) 18 W. R., 218.

Return of plaint.—An appellate Court is not bound to return the plaint under all circumstances, where defect of jurisdiction appears.¹

Death of the appellant—When the Court heard and decided the appeal without being aware of the death of the appellant, the decree was held to be a nullity.²

Duty of an appellate Court—See "DETERMINE THE CASE," r. 23, p. 1010, *supra*, and "FIRST RAISED IN SPECIAL APPEAL," "CHANGING NATURE OF SUIT," s. 100.

Point not raised first in appeal—As a rule, an objection such as that the proper parties are not before the Court—which, if taken in the first Court, might have been cured,—should not be listened to in appeal.³ And subject to this rule, an appellate Court cannot raise an issue in appeal not raised in the Court of first instance,⁴ or have the case argued on grounds not presented to the Court below,⁵ but when an issue is raised, care should be taken that the parties should have the fullest opportunity of producing evidence on it.⁶ An appellate Court should not entertain an objection as to the misjoinder of causes of action,⁷ or non-joinder of parties.⁸

A Court should not interfere with a finding not appealed against.⁹ Thus, on an appeal as to costs only, it cannot remand the case for trial on the merits.¹⁰

An appellate Court should not reject evidence admitted below,¹¹ nor decide the case not on the evidence, but upon the allegations in the plaint;¹² nor dismiss the suit because it was brought as a rent-suit;¹³ nor because the claim was greatly exaggerated,¹⁴ nor interfere with the result of a local enquiry;¹⁵

¹ *Yacoub v. Mohan Singh*, (1888) 11 Mad., 452.

² *Janardhan v. Ram Chandra*, (1902) 26 Bom., 317.

³ *Dhurm Day v. Shama Soondri Debahi*, (1841) 3 Mon. L. A., at p. 242; *Nurul Hossain v. Sheoshat*, (1893) 20 Cal., 1; see, however, the case of *Abdulla v. Subbarayar*, (1878) 2 Mad., 346; *Subba v. Nagappa*, (1889) 12 Mad., 353; *Vithu v. Bhondli*, (1901) 15 Bom., 407; *Dodhu v. Madhavrao Narayan Gadre*, (1894) 18 Bom., 113.

⁴ *Braro Soondur v. Tutick Chunder*, (1872) 17 W. R., 407; *Kashinath Roy v. Dwarkanath*, (1867) 7 W. R., 61; *Moung Hmoon v. Mah Hpwah*, (1893) L. R., 11 I. A., 103, p. 120; *Madhab Ali v. Hossain Reza*, (1879) 4 C. L. R., 52; but see *Madho Pershad v. Gajadhar*, (1893) L. R., 11 I. A., 180, p. 193.

⁵ *Caton v. Caton*, (1867) L. R., 2 H. L., at p. 141; *Official Trustee v. Krishna Chunder*, (1894) L. R., 12 I. A., 166, 12 Cal., 239; *Kachubhai v. Krishna-bhai*, (1878) 2 Bom., 635; see, however, *Hickson v. Lombard*, L. R., 1 Eng. App., 324.

⁶ *Latoo Mundul v. Bhobun Mohun*, (1872) 17 W. R., 361.

⁷ *Maula v. Gulzara*, (1894) 16 All., 130.

⁸ *Paramasiva v. Krishna*, (1891) 14 Mad., 493; but see, *Ghulam Kadir v. Mustakim*, (1896) 18 All., 109.

¹⁰ *Muthra Pershad v. Bunde Roy*, (1873) 5 All. H. C., 20.

¹¹ *Gour Suran v. Kanhya Singh*, (1875) 23 W. R., 12; *Wooma Soonduree*, (1875) 23 W. R., 1, (1876) 23 W. R., 80; *Kashee Nath v. L.*, 168; *Akbur Ali v. Bhyea Lal*, (1891) 6 Cal., 600.

¹² *Suttroughur Pattes v. Manick Ram Gangooly*, (1864) 1 W. R., 199.

¹³ *Ahmed Kubeer v. Macrae*, (1876) 23 W. R., 417.

¹⁴ *Ram Chunder Chowdhry v. Marriott*, (1871) 15 W. R., 465.

¹⁵ *Monkee Dumber v. Monkee Bhallundur*, (1871) 15 W. R., 423.

Effect of order.—If the order is for particular evidence, the lower Court
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⁴ *Dolakee Loh v. Radha Singh*, (1864) 1 W. R., 357.

⁵ *Ahmed Rezza v. Enaet Hossein*, (1864) 1 W. R., 330.

⁶ *Ramchandra v. Sono Sodashiv*, (1895) 19 Bom., 531. See, *Bhagvan v. Kesur Auvjer*, (1893) 17 Bom., 428; *Umed Ali v. Salima*, (1894) 6 All., 383, *Mumtaz v. Fatch Hussain*, (1894) 6 All., 391.

⁷ *Kessowji v. G. I. P. Ry. Co.*, (1907) 31 Bom., 331, at p. 392.

⁸ *Ram Joy Surmah v. Puran Kishan*, (1862) W. R., Sp. No. 125.

⁹ *Juggessur v. Gopal Lall*, (1871) 15 W. R., 51.

¹⁰ *Sreerelash Roy v. Umlaka Churn*, (1869) 12 W. R., 375.

¹¹ *Mackintosh v. Watson*, (1865) 3 W. R., Act X, 123.

¹² *Yusuf Ali v. Fyrozussa Khatoon*, (1871) 15 W. R., 200.

¹³ *Chunder Nath v. Sirdar Khan*, (1872) 13 W. R., 218.

Return of plaint.—An appellate Court is not bound to return the plaint under all circumstances, where defect of jurisdiction appears.¹

Death of the appellant—When the Court heard and decided the appeal without being aware of the death of the appellant, the decree was held to be a nullity.²

Duty of an appellate Court—See "DETERMINE THE CASE," r. 23, p. 1010 *supra*, and "FIRST RAISED IN SPECIAL APPEAL," "CHANGING NATURE OF SUIT," § 100.

Point not raised first in appeal—As a rule, an objection such as that the proper parties are not before the Court—which, if taken in the first Court, might have been cured,—should not be listened to in appeal.³ And subject to this rule, an appellate Court cannot raise an issue in appeal not raised in the Court of first instance,⁴ or have the case argued on grounds not presented to the Court below,⁵ but when an issue is raised, care should be taken that the parties should have the fullest opportunity of producing evidence on it.⁶ An appellate Court should not entertain an objection as to the misjoinder of causes of action,⁷ or non joinder of parties.⁸

A Court should not interfere with a finding not appealed against.⁹ Thus, on an appeal as to costs only, it cannot remind the case for trial on the merits.¹⁰

An appellate Court should not reject evidence admitted below;¹¹ nor decide the case not on the evidence, but upon the allegations in the plaint;¹² nor dismiss the suit because it was brought as a rent suit,¹³ nor because the claim was greatly exaggerated,¹⁴ nor interfere with the result of a local enquiry;¹⁵

¹ *Yatoub v. Mohan Singh*, (1858) 11 Mad., 482.

² *Janardhan v. Ram Chandra*, (1902) 26 Bom., 317.

³ *Dhurin Das v. Shama Sundari Debshi*, (1841) 3 Mon. J. A., at p. 242; *Nurul Hossain v. Sheoanah*, (1893) 20 Cal., 1, see, however, the case of *Abdulla v. Subbarayyar*, (1878) 2 Mad., 316; *Subba v. Nagappa*, (1889) 12 Mad., 353; *Vithu v. Dhondi*, (1891) 15 Bom., 407; *Dadhu v. Madhavrao Narayan Gadre*, (1894) 15 Bom., 113.

⁴ *Brojo Sundur v. Putack Chunder*, (1872) 17 W. R., 407; *Kashinath Roy v. Dwarkanath*, (1867) 7 W. R., 61; *Moung Hmoun v. Mah Ipwah*, (1883) L. R., 11 I. A., 109, p. 120; *Madhab Ali v. Hossain Reza*, (1879) 4 C. L. R., 52; but see *Madho Prasad v. Gajadhar*, (1883) L. R., 11 I. A., 186, p. 195.

⁵ *Caton v. Caton*, (1867) L. R., 2 H. L., at p. 144; *Official Trustees v. Krishna Chunder*, (1884) L. R., 12 I. A., 166; 12 Cal., 239; *Kachubhai v. Krishna-bhai*, (1878) 2 Bom., 635; see, however, *Hickson v. Lombard*, L. R., 1 Eng. App., 324.

⁶ *Latoo Mundul v. Bhobhan Mohun*, (1872) 17 W. R., 361.

⁷ *Maula v. Gulzura*, (1894) 16 All., 130.

⁸ *Paramasara v. Krishna*, (1891) 14 Mad., 498; but see, *Ghulam Kadir v. Mustakim*, (1896) 18 All., 109.

⁹ *...*

¹⁰ *Muthra Pershad v. Bundeo Roy*, (1873) 5 All. H. C., 20.

¹¹ *Mohabeer Das v. ...* (1863) 2 V. 170; *Lac Mohesh*, Cal., 666.

¹² *Suttroughur Pattes v. Manick Ram Gangooly*, (1864) 1 W. R., 109.

¹³ *Ahmed Kubeer v. Macrae*, (1876) 23 W. R., 417.

¹⁴ *Ram Chunder Chowdhry v. Marriott*, (1871) 15 W. R., 465.

¹⁵ *Monkee Dumber v. Monkee Bhallundur*, (1871) 15 W. R., 423.

especially when the judge himself has inspected the spot;¹ nor interfere with the discretion of the Lower Court as to costs, unless satisfied that there has been some miscarriage or mistake.²

Points raised first in appeal—Care should be taken that injustice should not be done by interpreting the pleadings too strictly;³ and the Judge of the first appeal has jurisdiction to take cognizance of a defence raised in the grounds of appeal, though not raised in the first Court;⁴ or a title in support of the claim.⁵ The rule that the Court of appeal should not decide the case on a new point which should be observed where the parties have litigated on a certain state of facts,⁶ does not refer to cases in which the plaintiff has failed to prove the basis of his claim, such as notice to quit, when the infirmity can be pointed out in special appeal;⁷ or hold when the points raised are as to jurisdiction,⁸ or limitation,⁹ or to the validity of an award the defect of which was not known to the objector in the first Court;¹⁰ or that the plaintiff has no cause of action;¹¹ or go to bar the suit.¹² But where an issue, which should have formed the subject of a regular suit, is contested on the merits in an appeal, the Court of

appeal;¹⁴ nor an objection on the ground of want of jurisdiction.¹⁵ If should any objection to granting was heard on the merits.¹⁶ An a document, reference to which is as affording a basis to some of th to be taken by him in appeal.¹⁷

¹ *Brindaban Dharotee v. Dhunjoy Narain*, (1872) 18 W. R., 452.

² *Lachman Ram v. Watson*, W. R., (1861), 146.

³ *Gunga Pershad Sahu v. Maharam Bibi*, (1894) L. R., 12 I. A., 47, p. 51.

⁴ *Madho Pershad v. Gayadhur*, (1893) L. R., 11 I. A., 186.

⁵ *Sundari v. Mudhoo Chunder*, (1887) 14 Cal., 592.

⁶ *Lukhee Dossee v. Mahomed Afzal*, (1865) 2 W. R., 2.

⁷ *Abdulla v. Subbarayyar*, (1878) 2 Mad., 316; *Subba v. Nagappa*, (1889) 12 Mad., 333; *Vithu v. Dhondi* (1891) 15 Bom., 407; *dist. in Sijjod v. Ganga* (1905) 9 Cal. W. N., 469; and see, *Ashanulla v. Hurri Churn*, (1891) L. R., 19 I. A., 191.

⁸ *Ram Rutton Bhuggut v. Bakaoolah*, (1864) 1 W. R., 259; *Aukhil Chunder v. Mohenees Mohun*, (1879) 4 C. L. R., 491; *Sethu v. Venkatrama*, (1886) 9 Mad., 112; *Nazamma v. Subba*, (1889) 11 Mad., 197, and see, *Biru Mahata v. Shyama Churn*, (1893) 22 Cal., 493.

⁹ *Okhetoonissa v. Koochil Sirdar*, (1865) 2 W. R., 45.

¹⁰ *Chula Mal v. Hari Ram*, (1866) 8 All., 549; or *res judicata*—*Koylashnanth Chund v. Monmolheeny*, (1863) Marsh., 276; *Mugnomoyee v. Hur Chunder*, (1875) 3 W. R., Act X., 146; *Muhammad Ismail v. Chatter Singh* (1882) 4 All., 69; but see, *Vaythenatha v. Sami Pandithar*, (1878) 3. Mad., 116.

¹¹ *Parbati v. Kaly Nath*, (1879) 6 B. L. R., App., 73; *Lachman Prasad v. Bhador*, (1879) 2 All., 181; but see *contra*, *Kali Commar v. Birnomoyee*, (1864) 1 W. R., 21; *Sudakhina v. Rajmohan*, (1869) 11 W. R., 350; *Bukah Ali v. Joyant*, (1863) 11 W. R., 248.

¹² *Saravati v. Pachanna Setti* (1866) 3 Mad. II. C., 239.

¹³ *Gillert v. Eidean*, (1878) 9 C. D., at p. 266; *Anzuddin v. Ramanugra*, (1887) 14 Cal., 605.

¹⁴ *Takiraji v. Rudrapa*, (1892) 16 Bom., 120.

¹⁵ *Kalhu v. Madhavarao Narayan Gadre*, (1891) 18 Bom., 113.

¹⁶ *Mazumal v. Govindlal*, (1891) 15 Bom., 697; compare, *Maina v. Brij Mohan*, (1889) L. R., 17 I. A., 187. "FIRST RAISED IN SPECIAL APPEAL," S. 100.

¹⁷ *Hriday Krishna v. Prayanna Kumari*, (1901) 28 Cal., 142.

Judgment of Court.—The parties to the suit are entitled, as well on questions of fact as on questions of law, to demand the decision of the Court of appeal, and that Court cannot ex-use itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect,¹ this proposition was re-affirmed;—James, L. J., said —“With respect to the great weight due to the decision of a Judge of the Court of first instance, whenever, in a conflict of testimony, the demeanour and manner of the witnesses who have been seen and heard by him are material elements in the consideration of the truthfulness of their statements, I repeat, and adhere to, what we said in the case of *The Glanvibanta* (1 P. D., 287) Of course, if we are to accept as final the decision of the Court of first instance in every case where there is a conflict of evidence, our labours would be very much lightened. But then, that would be in truth doing away with the right of appeal in all cases of nuisance, for there is never one brought into Court in which there

it has been remanded under r. 23 or dealt with under r. 26.² There are decisions which are difficult to reconcile with this doctrine; such as that an appellate Court commits an error in law in disbelieving witnesses believed by the first Court, unless there are *good reasons* for so doing,³ or that it is not justified in believing a witness whose demeanour has been declared not satisfactory.⁴ If it reverses the judgment of the lower Court, it should state clearly and fully its reasons for doing so.⁵

Presumption in favour of first Court—The presumption is in favour of the judgment of the lower Court, and the appellate Court should not interfere, unless it is shown to be wrong;⁶ manifestly wrong,⁷ and then the appellate Court should show the grounds on which it comes to an opposite conclusion.⁸

Contents, date and
signature of judgment

31. The judgment of the Appellate
Court shall be in writing and shall state—

- (a) the points for determination;
- (b) the decision thereon;
- (c) the reasons for the decision; and
- (d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled;

¹ *The Glanvibanta*, (1876) 1 P. D., 287; *Tayammam v. Sashachalla Naker*, (1863) 10 Moo., I. A., 436; *Muhammad v. Zubaida*, (1888) L. R., 16 I. A., 205, p. 211; 11 All., 460; *Smith v. Chadwick*, 9 App. Cas., 187, p. 194. In the case of *Bigby v. Dickinson*, (1876) 4 C. D., 28.

² *Rohimani Dabi v. Zamruddin*, (1894) 8 C. L. R., 597; *Kirani Ahmedula v. Subabhat*, (1894) 8 Bom., 28.

³ *Umed Ali v. Salima*, (1894) 6 All., 383; *Mumtaz Begum v. Fateh Husain*, (1884) 6 All., 391.

⁴ *Nalin Chunder v. Ramesh Chunder*, (1876) 1 W. R., 363; *Hoymobutty Dossee* and *Chunder v. Rutnesur*

⁵ W. R., 26.

⁶ *Ram Rangini Chanda v. Chandra Benode Pal*, (1897) 1 Cal. W. N., 691.

⁷ *Tahboonissa v. Sham Ki-shore*, (1871) 15 W. R., 228; *Shetabdee Biswas v. Molamdee Mundul*, (1876) 23 W. R., 30.

⁸ *Wiso v. Sunduloomissa Ghowdhrani*, (1866) 41 Moo. I. A., 181.

⁹ *Munsoob Bibee v. Ali Meah*, (1872) 17 W. R., 358.

and shall at the time that it is pronounced be signed and dated by the Judge or by the Judges concurring therein.

Act XIV of 1882, s 574

This rule applies to H. C.

So much of it as relates to the signing and dating of judgment has been declared not to apply to Lower Burmah, see Gazette of India, 1900, Pt. I, p. 730.

Points for determination.—The judgment must be confined to the issues tried in the lower Court¹ and should contain the particulars mentioned in this rule²

Reasons—Not the reasons for coming to any conclusion of fact, but the reasons showing upon what points of fact or law the decision runs³

Contents of judgment.—It is incumbent on an appellate Court to state the reasons for affirming or reversing the judgment of the lower Court⁴ and give its reasons⁵ for affirming or reversing the judgment of the lower Court⁶ and in reversing and this is also the rule

with costs," the judgment rejected under O XXI, r 11 Court's judgment that no lower Court's decision is not void contain the points for

decision, and the reasons for the decision.¹³ In another case, it was held that the Judge should not have confined himself to saying that the plaintiff's evidence proved plaintiff's case, but should have stated what the evidence was, and in what way and for what reason it proved the plaintiff's case¹⁴ And where a Judge discredited witnesses without giving his reasons, or stated that the defence

¹ Official Trustee v. Krishna Chunder, (1884) L. R., 12 L. A., 166; 12 Cal., 239; Lachho v. Har Sahai, (1890) 12 All., 46

² Noor Mahomed v. Zuhoor Ali, (1869) 11 W. R., 34 See note under r. 20

³ Ramesur Bhuttacharjee v. Bhanoo, (1869) 12 W. R., 272

⁴ Shurhesur Ghose v. Sadhu Churn Ghose, (1871) 15 W. R., 130, Rajchunder v. Ramakant, (1871) 15 W. R., 324, see p. 326

⁵ Gopalrao v. Kishor, (1885) 9 Bom. 597; Sahas v. D. N. S. (1887) 10 All. 26; Haimabati Das v. Govi

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mayee

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(1871) 16 W. R., 280

⁶ Bhagvan v. Kesur Kuverji, (1893) 17 Bom., 423, Ramchandia v. Sono Sadashiv, (1895) 19 Bom., 551.

Radha Gobind v. Ram Kishore, (1867) 8 W. R., 340; Rajoo v. Raj Koomar Singh, (1867) 7 W. R., 137; Khettur Mohun v. Bhyrub Chunder, (1865) 3 W. R., 126

Bhagbut Khan v. Puddo Dewa, (1865) 3 W. R., 102; Korban Ali v. Ashan Ali, (1865) 4 W. R., 4. See also Bahban v. Jamiangal, (1906) A. W. N., 86, and Mhasa v. Davulab, (1905) 7 Bom. L. R., 174

Bell v. Gurudas Roy, (1868) 1 B. L. R., A. C., 50.

Raghunath v. Nilu, (1895) 9 Bom., 452

Srikant Dey v. Huri Das Pal, (1882) 11 C. L. R., 131.

10, 97; diss. from Samin v. Piran,

W. R., 176 See also, Kamat v. Kamat, (1894) 9 Bom., 368, and Imrit Singh v. Koylashoo Koer. (1869) 11 W. R., 559

is "ridiculous" or "absurd," without giving reasons,¹ or gave no opinion at all, but merely concurred with the first Court,² or merely said that he considered the "Munsif's decision fair and equitable," in all these cases the judgments have been considered imperfect.³ But where the decision of a case involves issues of fact chiefly, and the first Court has gone into the evidence carefully, the Court, if it agrees with the lower Court, is not bound to state in detail the reasons previously recited and in which it concurs.⁴ The rule should, however, be followed strictly when the judgment of the first Court is reversed,⁵ although it is not necessary to meet categorically every one of the arguments advanced by it,⁶ or to give a review or setting forth of the whole of the evidence.⁷ Where the Judge of the lower appellate Court did not record his judgment as required by s. 359, Act VIII of 1859, the case was sent back to him to state the points for decision and to give his decision upon those points consecutively.⁸ Where a judgment omitted to make mention of certain important documents, and a finding that the plaintiff's claim was barred by limitation was based on statements without referring to any evidence to establish them, the judgment was held to be insufficient.⁹ But the judgment should not be based on a document which was neither produced in the first Court nor marked as an exhibit by the appellate Court in compliance with the requirements of r. 28.¹⁰ The judgment of an appellate Court should show on the face of it that the points in dispute were clearly before the mind of the Judge and that he exercised his own discrimination in deciding them.¹¹ A Judge having remanded a case for further evidence to be taken and a fresh finding recorded on a question of fact, he is bound to examine the correctness of the finding and to state in his judgment the reason for which he either accepts or rejects it.¹²

High Court.—The same rule applies to judgments passed by the High Court on appeal,¹³ and to cases remanded for the trial of issues,¹⁴ it is doubtful if it applies to cases in special appeal where the Court upholds the judgment for the reasons given by the Court below.¹⁵

¹ *Juggesuree Debia v. Gudhadhur*, (1866) 6 W. R., Act X, 21.

² *Ommatul Fatima v. Janee Khanom*, (1864) 1 W. R., 295; *Khelluck Chunder v. Nund Ram*, (1865) 2 W. R., 7.

³ *Kristna Reddi v. Srinivasa*, (1869) 5 Mad. II C, 174.

⁴ *Juggesur Sahoy v. Gopal Lall*, (1871) 15 W. R., 54; *Shah Ekbal Hossein v. Bunsce Sahoo*, (1876) 25 W. R., 12; *Imrit Lall v. Nuckshid Sahaye*, (1863) 10 W. R., 100; *Kulumntoo v. Jowahar Lall*, (1869) 11 W. R., 318; but see, *Adheen Misser v. Jogia*, (1869) 11 W. R., 312; and *Shumbhoo Nath v. Prakash*, (1867) 8 W. R., 272.

⁵ *Kartie Napit v. Prosonnomoyee Naptineo*, (1865) 2 W. R., 77; *Munsoob Bibee v. Ali Meah*, (1872) 17 W. R., 358; *Shathuk Paul v. Gudhadhur Roy*, (1865) 1 W. R., 100; *Mahadeo v. Mahadeo*, (1865) 1 W. R., 100; *R. App.*, 20; *Mahomed usul Fatwa v. Chandoo*, *Ikatesh Manjaya*, (1892)

⁶ *Krishnendro Roy t. Digumburee Debia*, (1871) 16 W. R., 15; *Shumsharooddy v. Jan Mahomed*, (1874) 21 W. R., 260; see also, *Indrabati v. Mahadeo*, (1865) 1 B. L. R., S. N., 11.

⁷ *Noor Mahomed v. Zuhoor Ali*, (1869) 11 W. R., 34.

⁸ *Tatur Khawas v. Jagannath*, (1871) 7 B. L. R., App., 14; 15 W. R., 131.

⁹ *Appa Kalga Naik v. Mallu*, (1892) 16 Bom., 477.

¹⁰ *Juggernath v. Kanai Das*, (1901) 6 Cal. W. N., 31.

¹¹ *Sitaram v. Suryanarayana*, (1899) 22 Mad., 12.

¹² *Kunhi Marakkar v. Kutti Umma*, (1897) 20 Mad., 496; *Subbaya v. Rama Reddi*, (1899) 22 Mad., 344.

¹³ *Katchelkalejana v. Kachivijaya*, (1867) 12 Moo. I. A., 502.

¹⁴ *Umed Ali v. Salima*, (1884) 6 All., 383.

¹⁵ *Sundar Bibi v. Bisheshar Nath*, (1887) 9 All., 93. See s. 122.

Second appeal.—The mere omission to record a judgment is not a good ground of second appeal;¹ otherwise in Allahabad;² but if the same Judge is in office, the High Court may, if it considers it necessary,³ keep the case in special appeal, but return the proceedings to the lower Court and require the Judge to state his reasons,⁴ or if he is not in office, direct a re-trial.⁵ Where no reasons are given by a lower appellate Court for the conclusions arrived at, such conclusions cannot be accepted as legal findings of fact in second appeal.⁶

32. The judgment may be for confirming, varying or reversing the decree from which the appeal is preferred, or, if the parties to the appeal agree as to the form which the decree in appeal shall take, or as to the order to be made in appeal, the Appellate Court may pass a decree or make an order accordingly.

Act XIV of 1882, s. 577.

See *Bhardu Bhagat v. Shah Muhammad*†

33. The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection.

Illustration.

A claims a sum of money as due to him from X or Y, and in a suit against both obtains a decree against X. X appeals and A and Y are respondents. The Appellate Court decides in favour of X. It has power to pass a decree against Y.

R. S. O. 58, r. 4

This rule applies to H. C.

This rule has been adopted from the English rules and orders for the purpose of giving to the appellate Court the fullest power to do complete justice to all the parties to the suit.^a

¹ *Gulam Hossein v. Ram Doyal*, (1869) 12 W. R., 152, *Bisvanath Maiti v. Baidyanath*, (1886) 12 Calc., 199

² *Sahawan v. Babu Nand*, (1897) 9 All., 26.

³ *Shamsharooddy v. Jan Mahomed*, (1874) 21 W. R., 269.

⁴ *Dooles Chund v. Oomda Begum*, (1872) 18 W. R., 473

⁵ *Kristo Chunder v. Ram Brohmo*, (1873) 20 W. R., 403; *Assanullah v. Hafiz Mahomed*, (1884) 10 Calc., 932

Ningappa v. Shivappa, (1895) 19 Bom., 323.

⁶ *Bhardu Bhagat v. Shah Muhammad* (1892) 14 All., 350.

^a See Report of Special Committee.

34. Where the appeal is heard by more Judges than one, any Judge dissenting from the judgment of the Court shall state in writing the decision or order which he thinks should be passed on the appeal, and he may state his reasons for the same.

Act XIV of 1882, s. 576.

This rule applies to H. C.

Decree in appeal.

35. (1) The decree of the Appellate Court shall bear date the day on which the judgment was pronounced.

(2) The decree shall contain the number of the appeal, the names and descriptions of the appellant and respondent, and a clear specification of the relief granted or other adjudication made.

(3) The decree shall also state the amount of costs incurred in the appeal, and by whom, or out of what property, and in what proportions such costs and the costs in the suit are to be paid.

(4) The decree shall be signed and dated by the Judge or Judges who passed it :

Provided that where there are more Judges than one and Judge dissenting from the judgment of the Court to sign the decree.

Judge dissenting from judgment need not sign decree.

Act XIV of 1882, s. 579

This rule does not apply to H. C. or to the Punjab Chief Court in the exercise of their appellate jurisdiction, or to the Judicial Commissioner N. W. Frontier Province—O XLIX, s. 3 See s 638, Act XVIII of 1884, s. 15 (3), and s. 46 (3) of the N. W. Frontier Province Law and Justice Regulation, 1901, (VII of 1901)

Date.—The date which the decree must bear is the date when the judgment was delivered ¹

Claim—It is not necessary that the claim should be stated in the decree so as to make it a part of the decree itself.²

Appellate Decree—The decree of the appellate Court supersedes that of the first Court and is the decree to be executed, and limitation runs from the date on which it is passed ³

¹ Parbati v. Biola, (1890) 12 All., 79.

² Soude Shrinivasappa v. Krishnappa, (1897) 11 Bom., 177.

³ Muhammad Sulaiman v. Muhammad Yar, (1899) 11 All., 267 ; and s. 140.

The decree in appeal may vary the decree appealed against not only in the points in which it is erroneous, but also in respect of matters occurring subsequently which are admitted,¹ provided the erroneous portion has been appealed against.²

The decree should state by what parties and in what proportions, if necessary, the costs of the suit are to be paid.³ This sum the Court must take for granted; and it need not go into particulars or set forth in a schedule the different items which go to make up the costs of the first Court.⁴ It is a convenient practice for a Court to annex to every decree the costs incurred by both parties,⁵ and if the Court, the costs of the first Court should be ap-
peal is affirmed upon wholly different Court, the appeal should be dismissed

The appellate Court can direct how its decree should be carried out.⁶

Where the decree of an appellate Court was in general terms, viz., "that the appeal be decreed with costs," and the judgment indicated a different intention, it was held that execution should not have been allowed for the whole of the claim; but confined to what was the manifest intention of the Court. In other words, the decree should be interpreted by the judgment.⁷ This seems doubtful.

Effect of decree.—See "EFFECT OF DECREE," s. 109

36 Certified copies of the judgment and decree in appeal shall be furnished to the parties on application to the Appellate Court and at their expense.

Copies of judgment and decree to be furnished to parties

Act XIV of 1882, s. 580

This rule applies to H. C.

37. A copy of the judgment and of the decree, certified by the Appellate Court or such officer as it appoints in this behalf, shall be sent to the Court which passed the decree appealed from and shall be filed with the original proceedings in the suit, and an entry of the judgment of the Appellate Court shall be made in the register of civil suits.

Certified copy of decree to be sent to Court whose decree appealed from.

Act XIV of 1882, s. 581.

This rule applies to H. C.

¹ Sakharam v. Hart, (1882) 6 Bom., 113.

² Rughnath v. Pareshrum, (1883) 9 Calc., 635.

³ Kashee Chunder v. Bungshee Buddun, (1875) 23 W. R., 89.

⁴ Mothoora Mohun Roy v. Hury Kishore, (1872) 18 W. R., 286, on review from Hurree Kishore v. Muthoora Mohan Roy, (1872) 17 W. R., 445; Rajkrishno Singh v. Pranoda Dabee, (1874) 21 W. R., 74.

⁵ Nubo Kristo v. Parbutty Churn, (1870) 13 W. R., 23.

⁶ Mahomed Busseeroollah v. Ramkant, (1871) 16 W. R., 206.

⁷ Fischer v. Kamala Naoiker, (1859) 8 Moo I. A., 170; 3 W. R., P. C., 33.

⁸ Kallee Doss Sandyal v. Luchmeepnt Doogur, (1870) 14 W. R., 145.

⁹ Mehdeo Beg v. Zellal, (1871) 15 W. R., 530.

Appellate decree — The effect of these rules, 35-37, is that the decree in appeal completely supersedes the decree of the first Court, even when it merely affirms it.¹

¹ Muhammad Sulaiman v. Muhammad Yar, (1889) 11 All, 267, and "FINAL DECREE," s. 149

ORDER XLII.

Appeals from Appellate Decrees.

Procedure. 1. The rules of Order XLI shall
apply, so far as may be, to appeals from
appellate decrees.

This is a new rule.

ORDER XLIII.

Appeals from Orders

1. An appeal shall lie from the following orders
 Appeals from orders under the provisions of section 104,
 namely :—

- (a) an order under rule 10 of Order VII returning a
 plaint to be presented to the proper Court ;
- (b) an order under rule 10 of Order VIII pronounc-
 ing judgment against a party ;
- (c) an order under rule 9 of Order IX rejecting an
 application (in a case open to appeal) for an order
 to set aside the dismissal of a suit ;
- (d) an order under rule 13 of Order IX rejecting an
 application (in a case open to appeal) for an
 order to set aside a decree passed *ex parte* ;
- (e) an order under rule 4 of Order X pronouncing
 judgment against a party ;
- (f) an order under rule 21 of Order XI ;
- (g) an order under rule 10 of Order XVI for the
 attachment of property ;
- (h) an order under rule 20 of Order XVI pronouncing
 judgment against a party ;
- (i) an order under rule 34 of Order XXI on an objec-
 tion to the draft of a document or of an
 endorsement ;
- (j) an order under rule 72 or rule 92 of Order XXI
 setting aside or refusing to set aside a sale ;
- (k) an order under rule 9 Order XXII refusing to set
 aside the abatement or dismissal of a suit ;
- (l) an order under rule 10 of Order XXII giving or
 refusing to give leave ;
- (m) an order under rule 3 of Order XXIII recording
 or refusing to record an agreement, compromise
 or satisfaction ;

- (n) an order under rule 2 of Order XXV rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit;
- (o) an order under rule 3 or rule 8 of Order XXXIV refusing to extend the time for the payment of mortgage-money;
- (p) orders in interpleader-suits under rule 3, rule 4 or rule 6 of Order XXXV;
- (q) an order under rule 2, rule 3 or rule 6 of Order XXXVIII;
- (r) an order under rule 1, rule 2, rule 4 or rule 10 of Order XXXIX;
- (s) an order under rule 1 or rule 4 of Order XL;
- (t) an order of refusal under rule 19 of Order XLI to re-admit, or under rule 21 of Order XLI to re-hear, an appeal;
- (u) an order under rule 23 of Order XLI remanding a case, where an appeal would lie from the decree of the Appellate Court;
- (v) an order made by any Court other than a High Court refusing the grant of a certificate under rule 6 of Order XLV;
- (w) an order under rule 4 of Order XLVII granting an application for review.

Act XIV of 1882, s. 588

Procedure. **2.** The rules of Order XLI shall apply, so far as may be, to appeals from orders.

Act XIV of 1882, s. 590

ORDER XLIV.

Pauper Appeals

1. Any person entitled to prefer an appeal, who is
 Who may appeal as pauper unable to pay the fee required for the
 memorandum of appeal, may present an application accompanied by a memorandum of appeal, and may be allowed to appeal as a pauper, subject, in all matters including the presentation of such application, to the provisions relating to suits by paupers, in so far as those provisions are applicable :

Provided that the Court shall reject the application unless, upon a perusal thereof and of the
 Judgment and decree appealed from, it
 sees reason to think that the decree is
 contrary to law or to some usage having the force of law, or is otherwise erroneous or unjust.

Act XIV of 1882, s. 392

This rule applies to H. C. as to practice, see *Sakubai v. Ganpat*.¹

Appeal—An application for leave to appeal in *forma pauperis* need not be preceded by separate formal application for inquiry into the pauperism of the applicant.² It must be presented within 30 days from the date of the decree appealed against and must be accompanied by a memorandum of appeal, a copy of the decree or order appealed against, and a copy of the judgment upon which the decree or order is founded. No extension can be allowed under s. 5, Act XV of 1877, (ss. 4 & 5, Act IX of 1908).³ And where an application to appeal in *forma pauperis* was rejected and a regular appeal on a proper stamp was subsequently presented but after time, it was held not to relate back to the time of the application in *forma pauperis*.⁴

A plaintiff whose suit had been dismissed presented an unstamped memorandum of appeal and a petition for leave to appeal as a pauper. Leave to appeal as a pauper was refused, but the Judge gave leave to amend the memorandum of appeal by stating the claim at a lower valuation, and a week's time was granted to the appellant to pay the reduced fee. The fee was paid and the appeal accepted, but it was subsequently dismissed as barred by limitation. On second appeal to the High Court, it was held that the appeal was not barred by limitation.⁵ When an appeal at first presented in *forma pauperis*, is admitted after time on payment of the full Court fee, the Court must be taken to have exercised its discretion under s. 5, Act XV of 1877, (s. 4, Act IX of 1908).⁶

¹ *Sakubai v. Ganpat*, (1904) 28 Bom., 451.

² *Kamod Poory v. Sheo Poory*, (1869) 1 All. H. C., 167.

³ *Bechi v. Alsanullah*, (1890) 12 All., 461; *Parbati v. Bhola*, (1890) 12 All., 79, p. 93; *Mahadev v. Lakshman*, (1895) 19 Bom., 48.

⁴ *Bishnath v. Jagannath*, (1891) 13 All., 305.

⁵ *Bai Ful v. Desai Manorbhai*, (1893) 22 Bom., 849.

⁶ *Girwar Lal v. Lukshmi Narain*, (1904) 26 All., 329.

Security.—If the appellant is found to be unable to give security, he cannot be called on to give security for himself, but a respondent, and wishes to file before it can be heard.²

Order rejecting appeal.—The Code gives no appeal from an order refusing leave to appeal as a pauper. In one suit the High Court, on a motion from such an order sent it back to the appellate Court for re-consideration, with an expression of their opinion.³

An appeal presented on behalf of a pauper by a vakeel retained under an ordinary retainer and not authorized to sign as agent should be rejected.⁴ It should be made by the party in person.⁵

Original Side.—No appeal is allowed from the order of a single Judge on the Original Side of the High Court rejecting an application.⁶

Where a guardian obtains leave to sue *in forma pauperis* on behalf of a minor, the mere rejection of the suit supplies no ground for throwing the costs of the suit on the guardian.⁷

Court-fees.—See Act VII of 1870, Sched. II, art 3

Limitation.—The period of limitation for leave to appeal as a pauper is 30 days, see art 170, Sched II, Act XV of 1877, see (Act IX of 1908)

2. The inquiry into the pauperism of the applicant
Inquiry into pauper- may be made either by the Appellate
 1871 Court or under the orders of the Appellate
 Court by the Court from whose decision the appeal is preferred :

Provided that, if the applicant was allowed to sue or appeal as a pauper in the Court from whose decree the appeal is preferred, no further inquiry in respect of his pauperism shall be necessary, unless the Appellate Court sees cause to direct such inquiry.

Act XIV of 1882, s. 593

This rule applies to H. C

¹ Nussereooden Biswas v. Ujjal Biswas, (1872) 17 W. R., 68 [see, however, Jogendro Deb Roykut, *in the matter of*, (1872) 18 W. R., 102].

² Rashmonee Doss v. Jumbojoy Mullick, (1868) 9 W. R., 356

³ Moshallah Khan, *in the matter of*, (1870) 14 W. R., 445 See, however, Harsaran Singh v. Muhammad Raza, (1882) 4 All., 91.

⁴ Bhugobutty Kover v. Ganesh Dutt, (1874) 21 W. R., 308.

⁵ Naris, *in re*, (1885) 8 Mad., 504.

⁶ Rajagopal v. ...
 Ma ...

⁷ Brijes.

Somasundra, (1903) 26

ORDER XLV.

Appeals to the King in Council.

1. In this order, unless there is something repugnant in the subject or context, the expression "Decree" defined "decree" shall include a final order.

Act of XIV of 1882, s. 594.

An order dismissing a petition by a company for the confirmation of a special resolution altering the memorandum of association is a decree within the meaning of this rule.¹

Application to Court whose decree complained of
2. Whoever desires to appeal to His Majesty in Council shall apply by petition to the Court whose decree is complained of.

Act XIV of 1882, s. 598

In appeal to the Privy Council three motions are required; (1) that petition be received and filed, (2) that the recognizances be entered into by deposit made, (3) that the petition be allowed.²

The Court cannot receive any appeal without the security-bond duly registered, as provided by rule.³

Petition—The petition of appeal to the Privy Council should distinctly state the substantial question of law proposed to be submitted to the Privy Council.⁴ There should be also a full statement of the facts and legal grounds to show that there is a substantial case on the merits.⁵

Forma pauperis—An application to appeal to the Privy Council in *forma pauperis* may be made to the High Court on unstamped paper, accompanied by certificate of counsel that there is a reasonable ground for appeal; the usual security for costs and costs of translation must be given.⁶ A separate application should also be made to the Privy Council.⁷

Representation—Pending appeal the appellant died, and the Sudder Dewany directed the Zillah Court to take evidence and determine the right of succession. Evidence was taken and the Sudder Court entered the name of A. It was held that the validity of the order directing substitution could not be questioned in appeal, and the only remedy was by review.⁸

¹ *Bombay Burmah Trading Corporation v. Dorabji Cussetji Shroff*, (1903) 27 Bom. 415

² *Hurrooondry Dossee v. Cowar Kristonath*, (1842) Fulton, 10.

³ *Pershad Sein v. Rajendro Kishore*, (1867) 7 W. R., 338.

⁴ *Ali Akbar v. Abdul Latif*, (1875) 12 Bom. H. C., 8

⁵ *Goree Monee v. Jaggut Indro*, (1886) 11 Moo. I. A., 1.

⁶ *Jowad Ali*, appellant, (1867) 8 W. R., 43; *Cour Sarn Dass*, in re, (1873) 19 W. R., 305

⁷ *Munni Ram v. Sheo Churn*, (1846) 4 Moo. I. A., 114; 7 W. R., P. C., 29

⁸ *Kasi Persad Narain v. Kawalbasi*, (1849) 5 Moo. I. A., 146.

Limitation—An application for leave to appeal to the Privy Council must be made within six months from the date of the order or decree appealed against. An application is not valid for obtaining a copy of the order or decree under Act (s. 4, Act IX of 1892) unless it is made to His Majesty in

3 (1) Every petition shall state the grounds of appeal and pray for a certificate either that, as regards amount or value and nature, the case fulfils the requirements of section 110, or that it is otherwise a fit one for appeal to His Majesty in Council.

(2) Upon receipt of such petition, the Court shall direct notice to be served on the opposite party to show cause why the said certificate should not be granted.

Act XIV of 1882, s. 600.

A certificate of appeal given pursuant to this provision that the case is one fit for appeal is valid.¹

Non-prosecution.—If the petitioner does not prosecute his petition, his application may be struck off for non-prosecution;² with costs,³ but it may be re-admitted.⁴

Certificate ex parte.—If leave to appeal, be obtained *ex parte*, the respondent may, as a matter of course, present a counter-petition,⁵ but if there has been laches in applying to discharge the order, no costs will be given.⁶

Otherwise.—The word "otherwise" refers to special cases, where the point in dispute is not measurable by money, though it may be of great public or private importance. The mere assent of the respondent does not give the appellant a right of appeal.⁷ The mere omission to record reasons is not a ground for granting special leave to appeal to the Privy Council from the order or decree subsequently made.¹⁰

Appeal—No appeal lies from the order of a Judge of the High Court granting or refusing a certificate to the effect that the subject-matter of a suit is

¹ *Moroha Ramchandra v Ghanasham Nilkant*, (1895) 19 Bom., 301. Followed in *Strib v. Gandharp*, (1906) A. W. N., 55. *Anderson v Petiasami*, (1891) 15 Mad., 169.

² *Kundan Lal Kapur v Beni Madhub Mitter*, (1896) 1 Calc. W. N., 1x1; *Sita Ram Kesho, in the matter of*, (1893) 15 All., 14.

³ *Webb v. Macpherson*, (1902) L. R., 39 I. A., 233; *Amar Chandra v. Shoshu Bhushan Roy*, (1904) 31 Calc., 305.

⁴ *Moorajee v. Visranjee*, (1886) 12 Calc., 658.

⁵ *Secretary of State v. Janardan*, (1903) 27 Bom., 124.

⁶ *Shankar v. Hardeo*, (1889) 16 Calc., 397; L. R. 16 I. A., 71.

⁷ *Sib Narain v. Kullodhar*, (1849) 6 Moo. I. A., 207.

⁸ *Mohun Lal v. Debee Doss*, (1859) 8 Moo. I. A., 193.

⁹ *Banarasi Prasad v. Kashi Krishna Narain*, (1900) 23 All., 227; L. R., 28 I. A. 11.

¹⁰ *Shankar Baksh v. Bulwant Singh*, (1899) 27 Calc., 333; L. R., 27 I. A., 79; 4 Calc. W. N., 203.

¹¹ *Moti Chand v. Ganga Prasad Singh*, (1901) 24 All., 174; L. R., 29 I. A., 40; 6 Calc. W. N., 362.

of the value of Rs. 10,000.¹ The Court refusing leave to appeal should state its reasons.²

The mere fact that the High Court has certified the sufficiency of the amount and the value of the suit for an appeal to the Privy Council cannot make appealable an order which does not fulfil the statutory conditions.³

4 For the purposes of pecuniary valuation, suits involving substantially the same questions for determination and decided by the same judgment may be consolidated: but suits decided by separate judgments shall not be consolidated, notwithstanding that they involve substantially the same questions for determination.

5 In the event of any dispute arising between the parties as to the amount or value of the subject-matter of the suit in the Court of first instance, or as to the amount or value of the subject-matter in dispute on appeal to His Majesty in Council, the Court to which a petition for a certificate is made under rule 2 may, if it thinks fit, refer such dispute for report to the Court of first instance, which last-mentioned Court shall proceed to determine such amount or value and shall return its report together with the evidence to the Court by which the reference was made.

Act XIV of 1882, s. 601.

These are new rules inserted by Act V. of 1908.

Appeal—See O XLIII, r. 1, (v)

6. Where such certificate is refused, the petition shall be dismissed.

The Court should state its reasons for refusal.⁴

7. (1) Where the certificate is granted, the applicant shall, within six months from the date of the decree complained of, or within six weeks from the date of the grant of the certificate, whichever is the later date,—

(a) furnish security for the costs of the respondent, and

¹ *Amirunnessa v. Behary Lall*, (1876) 25 W. R., 529; *Tara Chand v. Radha Jeebun*, (1875) 24 W. R., 148; *Manly v. Patterson*, (1891) 9 C. L. R., 166; 7 Cal., 339; and see the cases cited in *Kishen Pershad v. Tiluckdhari*, (1895) 18 Cal., 182.

² *Venganal v. Cherakunnath*, (1906) 29 Mad., 191.

³ *Radha Kishan v. Collector of Jaunpur*, (1906) 5 Cal. W. N., 153; 23 All., 220.

⁴ *Venganal v. Cherakunnath*, (1906) 10 Cal. W. N., 545; 4 Cal. L. J., 305; 8 Bom. L. R., 374.

(b) deposit the amount required to defray the expense of translating, transcribing, indexing and transmitting to His Majesty in Council a correct copy of the whole record of the suit, except—

- (1) formal documents directed to be excluded by any order of His Majesty in Council in force for the time being ;
- (2) papers which the parties agree to exclude ;
- (3) accounts, or portions of accounts, which the officer empowered by the Court for that purpose considers unnecessary, and which the parties have not specifically asked to be included ; and
- (4) such other documents as the High Court may direct to be excluded.

(2) Where the applicant prefers to print in India the copy of the record, except as aforesaid, he shall also, within the time mentioned in sub-rule (1), deposit the amount required to defray the expense of printing such copy.

Act XIV of 1882, s. 602

Enforcement of security.—The present plaintiff purchased land brought to sale in execution of a decree and was put in possession. The sale was ousted. He preferred an order directed that security be given for the property without waste by the plaintiff who had succeeded.

It appeared that after the date of the instrument abovementioned a payment was made from the income of the property in satisfaction of the decree obtained by the zamindar against the present plaintiff for arrears of *poruppu* previously accrued due. *Held* (1) that the order of the High Court requiring security to be furnished was not *ultra vires* and that the instrument was enforceable ; (2) that the defendants who had given no personal guarantee were not competent to put an end to the security ; (3) that the period for the profits of which the defendants were chargeable was that between the date of the instrument and the date of the Privy Council decision ; (4) that the defendants should be credited with the amount paid in satisfaction of the decree for *poruppu*.¹

Six months—In *Anderson v. Periasami*,² it was ruled that in computing the period of limitation, the time occupied in obtaining copies of the decree and judgment sought to be appealed against cannot be excluded. Judgment was delivered in June 1870. In July 1871, a review was applied for and rejected in September, and when rejecting it, the Judicial Commissioner gave leave to appeal to the Privy Council. It was held that the permission was *ultra vires*, as the petition to appeal was not presented within six months of the judgment.

¹ *Narayanan v. Arunachellam*, (1896) 19 Mad., 140.

² *Anderson v. Periasami*, (1892) 15 Mad., 169.

complained of.¹ In 1883, the High Court in appeal passed a decree to which a minor under the Court of Wards was a party. Having attained majority in 1894 he sought to appeal to Her Majesty in Council, and presented an appeal within 6 months of the date when he attained majority. On an application under s. 598, former Code, (O XLV, r. 2) it was held that the application was barred by limitation.²

Petitioner applied for leave to appeal on the last day of the six months allowed to appeal, and deposited the estimated costs of translating and transmitting the record, but not the costs of printing, as required by Rule IV. The omission was not amended till after the six months, and his application was dismissed.³

Quere—If an application may be made on the first opening day, if the Court is closed and the period has expired.⁴

Struck off.—A petition presented in time and admitted, if struck off for default, can be re-admitted after six months.⁵

Costs and expenses and security.—The Court has power to enlarge the period.⁶

Security-bonds require a stamp.⁷

Appeal—No appeal is allowed from the order of a single Judge granting a certificate,⁸ nor from an order refusing to extend time to furnish security and striking off the application.⁹

Amendment—On an application that a certain limited meaning should be placed on an endorsement by a Bench Clerk on a certificate, the Court left the matter to be disposed of by their lordships of the Privy Council.¹⁰

8. Where such security has been furnished and deposit made to the satisfaction of the Court, the Court shall—

(a) declare the appeal admitted,

(b) give notice thereof to the respondent,

¹ *Gajadhar Peshad v. Widows of Eman Ali*, (1875) 15 B. L. R., 221. See also, *Sondamonce v. Mahatah Chand*, (1866) 6 W. R., 102.

² *Thurai Rajah v. Jamilabdeen Rowthan*, (1895) 18 Mad., 484.

³ *Gour Surn Dass, in the matter of*, (1873) 19 W. R., 305.

⁴ *Raj Kishen v. Hurro Soondjee*, (1871) 15 W. R., 255, and the cases there referred to; see also, *Luchmun Chunder v. Kaleo Churn*, (1869) 12 W. R., 293, where parties were allowed to file their petitions of appeal on the first open day after the vacation, but see *contra*, *Tamvaco v. Skinner*, (1868) 1 B. L. R., O. C., 39.

⁵ *Radha Binde Misser, in the matter of*, (1863) B. L. R., (F. B.), 730; 7 W. R., 531; *Shaukar v. Hardeo*, (1889) 16 Calc., 397; L. R., 16 I. A., 71.

⁶ *Gokal Chand*, (1835) A., 7; 10 Calc., 557, 1104; *Rangasayi v. Goopee Chand, in the* *Jogendro Deb*, (1874) 23 W. R., 220.

⁷ *Soonjharree Koonwar v. Ramesur Pandey*, (1866) 5 W. R., 47.

⁸ *Mainly v. Patterson*, (1881) 7 Calc., 339; *Tara Chand v. Radha Jeebun*, (1875) 24 W. R., 148; *Mowla Bukah v. Kissen Pertab*, (1876) 1 Calc., 102; 24 W. R., 150; *Lutfali v. Asgur Reza*, (1890) 17 Calc., 455.

⁹ *Kissen Pershad v. Tilackdhari*, (1891) 18 Calc., 182. See also, *Hurish Chunder v. Kalisunders*, (1882) 9 Calc., 483; L. R., 10 I. A., 4.

¹⁰ *Rattan Koer v. Chotay Narain Singh*, (1894) 21 Calc., 476.

- (c) transmit to His Majesty in Council under the seal of the Court a correct copy of the said record, except as aforesaid, and
- (d) give to either party one or more authenticated copies of any of the papers in the suit on his applying therefor and paying the reasonable expenses incurred in preparing them.

Act XIV of 1882, s. 603.

Right to appeal when perfected—There is no right to appeal to the Privy Council until this petition is admitted and allowed. If the petition is not prosecuted within a reasonable time, the Court has power to remove it from the file.¹

If the order admitting an appeal is void because given after the time allowed to do so has expired, this objection should be taken as early as possible before the Privy Council; for, if the case is called on and the argument entered on, their lordships will give special leave to appeal, if the appellant has a good case.² A security bond given on behalf of a respondent in a Privy Council appeal and purporting to transfer to the Registrar of the High Court an interest in the properties mentioned in the bond is a mortgage-bond within the meaning of s. 58 of the Transfer of Property Act.³

Review.—If the appeal has been admitted, the High Court cannot review its order.⁴

Surety.—Notwithstanding the admission of the appeal, a surety is not precluded from questioning the validity of the security-bond in the execution-proceedings, he not being a party to the order of Court admitting the appeal.⁵

Copy of record.—When the High Court had limited its decision to one or more issues as decisive of the case, their lordships held that only so much of the original record as properly bore upon and was material to the questions of law decided by the High Court and the subject of appeal should be printed.⁶

See note under r 11, *infra*.

9 At any time before the admission of the appeal, the Court may, upon cause shown, revoke the acceptance of any such security, and make further directions thereon.

Revocation of acceptance of security.

Act XIV of 1882, s. 604.

10. Where at any time after the admission of an appeal but before the transmission of the copy of the record, except as aforesaid, to his Majesty in Council, such security appears inadequate,

Power to order further security or payment.

¹ *Kapilnath Sihal v. Government*, (1876) 1 Cal., 142; *Moorajee v. Visranjee*, (1886) 12 Cal., 638; *Aghore Nath Chatterjee v. Damodardas Burman*, (1897) 2 Cal. W. N., xlv.

² *Gajadhar Pershad v. Widows of Emam Ali*, (1875) 15 B. L. R., 221; *Ram Babuk v. Kaminee Koomaree*, (1874) 14 B. L. R., 394.

³ *Girindro Nath Mukerjee v. Bejoy Gopal Mukerjee*, (1894) 3 Cal. W. N., 84; 26 Cal., 246; *foli in Tokhan v. Girwar*, (1905) 1 Cal. L. J., 118.

⁴ *Gopinath v. Goluck Chunder*, (1889) 16 Cal., 292.

⁵ *Girindra Nath Mukerjee v. Bejoy Gopal Mukerjee*, (1899) 26 Cal., 246.

⁶ *Venkata Surya v. Court of Wards*, (1896) L. R., 24 I. A., 194; 20 Mad., 395.

or further payment is required for the purpose of translating, transcribing, printing, indexing or transmitting the copy of the record, except as aforesaid.

the Court may order the appellant to furnish, within a time to be fixed by the Court, other and sufficient security or to make, within like time, the required payment.

Act XIV of 1882, s. 605

Documents. Unnecessary documents should not be inserted in the transcript, and all expenses occasioned by their insertion will be disallowed;² and in a case where the High Court could not determine whether certain books and accounts were material or relevant, it declined to put the appellant to the cost of printing them, but gave the respondent the option of printing and translating them at his own expense, with a view to their being sent to England as an appendix to the record.³

Razena in this, *razien* in this and security bonds connected with appeals need not be translated into English, if presented before the transmission of the appeal.³

Review - When an appeal has been filed from an order of the High Court on review, the papers relating to the application for review, if the application has been rejected, should not be transmitted with the record to the Privy Council.⁴

Judgment—The Letters Patent creating the High Court (of Madras), provide, that the reasons given by the Judges on appeal should be transmitted with the record for the information of the Privy Council at the hearing.⁵

11 Where the appellant fails to comply with such

Effect of failure to comply with order order, the proceedings shall be stayed,

and the appeal shall not proceed without an order in this behalf of His Majesty in Council.

and in the meantime execution of the decree appealed from shall not be stayed.

Act XIV of 1882, s. 606

A widow's interest in her husband's property should not be taken as security.⁴

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¹ Tarakant Bannerjee v. Puddomoney Dossee, (1863) 10 Moo. I. A., 476.

* Deo Nandan, *petitioner*, (1867) 7 W. R., 90

¹ Meer Mahomed Tukoo v. Lachmeput Singh, (1867) 7 W. R., 291.

¹ Fakheerooldeen Mahomed v. Nojmoonissa, (1869) 11 W. R., 145.

* Katchekrileya Rungappa v Kachivijaya Rungappa, (1867) 12 Moo. I. A., 495; Enaet Hussein v. Rowshan Jehan, (1868) 10 W. R. (F. B.), 1; 1 B. L. R., F. B. 1.

⁶ *Phool Koer v Dabee Peishad*, (1869) 12 W. R. 187.

¹ Kapilnath Sahasr, Government, (1876) 1 Cal., 142.

* Gour Surn Dass, in the matter of, (1873) 19 W. R., 305; and see, Moorajee v. Visramjee, (1886) 12 Calc., 653.

Extend time.—The High Court has the power to restore an appeal dismissed for default, or for any other reason removed from the file, after six months have expired¹

Appeal—No appeal lies from an order refusing to extend the time for furnishing security²

12. When the copy of the record, except as aforesaid, has been transmitted to his Majesty in Council, the appellant may obtain a refund of the balance (if any) of the amount which he has deposited under rule 7.

Act XIV of 1882, s. 607.

13. (1) Notwithstanding the grant of a certificate for the admission of any appeal, the decree appealed from shall be unconditionally executed, unless the Court otherwise directs

*Powers of Court pend-
ing appeal.*

(2) The Court may, if it thinks fit, on special cause shown by any party interested in the suit, or otherwise appearing to the Court,—

(a) impound any moveable property in dispute or any part thereof, or

(b) allow the decree appealed from to be executed, taking such security from the respondent as the Court thinks fit for the due performance of any order which His Majesty in Council may make on the appeal, or

(c) stay the execution of the decree appealed from, taking such security from the appellant as the Court thinks fit for the due performance of the decree appealed from, or of any order which His Majesty in Council may make on the appeal, or

(d) place any party seeking the assistance of the Court under such conditions or give such other direction respecting the subject-matter of the appeal, as it thinks fit, by the appointment of a receiver or otherwise.

Act XIV of 1882, s. 608

Admission of any appeal—Security cannot be demanded before the application has been considered and the appeal admitted;³ but if once a party

¹ Radha Binode Misser, *in the matter of*, (1867) B. L. R. (F. B.) 730; 7 W. R., 531; *contra*, Bolakun, *in re*, (1866) 6 W. R., 121.

² Kishen Pershad v. Tiluckdhari, (1891) 18 Cal., 182. See, O. XLIII.

³ Barra Lal, *in the matter of*, (1871) 16 W. R., 289.

has been put in possession of the property in suit in execution before the admission of an appeal, he cannot be required to give security.¹ The execution of a decree can be stayed, when a petition for leave to appeal has been presented, though the appeal has not been admitted under r. 8, but see the under noted case,² where it was held that an application for stay of execution cannot be granted before an appeal to the Privy Council is finally admitted under r. 8.³

Powers of High Court.—The Zillah Court decreed a suit in plaintiff's favour. On appeal, the High Court reversed the judgment and remanded the case. Against such remand an appeal was preferred to the Privy Council. The Zillah Court, however, proceeded with the case, and eventually dismissed the whole suit, and the defendant applied to execute the decree for costs. *Held*, that in such circumstances, the High Court was not competent to suspend execution of decree, or to direct the taking of security.⁴ When an appeal to the Privy Council has been admitted, all that the High Court can do is to proceed to stay the execution of the decree, on the appellant giving security for the due performance of the decree of the Privy Council. But it cannot continue an attachment of money made during the pendency of the suit in the District Court, after reversing the decree of that Court.⁵

Stay execution. It is essential to support an application to stay execution that irreparable and, secondly, that prove special circumstances would be nugatory. applicant has not an affidavit showing special circumstances, probably his application should be dismissed, and he should not be allowed time to produce further affidavits.⁶

A appealed to the Privy Council from a decree given against him; in a second suit he obtained a decree, and an order was issued against him to stay execution "until further orders." *Held*, if the party obtaining the decree against which A had appealed to the Privy Council attempted to execute it, the order restraining A might be modified, and the restraint withdrawn.⁷

A rule suspending execution pending an appeal to the Privy Council ceases to have effect when judgment is delivered and limitation begins to run.¹¹

The exercise of such jurisdiction is not a matter of right, but of discretion, and security will not be required, unless it has been shown that the party in possession is making waste, or is so embarrassed by debt that the estates are likely to be seized by creditors in satisfaction of their claims, or some such good cause.

¹ *Huro Sunduree v. Stevenson*, (1866) 5 W. R., 113.

² *Dame Jahbat v. Sale Mahomed*, (1895) 19 Bom., 10.

³ *Jarao Kumari v. Gopi Chand*, (1900) 5 Cal. W. N., 562.

⁴ *Onooroop Chunder, in the matter of*, (1866) 6 W. R., 114. See also, *Nilkissen v. Beerchunder*, (1863) 2 W. R., 23.

⁵ *Ramnath, in re*, (1866) 6 W. R., 117.

⁶ *Sidhee Nuzur Ally v. Ojoodhyaram*, (1865) 1 Ind. Jur., N. S., 185. See also, *Inder Kumari v. Jaipal*, (1887) 14 Cal. 290; L. R., 14 I. A., 1.

⁷ *Wilson v. Church*, (1879) 12 C. D., 454; *Polini v. Gray*, (1878) 12 C. D., 411.

⁸ *Repub. of Peru v. Weguelin*, 24 W. R., 297.

⁹ *Barker v. Lavery*, (1895) 14 Q. B. D., 769.

¹⁰ *Dwarkanath Roy v. Wooma Sunduree*, (1870) 14 W. R., 329.

¹¹ *Gunesh Dutt Singh v. Mangree Ram*, (1873) 19 W. R., 186.

¹² *Varatool Butool v. Hoseinee v. Gopon Nadaraja*, (1849) of, (1871) 16 W. R., 289.

Partial execution—Security to the extent of the whole sum decreed need not always be taken, but when a sum less than the amount decreed is taken as security, the decree-holder should be restrained from issuing process of execution with a view to realise any sum in excess of the amount for which security is given.¹ Security can be demanded after execution has issued in regard to part of the decree;² or has been completed;³ and execution may be stayed after partial completion, though whether restitution can be ordered is doubtful.⁴

Privy Council.—The Privy Council cannot stay execution. But when their lordships admitted an appeal from an interlocutory order, they advised the appellant to petition the Court in India to stay execution.⁵ But in one case, they stayed execution, when the Judges of the High Court had differed in opinion as to the propriety of staying execution under cl (c) of this rule.⁶ The application should always be made first to the Court in India but may be as in the under-noted cases granted by the Privy Council.⁷ The High Court having refused for want of security, the appellant should remain in India and certify by themselves but the High Court's lordships declined to interfere but advised the grant of an order staying proceedings, the petitioner being answerable in damages, and any aggrieved respondent having leave to move for discharge of the order.⁸

Restitution.—See *Raj Kissen v. Baroda*.⁹

Construction of bond—Where a decree-holder wishing to execute a decree gave security, yet did not execute the decree for some reason or other and the decree was set aside with costs in the Privy Council, it was held that the terms of the security-bond did not render the surety liable for costs or anything else awarded by the Privy Council.¹⁰ The terms of the bail-bonds in these cases are not given, and probably they were to restore the property the decree-holder might take in execution.

Value of security—In practice, the security is calculated at three years mesne profits of all lands the decree-holder may take possession of.¹¹

Insufficient security—A widow's life-interest in an estate cannot be accepted as competent security.¹²

Failure to furnish security—In the case of an appeal to the Privy Council, the Court has no power, on failure of both parties to furnish security, to attach any property held by the appellant beyond that decreed.¹³

¹ *Molka v. Sampal Koonwar*, (1866) 6 W. R., Mis., 62.

² *Inder Kumari v. Jaipal*, (1887) 14 Cal., 220, p. 295; L. R., 14 I. A., 1.

³ *Jamunool Butool v. Hosseinee Begum*, (1863) 10 Moo. I. A., 196; *Sooruj Monte v. Sudhama*, (1869) 12 W. R., 296.

⁴ *Ashinulla v. Karoonamoyi*, (1879) 4 C. L. R., 124. See also the case of *Joyram Patter v. Russek Mohun*, (1867) 8 W. R., 144, decided under Regulation XVI of 1797. See also r. 14, *infra*.

⁵ *Inder Kumari v. Jaipal*, (1887) 14 Cal., 220; L. R., 14 I. A., 1; *Chalikani Appa v. Venkataramanajamma*, (1897) 2 Calc. W. N., 17.

⁶ *Chitrapat Singh v. Dwarkanath Ghose*, (1895) 22 Cal., 1; L. R., 21 I. A., 170.

⁷ *Vasudeva v. Shadagap*, (1906) 29 Mad., 379; 10 Calc. W. N. 915; 4 Calc. L. J., 101; 8 Bom. L. R., 407.

⁸ *Mohesh Chandra v. Satrugan Dhal*, (1893) L. R., 26 I. A., 281; 27 Cal., 1; 4 Calc. W. N., 34.

⁹ *Raj Kissen v. Baroda*, (1866) 6 W. R., Mis., 111.

¹⁰ *Nuffer Chunder v. Soorenro Nath*, (1870) 14 W. R., 410; and see, *Brijobuttee v. Pertab Sing*, (1865) 3 W. R., P. C., 36.

¹¹ *Ameeroomssa v. Dunne*, (1870) 14 W. R., 361.

¹² *Phool Koer v. Dabec Parshud*, (1869) 12 W. R., 187.

¹³ *Khoroo Lal v. Kant Lal*, (1866) 5 W. R., Mis. 37.

Registration—The security bond (if registration is necessary) need not be registered until the security has been accepted. Thus, the High Court directed a party to furnish security within two months and on the last day allowed by the order the party tendered a *chutni mehal*, and on the day following gave an unregistered security bond which the Judge refused. It was held that the Judge should have entered into the sufficiency of the security, and that registration was not necessary until the security had been accepted.¹

Reporting on security—In reporting on security a Judge should not transmit to the High Court all the documents used to make out the title of the parties offering the security, but should confine himself to stating the particulars of the documents which have been produced and proved before him, and upon which the title of the surety appears to have been made out.²

A District Judge has no power to release a surety from security taken by the High Court in a Privy Council case, and no appeal lies from such an order. It is void.³

Quere.—Has the Court power to order restitution of property already taken in execution of decree pending appeal to the Privy Council?⁴

Letters Patent appeal—An order under this rule refusing to order security for costs is not subject to appeal under s. 15 of the Letters Patent.⁵

14 (1) Where at any time during the pendency of the appeal the security furnished by either party appears inadequate, the Court may, on the application of the other party, require further security.

(2) In default of such further security being furnished as required by the Court,—

- (a) if the original security was furnished by the appellant, the Court may, on the application of the respondent, execute the decree appealed from as if the appellant had furnished no such security;
- (b) if the original security was furnished by the respondent, the Court shall, so far as may be practicable, stay the further execution of the decree, and restore the parties to the position in which they respectively were when the security which appears inadequate was furnished, or give such direction respecting the subject-matter of the appeal as it thinks fit.

Act XIV of 1882, s. 609.

¹ *Dunne v Amceeroonissa*, (1870) 13 W. R., 41.

² *Amceeroonissa Khatoon, in the matter of* (1870) 14 W. R., 24.

³ *Abedoonissa v. Amceeroonissa*, (1872) 17 W. R., 461.

⁴ *Ashanulla v. Karoonamoyt*, (1879) 4 C. L. R., 125.

⁵ *Mohabir Prosad v. Adhikari Kunwar*, (1894) 21 Cal., 473.

15. (1) Whoever desires to obtain execution of any order of His Majesty in Council shall apply by petition, accompanied by a certified copy of the decree passed or order made in appeal and sought to be executed, to the Court from which the appeal to His Majesty was preferred.

(2) Such Court shall transmit the order of His Majesty in Council to the Court which passed the first decree appealed from, or to such other Court as His Majesty in Council by such order may direct, and shall (upon the application of either party) give such directions as may be required for the execution of the same; and the Court to which the said order is so transmitted shall execute it accordingly, in the manner and according to the provisions applicable to the execution of its original decrees.

(3) When any monies expressed to be payable in British currency are payable in India under such order, the amount so payable shall be estimated according to the rate of exchange for the time being fixed at the date of the making of the order by the Secretary of State for India in Council with the concurrence of the Lords Commissioners of His Majesty's Treasury for the adjustment of financial transactions between the Imperial and the Indian Governments.

Act XIV of 1882, s. 610.

The functions of a Court under this rule are purely ministerial. The effect of the order of His Majesty in Council on the suit itself cannot be discussed on an application under this rule.¹

Limitation—Twelve years, from the time when a right to enforce the judgment arises—Art 180, Sched II, Act XV, 1877, (Art. 183, Sch I, Act IX of 1908)² and in, *Anand Moyee v. Poorno Chunder*³ it has been held that the right to enforce decrees of Her Majesty in Council is not affected by any law of limitation.

Execution—The application for execution must be made to the Court from which the appeal has been preferred—i.e., the High Court, and proceedings commenced in any other Court are invalid.⁴ And it is the duty of such Court to give directions for executing the decree to the Court of first instance by which the suit was originally tried.⁵ District Courts should refer to the High Court parties applying for execution of decrees which have been appealed to the Privy Council.⁶

¹ *Prem Lall Mullick v. Sumbhoonath Roy*, (1895) 23 Cal., 960.

² *Luchmun Persad Singh v. Kishun Persad Singh*, (1882) 8 Cal., 218; *Bhooboona Alumbabi v. Johraj Singh*, (1882) 11 C. L. R., 277.

³ *Anand Moyee v. Poorno Chunder*, (1896) 6 W. R., 69.

⁴ *Joy Narain Giree v. Goluck Chander Mytee*, (1874) 22 W. R., 102; *Lethbridge v. Frohlah Sen*, (1873) 19 W. R., 301.

⁵ *Barlow v. Orde*, (1872) 18 W. R., 175.

⁶ *Habeeboollah v. Gower Ali*, (1867) 7 W. R., 225.

The original decree of the Privy Council is given to the successful party, and it is his duty to file the original for execution in the High Court, but this rule does not limit the only possible copies to a certified copy, and an uncertified copy is sometimes admissible. In such a case the decree holder must produce a certified copy of the formal order, and a true and correct copy of the judgment cannot be treated as the decree, although it is when the Privy Council remits a case with directions that the High Court shall give a certain result by certain inquiries, the facts and reasons of those inquiries as set forth in the judgment are part of the decree, and should be forwarded to the Zillah Court with the decree.⁴ When the decree is filed, the High Court forwards it, as a rule, to the first Court which is bound to execute it as if it were its own original decree,⁵ if that Court has ceased to have territorial jurisdiction, it should, either of its own motion or when applied to transfer the decree for execution to the Court which has territorial jurisdiction.⁶ A security bond cannot be enforced against a surety, if invalid.⁷

Against person not a respondent—All the defendants in a suit except one B, appealed to the High Court which reversed the decree of the District Judge and dismissed the suit. On an appeal by the plaintiff to the Privy Council in which it was not made a respondent, the decree of the High Court was set aside and that of the District Judge restored. *Held*, that notwithstanding B was not a party to the appeals, the decree could be executed against him.⁸

Interest—Interest is not allowed without an express order,⁹ and where a decree gave interest on the principal only, and costs, no interest was allowed on the costs.¹⁰ but in one case said nothing as to interest, it carried interest at 6 per cent.¹¹ In some cases, the rate granted in the

Costs—The word "costs" in Privy Council decrees mean costs in England only.¹² Costs in India are not assessed by the Privy Council.¹³ They include the ordinary costs of translation and printing,¹⁴ unless there is a special order

¹ *Kally Boodhary v. Hurriah Chunder*, (1881) 6 Cal. 594; *Hurriah Chunder v. Kalibundari*, (1883) L. R., 101. A., 4; 9 Cal. 482.

² *Juggernath v. Judoo Roy*, (1879) 5 Cal. 329; 4 C. L. R., 387.

³ *Joy Narain Guze v. Goluck Chunder*, (1873) 20 W. R., 444.

⁴ *Goluck Chunder Dutt v. Mohan Lall Sookul*, (1866) 5 W. R., 271.

⁵ *Goomo Sain v. Hanooman Pershad*, (1873) 20 W. R., 419.

⁶ *Girindro Chunder v. Jarawa Kumari*, (1893) 20 Cal. 105.

⁷ *Grimdra Nath Mukherjee v. Dejoy Gopal Mukerjee*, (1897) 26 Cal., 240; 3 Cal. W. N., 84.

⁸ *Kishen Sahai v. Collector of Allahabad*, (1892) 4 All., 137.

⁹ *Lekhraj Roy v. Mahtab Chand*, [1874] 21 W. R., 147; *Forester v. Secretary of State*, (1877) L. R., 41 A., 137; 3 Cal. 161; *Dakhina Mohan Roy v. Sarola Mohan Roy*, [1896] 23 Cal., 357; *Tokhansig v. Girwar*, (1905) 1 Cal. L. J., 118.

¹⁰ *Amceeroonnissa v. Meer Mahomed*, (1872) 18 W. R., 103; *Brojo Soondree v. Anund Moyee*, (1871) 16 W. R., 302; *Tokhan Singh v. Girwar Singh*, (1905) 9 Cal. W. N., 372, 1 Cal. L. J., 118.

¹¹ *Nil Madhub v. Bissambhur*, [1874] 21 W. R., 411.

¹² *Amceeroonnissa v. Meer Mahomed*, (1872) 18 W. R., 103.

¹³ *Oomatoof Fatima v. Azhar Ali*, [1871] 15 W. R., 356, 9 B. L. R., App., 23, note.

¹⁴ *Sharo la Pershad Mullick, in the matter of*, [1872] 18 W. R., 89; 9 B. L. R., App., 23, note.

¹⁵ *Ram Coomar v. Prosnanno*, [1894] 19 Cal., 106; see also, *Madan Thakur v. Lopez*, (1871) 9 B. L. R., App., 22; 18 W. R., 253; *Asgur Ali v. Nagendro*, (1875) 23 W. R., 463.

disallowing them in whole or in part.¹ A refund of the costs, with interest at 6 per cent, will be granted on motion.²

Mesne profits—When the appeal was dismissed by the Privy Council and no order made as to mesne profits, *held*, the respondent was entitled to mesne profits from the date of the decree.³

Restitution—Restitution carries mesne profits without any express order;⁴ and where a definite sum has been paid under the decree, restitution carries interest on it.⁵ The purchaser at a sale set aside by the High Court on account of irregularities appealed to the Privy Council. Pending the appeal, he was compelled to deliver up possession of the land, but security was furnished by persons not parties to the suit for its re-delivery to him with mesne profits. The land

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interest. On appeal to the High Court, *held* (1) that the order was one under this provision and an appeal lay therefrom; (2) although the order of the Privy Council did not direct payment of mesne profits, such payment was within its purview, as being a benefit by way of restitution fairly and reasonably conse-

Restitution may be obtained of property sold pending appeal even as against the auction-purchaser who was a party to the suit.⁷

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on the ground that A's property had been exhausted.⁸ The Privy Council, doubting whether the respondents to England were on the face of the plaint, entitled to the full amount claimed, left the matter to be determined by the High Court in execution, where it appeared that the doubt arose owing to the word *shahodar* in the plaint having been wrongly translated "sons." The High Court allowed the respondents to take out execution for the whole amount.⁹ A judgment was pronounced on the 20th of April, 1870, and an appeal was allowed to the Privy Council on the 14th of May. A judgment on review was passed on the 29th August, and was sent with the papers; but no appeal was preferred against it. Their lordships affirmed the first judgment without prejudice to the second judgment passed subsequent to the appeal.¹⁰ Where a minor withdrew an appeal on coming of age, the costs of his mother and guardian, who had carried on the case, were directed to be paid out of his estate.¹¹

¹ *Bishen Mun v. Ld. Mortgage Bank*, (1834) L. R., 12 L. A., 7; 11 Calo., 244.

² *Dorab Ally v. Abdool Azeer*, (1878) 3 C. L. R., 338; 4 Calo., 229.

³ *Gogun Chunder Sirkar v. Laidlay*, (1879) 5 C. L. R., 189.

⁴ *Gooroodoss Roy v. Stephens*, (1874) 21 W. R., 195; *Leelanund v. Lakchmissar Sing*, (1870) 14 W. R., P. C., 23; 13 Moo. I. A., 490.

⁵ *Rodger v. Comptoir d'Escompte de Paris*, (1871) L. R., 3 P. C., 465.

⁶ *Arunachellam v. Arunachellam*, (1892) 15 Mad., 203.

⁷ *Garurduh Prasad Singh v. Bajju Mal*, (1907) 28 All., 337.

⁸ *Dhunpat Singh v. Forbes*, (1874) 22 W. R., 104.

⁹ *Mazaffer Hossein v. Amereoonissa*, (1872) 17 W. R., 340.

¹⁰ *Toondun Singh v. Pokhnaram Singh*, (1873) L. R., 1 L. A., 345.

¹¹ *Bistoopria Putmadaye v. Nand Dhul*, (1870) 13 Moo. I. A., 602.

Rate of exchange — This means the rate of exchange when execution is taken out and not when the decree was passed.¹ The amount payable must be calculated at the rate of exchange for the time being fixed by the Secretary of State: the words "for the time being" refer only to the time the order of the Privy Council was passed and not to the time in which execution was taken out.²

Appeal — An appeal is allowed to the full Court from the decision of a single Judge refusing execution.³

16 The orders made by the Court which executes the Appeal from order of his Majesty in Council, relating to such execution, shall be appealable in the same manner and subject to the same rules as the orders of such Court relating to the execution of its own decrees.

Act XIV of 1882, s. 611.

¹ *Param Sukh v. Ram Dayal*, (1896) 8 All., 650.

² *Dakhina Mohan Roy v. Saroda Mohan Roy*, (1896) 23 Calc., 357; *Mahomed Abdul Hye v. Gayraj Sahai*, (1898) 25 Calc., 233; 2 Calc. W. N., 89.

³ *Kally Soondery v. Hurrish Chunder*, (1891) 6 Calc., 594; L. R., 10 I. A., 4.

ORDER XLVI

Reference.

1. Where, before or on the hearing of a suit or an appeal in which the decree is not subject to appeal, or where, in the execution of any such decree, any question of law or usage having the force of law arises, on which the Court trying the suit or appeal, or executing the decree, entertains reasonable doubt, the Court may, either of its own motion or on the application of any of the parties, draw up a statement of the facts of the case and the point on which doubt is entertained, and refer such statement with its own opinion on the point for the decision of the High Court.

Reference of question
to High Court.

Act XIV of 1882, s. 617.

This rule applies to H. C. and Prov. S. C. C.

Form of reference—As to the form in which a reference from a Presidency Small Cause Court should be made, see *Ralli Brothers v Goculbhai*.¹

Small Cause Court—See sec 9 Act XV of 1882. In *Oakshott v. British India Co.*,² it was ruled that a Full Bench of a Presidency Small Cause Court cannot state a case for the opinion of a High Court on an application for a new trial. A reference can only be made under s. 69 of Act XV of 1882 upon some question of law or usage having the force of law, or upon the construction of a document, if any such question arises in a suit or proceeding in which the amount or value of the subject-matter is over Rs. 500, and either party requires such a reference.³ When upon an application to the Presidency Small Cause Court for a new trial, the judges differ in their opinion as to any question of law and the majority without ordering a new trial reverse the decree of the Judge who tried the suit, the Court is bound to state a case for the opinion of the High Court under s. 69 of the Presidency Small Cause Court Act.⁴ The party requiring a Small Cause Court Judge to make a reference under s. 69 must do so before the Judge has delivered judgment.⁵ Under s. 69 of the Presidency Small Cause Court Act (XV of 1882) the existence of such a question of law or usage or construction as therein mentioned is a condition precedent to a reference to the High Court and if no such question arises, the Small Cause Court has no authority to refer and the High Court no jurisdiction to deal with the reference.⁶

¹ *Ralli Brothers v Goculbhai*, (1891) 15 Bom., 376.

² *Oakshott v British India Coy.* (1892) 15 Mad., 179.

³ *Benolo Lal Roy v. River Steam Navigation Co.*, (1896) 1 Calc. W. N., 143.

⁴ *Seshammal v. Munnusami Mudali*, (1897) 20 Mad., 353.

⁵ *Bank of Bengal v. Vyabhoj Gangji*, (1892) 15 Bom., 618.

⁶ *Iswardas Tribhovandas v. Kalidas Bhaides*, (1896) 20 Bom., 779.

Decree not subject to appeal—These words have been substituted for the word "final". This rule is not intended to provide for supposititious cases, which do not naturally arise in a proper proceeding before the Court.²

Application of rule—No reference can be made as to the amount of security that should be taken in staying execution, as it is a matter to be decided under s. 4.³

It seems doubtful if this rule applies to applications for review,⁴ but it would apply to an application for a new hearing.⁵

The Court cannot make a reference to a point merely on the application of the parties, unless it entertains a reasonable doubt upon the matter,⁶ nor on a point on which a Division Bench of the High Court has expressed an opinion.⁷

This rule does not authorise a reference in a matter of probate; though when referred, the High Court may deal with the case under s. 246 of the Succession Act.⁸

A reference cannot be made as to the amount of Court Fee payable on a memorandum of appeal.⁹

2 The Court may either stay the proceedings or proceed in the case notwithstanding such reference, and may pass a decree or make an order contingent upon the decision of the High Court on the point referred;

but no decree or order shall be executed in any case in which such reference is made until the receipt of a copy of the judgment of the High Court upon the reference.

Act XIV of 1882, s. 618

This rule applies to H. C. and Prov. S. C. C.

Repealed in Ajmere and Merwara; Reg. 1 of 1877, s. 2

3 The High Court, after hearing the parties if they appear and desire to be heard, shall decide the point so referred, and shall transmit a copy of its judgment, under the signature of the Registrar, to the Court by which the reference was made; and such Court shall, on the receipt,

Judgment of High Court to be transmitted, and case disposed of accordingly

¹ *Yashwanth v. D. S.*, 11 Bom. 123 (1887); *see also* *Yashwanth v. D. S.*, 11 Bom. 123 (1887).

² *Mahmad Haji Zakari v. Ahmad Bha Habibbhai*, (1901) 25 Bom. 327.

³ *Ishwargar v. Chundrama*, (1898) 12 Bom. 30; and see, *Rangji v. Bhaiji*, (1887) 11 Bom. 57.

⁴ *Bonomally Deo v. Ram Saday*, (1872) 17 W. R., 96; *Talim Mundal v. Watson & Co.*, (1872) 17 W. R., 94.

⁵ *Ishan Chunder v. Haran Sirdar*, (1869) 11 W. R., 525.

⁶ *Henrich Chunder Talapattur v. O'Brien*, (1870) 14 W. R., 248.

⁷ *Nara Koli v. Chima*, (1889) 13 Bom., 34; and see, *Bhairaji v. de Brito*, (1906) 30 Bom. 226; 7 Bom. L. R., 995.

⁸ *Monohur Mookerjee, in re*, (1890) 5 Cal., 756; 6 C. L. R., 264.

⁹ *Pir Bakshi v. Faiz*, (1906) A. W. N., 180.

thereof, proceed to dispose of the case in conformity with the decision of the High Court.

Act XIV of 1882, s. 619

This rule applies to H. C. and Prov. S. C. C. Repealed in Ajmere and Merwara—Reg. 1 of 1877, s. 2.

A Small Cause Court passed a decree for the plaintiff but contingent on the opinion of the High Court. On the reference the High Court decided that upon the plaint the plaintiffs could not recover. *Held*, that the Small Cause Court on receipt of copy of the judgment of the High Court was bound to enter judgment for the defendants.¹

Review.—Where the reference is made not by the Judge of a Court of Small Causes, but by a Subordinate Judge, the High Court cannot review its own judgment.²

4. The costs (if any) consequent on a reference for the decision of the High Court shall be costs in the case.

Costs of reference to High Court.

Act XIV of 1882, s. 620

This Rule applies to Prov. S. C. C. Repealed in Ajmere and Merwara; Reg. 1 of 1877, s. 2. See *Nicol v. Mathoora Dass*.³

5. Where a case is referred to the High Court under rule 1, the High Court may return the case for amendment, and may alter, cancel or set aside any decree or order which the Court making the reference has passed or made in the case out of which the reference arose, and make such order as it thinks fit.

Power to alter, etc., decree of Court making reference

Act XIV of 1882, s. 621.

This rule applies to H. C. and Prov. S. C. C.

Before the High Court can give an opinion upon a matter referred to it under s. 69, Act XV of 1882, these conditions must be complied with—(1) that the referring Court entertains a reasonable doubt upon some question of law, (2) that it states what the point is, and (3) that it gives a statement of the facts with an expression of opinion on the point referred. When such a course has not been adopted, the High Court can under this rule return the case for amendment.⁴

6. (1) Where at any time before judgment a Court in which a suit has been instituted doubts whether the suit is cognizable by a Court of Small Causes or is not so cognizable, it may submit the record to the High Court with a statement of its reasons for the doubt as to the nature of the suit.

Power to refer to High Court questions as to jurisdiction in small causes.

¹ A. Yule & Co. v. Mahomed Hossain, (1897) 24 Cal., 129.

² Ramchandra v. Sitaram, (1886) 10 Bom., 63.

³ Nicol v. Mathoora Dass, (1889) 15 Cal., 507.

⁴ Garling v. Secretary of State, (1903) 30 Cal., 453.

(2) On receiving the record and statement, the High Court may order the Court either to proceed with the suit or to return the plaint for presentation to such other Court as it may in its order declare to be competent to take cognizance of the suit.

Act XIV of 1882, s. 646A

7. (1) Where it appears to a District Court that a Court subordinate thereto has, by reason of erroneously holding a suit to be cognizable by a Court of Small Causes or not to be so cognizable, failed to exercise a jurisdiction vested in it by law, or exercised a jurisdiction not so vested, the District Court may, and if required by a party shall, submit the record to the High Court with a statement of its reasons for considering the opinion of the subordinate Court with respect to the nature of the suit to be erroneous.

(2) On receiving the record and statement the High Court may make such order in the case as it thinks fit.

(3) With respect to any proceedings subsequent to decree in any case submitted to the High Court under this rule, the High Court may make such order as in the circumstance appears to it to be just and proper.

(4) A Court subordinate to a District Court shall comply with any requisition which the District Court may make for any record or information for the purposes of this rule.

Act XIV of 1882, s. 646B.

If required by a party shall — In Madras it has been held that the Court is bound to make a reference. *Case of the parties referred to is so*
 merely
 that

The High Court on a case being submitted to it under this rule has power to consider the question of jurisdiction or to deal with it on the merits, so as to do substantial justice. If the parties have submitted to the jurisdiction, it is not open to either of them on second appeal to plead the want of jurisdiction.³ This rule only applies to a restricted number of cases, namely, those in which a Court of Small Causes has erroneously held a suit to be or not to be cognizable by it.⁴ A plaint was presented to a Small Cause Court judge who returned it

¹ *Simson v. McMaster*, (1899) 13 Mad., 344.

² *Madan Gopal, v. Bhagwan Das*, (1899) 11 AIL, 304.

³ *Suresh Chunder Maitra v. Kristo Rangini Das*, (1904) 21 Cal., 249; *Parmesh. wata v. Vishnu*, (1904) 27 Mad., 478. See "WAIVER," p. 125 ante.

⁴ *Ram Lal v. Kabul Singh*, (1903) 25 AIL, 135.

under s 23 of the Provincial Small Cause Court Act. The Munsif then tried the suit, but the Judge on appeal, dismissed the suit for want of jurisdiction. *Held*, that the order under s 23, Act IX of 1887, conferred jurisdiction and it was said that even if this had not been the case it was doubtful whether, having regard to rr. 6 and 7, the appellate Court would have been right in dismissing the suit for want of jurisdiction.¹ A subordinate Judge invested with the jurisdiction of a Court of Small Causes tried a suit under his Small Cause Court powers, and passed a decree in plaintiff's favour. The defendant appealed. The appellate Court reversed the decree and remanded it for trial under his ordinary jurisdiction; thereupon the Subordinate Judge made a reference to the High Court under r. 6. *Held*, that the reference was not authorized, as it applied to a case before judgment.²

Reason—If the Judge does not give his reasons, the Court may return the reference.³

Costs—On an appeal from a decree for the plaintiff passed without jurisdiction the decree was reversed with costs, and it was held that the District Court had power to award costs.⁴

¹ *Mahamaya Dasya v. Nitya Hari Das*, (1896) 23 Cal , 425.

² *Diwalibai v. Sadasubhadas*, (1900) 24 Bom., 310.

³ *Diwalibai v. Sadasubhadas*, (1900) 24 Bom , 310.

⁴ *Sri Raja v. Chelassani*, (1907) 30 Mad , 41.

ORDER XLVII.

Review.

Application for review of judgment 1 (1) Any person considering himself aggrieved —

- (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,
- (b) by a decree or order from which no appeal is allowed, or
- (c) by a decision on a reference from a Court of Small Causes,

and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the Appellate Court the case on which he applies for the review.

Act XIV of 1882, s. 623.

This rule applies to H. C. and Prov. S. C. C.

Power to review — Does not exist save by Statute and of an order properly made.¹ The inferior Courts in the mofussil have no jurisdiction to review their own judgments except under the circumstances and with the limitations set forth in the Code of Civil Procedure.²

The Court for the relief of insolvent judgment-debtors;³ as well as Mufassil Small Cause Courts,⁴ have jurisdiction to review their own orders. The High

¹ *Drew v. Wills*, L. R., 1 Q. B., (1891), 452.

² *Burra Fakeer v. Fakeer Doss*, (1873) 20 W. R., 180.

³ *Thucker Bhagvandas, in the matter of*, (1880) 4 Bom., 489.

⁴ *Ishan Chunder v. Luchun Gope*, (1880) 5 Cal., 699.

Ex parte decree—An *ex parte* decree is subject to review,¹ although the case may be heard under O. IX, rr 13 and 14.²

Order—The order must be one passed in a suit or proceeding of a civil nature.³ An order under s. 5 of the Court-Fees Act is not a decree or order under this rule,⁴ an order disallowing a claim to attached property,⁵ an order *ex parte*, admitting an appeal after time,⁶ and an order under s. 62, Act II of 1874, are subject to review.⁷

Execution proceedings—The scope of this rule is wide enough to admit of the review of an order dissolving an execution case,⁸ or of any other order passed in execution of a decree.⁹

After satisfaction of a decree on the application of the parties, the Court can re-open the execution proceedings under this section and s. 47 on the ground of the decree holder's mistake of calculation in fixing the amount due under the decree.¹⁰

Appeal allowed, but not preferred—After an appeal has been preferred, no review can be admitted,¹¹ and tried and disposed of.¹² But if the review has been applied for in proper time and before an appeal has been preferred, the Judge is not prevented from proceeding on the application for review by the subsequent presentation of an appeal, but is bound to come to a decision upon it.¹³

Appeal by some other Party—Where the grounds of review are common to all, and one appeals on this ground, the appellate Court can modify the decree in regard to all, and if this is not so, the decree can be modified on review.¹⁴ The preferring of an appeal by one defendant does not deprive another defendant of his right to apply for a review.¹⁵

Withdrawal of appeal—If an appeal is withdrawn, either party may apply for review in the lower Court.¹⁶

¹ *Amir Hasan v. Ahmed*, (1857) 9 All., 36.

² *Muto v. Hahn Begum*, (1881) 6 All., 65; *Hathur v. Budhu*, (1882) 13 C. L. R., 254. See also, *Poresh Nath v. Khetra Munoo*, (1873) 20 W. R., 234; *Ali Azim v. Ram Maunick*, (1869) 12 W. R., 193.

³ *Minakshi v. Subramanya*, (1896) L. R. 11 I. A., 169; 11 Mad., 26; *Smith v. Secretary of State*, (1878) 3 Cal., 310, p. 316.

⁴ *Balkaran v. Golbindnath*, (1890) 12 All., 129, p. 157.

⁵ *Cochran v. Heralal*, (1867) 7 W. R., 79.

⁶ *Venkatrayudu v. Nagidu*, (1896) 9 Mad., 430; *Moshanullah v. Ahmedullah*, (1896) 13 Cal., 78.

⁷ *Smith v. Secretary of State*, (1878) 3 Cal., 310.

⁸ *Asoka Kumar Roy v. Khetra Munu Das*, (1897) 2 Cal., W. N., 606.

⁹ *Ho. B. v. Chander Mal*, (1892) W. R. N. B. 66. *Yellu v. Court of*, (1867) 4 190. See

¹⁰ *Nilratan v. Ram Ratton*, (1900) 5 Cal. W. N., 637.

¹¹ *Navivahoo v. Turner*, (1889) L. R., 16 I. A., 157; 13 Bom., 520; *Lucas v. Stephen*, (1868) 9 W. R., 301; *Ramanadham v. Narayanan*, (1904) 27 Mad., 602.

¹² *Raj Dhareo v. Mahadeo Singh*, (1869) 11 W. R., 511; *Ramappa v. Bharma*, (1906) 30 Bom., 625, 8 Bom. L. R., 842, and *Kuar Sen v. Gauga Ram*, (1890) A. W. N., 141; followed in *Kanhaya Lal v. Buldeo Persad* (1906) 28 All., 240.

¹³ *Bhurut Chunder v. Ram Gunga*, (1863) B. L. R., (P. B.) 302; 5 W. R., 59; *Thancoor Prasad v. Baluck Ram*, (1892) 12 C. L. R., 64.

¹⁴ *Pegoo v. Waizooddeen*, (1872) 18 W. R., 464.

¹⁵ *Bunkoo Lal v. Basoomunissa*, (1867) 7 W. R., 166.

¹⁶ *Pandu v. Devji*, (1883) 7 Bom., 287. See also, *Patloji v. Gannu*, (1891) 15 Bom., 379, per Birdwood, J.

Court of Small Causes—The provisions of s. 17 of the Provincial Small Cause Court Act are only directory.¹ The Court of a Subordinate Judge invested with the powers of a Small Cause Court Judge does not fall within clause 17, made to the High Court for a rehearing of a Court of Small Causes at Bombay on the ground that, even if that were the case, there was no "miscarriage or failure of justice" and the plaintiffs were not entitled to a rehearing.²

New and important matter or evidence—A review of judgment cannot be allowed merely to enable the Court to reconsider its judgment on the same evidence;³ or on the ground that, if the facts had been better or more fully placed before the Court, the judgment would have been different;⁴ or that the point on which the decision is based had been raised for the first time in special appeal;⁵ or merely to supply defects on the part of pleaders in the conduct of appeal;⁶ or that the Court had improperly neglected to examine a witness unless the objection was taken when the case was heard in regular appeal.⁷

In 1874, A sued B to recover money paid for land and got a decree. B appealed to the Privy Council. Subsequently A sued again on account of a second payment and recovered on the strength of the former decree. Their lordships of the Privy Council reversed the first decree and it was held that their lordships' decision was "new and important matter" on which to apply for review of the second decree.⁸

The new evidence must be relevant, clear and conclusive.⁹ It need not be sufficient *per se* to show that the previous decision is wrong or that it must be such as to cause an overpowering balance of evidence in favour of the applicant;¹⁰ but it must be material and of such a character that, if it had been brought forward in the suit, it might have altered the judgment.¹¹

Special appeal—New evidence is not a ground for review in special appeal;¹² and in Bombay, the practice has been to allow the appellant to withdraw his appeal and then apply for a review to the lower Court.¹³

When the decree was passed—It must be shown that the new matter or evidence was not within the knowledge of the applicant, or, if within his

¹ *Ramasami v. Kurisu*, (1890) 13 M.A., 178; not followed—*Jogi Alur v. Bishen Dayal*, (1891) 18 Cal., 83. See, *Jenu v. Budhuani*, (1903) 1 Cal. L. J., 43; and *Jagan v. Chet Ram* (1906) A. W. N. 94.

² *Ramechandra v. Sitaram*, (1846) 10 Bom., 64.

³ *Vassonji, Tricumji & Co. v. Southern Mahratta Railway Co.*, (1893) 17 Bom., 14.

⁴ *Lachman Singh v. Mohan*, (1899) 2 All., 505.

⁵ *Jadub Ram v. Ram Lochun*, (1873) 19 W. R., 189; *Chunder Chuen v. Loodun Ram*, 25 W. R., 324; *Chance Mundur v. Chudce Lall*, (1870) 14 W. R., 178.

⁶ *Cowell v. Mohadeb Mundul*, (1872) 17 W. R., 182.

⁷ *Prasannanath v. Judoonath*, (1868) 9 W. R., 589.

⁸ *Munshad Bibee v. Luchmepoot Singh*, (1863) 9 W. R., 129.

⁹ *Waghela v. Maaludin*, (1889) 13 Bom., 330; but see, *Amrit Lal v. Madho*, (1884) 6 All., 292, and *Panchanan Bose v. Gurudas Roy*, (1871) 9 B. L. R., 187; 18 W. R., 317.

¹⁰ *Heera Lal v. Ram Taruck*, (1875) 23 W. R., 323.

¹¹ *Sahabjan v. Sufidur Ali*, (1874) 22 W. R., 288.

¹² *Hocking v. Terry*, 15 Moo. I. A., (P. C.), 193; *Appa Rao*, in re (1897) 10 Mad., 73; L. R., 13 I. A., 155.

¹³ *Bhyrub Nath v. Kally Chunder*, (1871) 16 W. R., 112; *Panchanan v. Radhanath*, (1869) 4 R. L. R., A. C., 213; *Jakkammal v. Palneappa*, (1869) 5 Mad. H. C., 464; *Ram Kutti v. Mamed*, (1895) 18 Mad., 480.

¹⁴ *Pandu v. Devji*, (1883) 7 Bom., 287; *Nanabhai Vallabh Das v. Nathabhai Haribhai*, (1871) 9 Bom., H. C., 89; *Pandurang v. Moro*, (1869) 6 Bom. H. C., A. C., 69.

knowledge, could not be produced by him at the time the decree was passed;¹ but if the application for review is admitted upon other grounds, fresh evidence not produced at the trial may be received, although no reason had been assigned for the non-production at the trial.²

Error of law apparent on the face of the record.—An error on a point of law,³ apparent on the face of the judgment,⁴ or of the record⁵ is a sufficient cause for granting a review. It is not a universal rule that no point can be raised on an application for a review which has been already discussed and decided at the hearing, or that no new point which has not been raised at the hearing of the case can be argued on the application for a review;⁶ but if the basis of the review was raised but abandoned at the hearing of the appeal, it should not be allowed to prevail.⁷ Nor is it an objection that the decision of one divisional Bench of the High Court is at variance with that of another divisional Bench on the same point,⁸ or that the error was brought to notice by a new decision;⁹ if the application has been made regularly within time.¹⁰ Where a Judge gives wrong reasons for rejecting material evidence;¹¹ or declines to admit additional evidence on appeal;¹² or dismisses a suit for non-joinder of parties under s. 85 of the Transfer of Property Act;¹³ or bases his judgment on another decree which is subsequently set aside;¹⁴ or omits to consider the effect of important evidence;¹⁵ or is misled as to the contents of a document;¹⁶ or applies a wrong rule in valuation;¹⁷ or omits to try a material issue;¹⁸ or has made an error in calculation,¹⁹ the proper remedy is by review and not by special appeal.

¹ Dwarkanath v. Kishenlal, (1863) 1 Marsh, 553; Omrao v. Gooool, (1871) 16 W. R., 7; Nubokishore v. Jadub Chunder, (1873) 20 W. R., 426.

² Bihari Lal v. Trailakhyo Mayi, (1869) 3 B. L. R., A. C., 346.

³ Koh Poh v. Moung Tay, (1869) 10 W. R., 143.

⁴ Sharup Chand v. Pat Dassce, (1897) 14 Cal., 627.

⁵ Hussain Begam v. Collector of Muzaffarnagar, (1899) 11 All., 170.

⁶ Chintamani Pal v. Pwari Mohun, (1870) 6 B. L. R., 126; 15 W. R., F. B., 1; Hures Pershad v. Nund Kishore, (1872) 17 W. R., 479; Kalu v. Vishram, (1878) 1 Bom., 543; but see, Sheo Ratan v. Lappu Kuar, (1893) 5 All., 14; and Bhiwabai Singh v. Rajendra Pratap, (1870) 5 B. L. R., 321.

⁷ Sabapathi v. Subraya, (1878) 2 Mad., 68.

⁸ Nobect Kishen v. Shih Pershad, (1869) 9 W. R., 161.

⁹ Walling v. Yennatha, (1894) 7 M. L. J., 207. "002) 8
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¹⁰ Harihar v. Mahabadi Chandra, (1871) 9 P. C. R., (P. C.), 566, p. 590. See also 16 I. A., 104; Ellem v. Basheer, 1871, it was ruled that the production to the notice of the Judge at the first hearing, and which lays down a view of the law contrary to that taken by the Judge, is not a sufficient ground for granting a review.

¹¹ Reasut v. Abdoolah, (1877) 2 Cal., 130, p. 140; L. R., 3 I. A., 221.

¹² Ram Lal v. Rung Lal, (1872) 17 W. R., 47.

¹³ Girish Chunder v. Jaramoni, (1900) 5 Cal. W. N., 83.

¹⁴ Mooraree v. Mahomed Akmal, (1874) 22 W. R., 161.

¹⁵ Mahadeva v. Sappani, (1876) 1 Mad., 396.

¹⁶ Gopal Chandra v. Solomon, (1886) 13 Cal., 62.

¹⁷ Kalu v. Vishram, (1876) 1 Bom., 543.

¹⁸ Hassan Ali v. Nasroodin, (1871) 18 W. R., 134; Bihari Lal v. Trailakhyo Mayi, (1869) 3 B. L. R., A. C., 346; 12 W. R., 223; Wise v. Huro Lal, (1871) 16 W. R., 150.

¹⁹ Akbur Ali v. Makhdoom Baksh, (1876) 25 W. R., 63.

In the North-West Provinces a review will not be allowed on grounds that would support an appeal;¹ though in a later case a review was allowed on the grounds that the order had been passed *ex-parte*, and without jurisdiction.²

Minors.—A minor cannot on attaining his majority apply for a review of judgment passed against him in a suit in which he was properly represented. He can only impeach such decree by a separate suit when his guardian has been guilty of fraud or negligence.³ Compare sec 6 (t) of the New Limitation Act IX of 1908

Other sufficient reason.—In the case of, *Reasut v. Abdoolah*⁴ their lordships of the Privy Council state "that, even though it be admitted that there is

discretion of the Court in saying what reason is good and sufficient, or what may be so far requisite to the ends of justice as to support an application for review. Upon an appeal, where an appeal lies, it may be open to the Court of appeal to say that a Judge ought not to have admitted a review; that is a different thing from ruling that he has acted wholly without jurisdiction. In the first case, the Appellate Court reverses the order, because the Judge has erred in the mode in which he has exercised a judicial discretion; in the latter case it quashes the order because he has no discretion at all to be exercised." A misapprehension at trial of all parties as to the contents of a document, provided its purport could not be known by the exercise of due diligence;⁵ or if material, omitting to consider it;⁶ discrediting without inspection a document, or declaring a Commissioner unworthy of credit, because he was a mohurr of the Court,⁷ raising a point for the first time in delivering judgment.⁸ A Court has no jurisdiction under this rule to re-instate a case, where a person has by his own negligence allowed his rights under O. IX, r. 4 to be barred.¹⁰ But in a subsequent case, it was ruled that, when a suit was dismissed for default under O. IX, r. 7 and an application for review of judgment was made by the plaintiff without a previous application to have the order of dismissal set aside under O. IX, r. 8 the Court had jurisdiction to entertain the application for review of judgment.¹¹ The omission to serve notice of hearing of an appeal on the respondent who consequently could not appear on the date of hearing was held to be a sufficient reason within the meaning of this rule.¹² The ground for amendment of a decree must be something which existed at the date of the decree. The rule does not authorise the review of a decree which was right when it was made on the ground of the happening of some subsequent event.¹³

¹ *Sheo Ratan v. Lappa Kuar*, (1893) 5 All., 14.

² *Amir Hassan v. Ahmad*, (1897) 9 All., 36.

³ *Cunsandas Natha v. Ladkavahu*, (1895) 19 Bom., 571.

⁴ *Reasut v. Abdoolah*, (1877) 2 Calc., p. 140; L. R., 3 I. A., 221.

⁵ *Nasiruddin Khatun v. Indronarayan*, (1863) B. L. R., F. B., 367; 5 W. R., 93.

⁶ *Gopal Chandra v. Solomon*, (1886) 13 Calc., 62, p. 64.

⁷ *Mahadeva v. Sappani*, (1876) 1 Mad., 396.

⁸ *Abdul v. Raeha*, (1876) 1 All., 363.

⁹ *Gunga Pershad v. Maharani*, (1884) L. R., 12 I. A., 47, p. 51; *Sulleman v. Gunga Pershad*, (1884) L. R., 12 I. A., 47, p. 51.

¹⁰ *Kotiah Mondul v. Nabadwip Chandra Kar*, (1897) 2 Calc. W. N., 318.

¹¹ *Raj Narain v. Ananga Mohun*, (1899) 26 Calc., 598.

¹² *Ghansham v. Lal Singh*, (1897) 9 All., 61.

¹³ *Kotagiri Venkata Subbamma v. Vellanki Venkatarama*, (1900) 4 Calc. W. N., 725; 24 Mad., 1; L. R., 27 I. A., 197.

Sale certificate—A sale certificate can be amended under this rule. There is no appeal from such an order.¹

Court fees—See Court Fees Act, 1870 Sched. I, arts. 4 and 5. In an application for review, Court fee duty must be paid on the whole value of the suit.²

Limitation—See Act XV of 1877 Sched. II, arts. 160 A, 162 and 173. (Arts. 161, 162, 173, Sch. I, Act IX of 1908)

Practice—It is not necessary that an application for review of judgment should be accompanied by copy of the decree, order or judgment sought to be reviewed.³

2 An application for review of a decree or order of a Court, not being a High Court, upon some ground other than the discovery of such new and important matter or evidence as is referred to in rule 1 or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the Judge who passed the decree or made the order sought to be reviewed; but any such application may, if the Judge who passed the decree or made the order has ordered notice to issue under rule 4, sub-rule (2), proviso (a), be disposed of by his successor.

Act XIV of 1882, s. 634

This rule applies to H. C.

Mufassil Small Cause Court—A Judge of a mufassil Small Cause Court has jurisdiction to direct a new trial of a case tried by his predecessor.⁴

Effect of this rule—In the case of *Moheshur Singh v. Bengal Government*,⁵ their lordships of the Privy Council pointed out the distinction between a review and an appeal. The present rule embodies the spirit of that decision, which passed the review of the order or evidence, which passed the decision of the court substituted for it. Thus, he cannot do so on the ground of supposed errors of judgment in the previous decision,⁷ nor because the order was passed in the absence of the petitioner and without giving him notice of the hearing.⁸

Important matter—A decision of the Privy Council passed subsequent to decree, between the same parties in regard to the same issue is new and important matter.⁹

¹ *Boojha Roy v. Ram Kumar*, (1898) 3 Cal. W. N., 374; 26 Cal. 529. See also, *Saddo Kunwar v. Bansi Dhar*, (1901) 23 All., 476.

² *Nobin Chandra v. Mahomed Uzir*, (1893) 3 Cal. W. N., 203. But see, *Manohar in re*, 4 Bom., 26.

³ *Wajid Ali v. Nawal Kishore*, (1895) 17 All., 213. But see, *Adarji Edulji v. Manikji*, (1880) 4 Bom., 414.

⁴ *Shumsher Ally v. Kurkut Shah*, (1881) 6 Cal., 236; and see s. 17 of the Provincial Small Cause Court Act, IX of 1887.

⁵ *Moheshur Singh v. Bengal Government*, (1885) Moo. I A. 301, 3 W. R., P. C., 45.

⁶ *Sarangapani v. Narayanasami*, (1885) 8 Mal., 567.

⁷ *Behari Lal v. Mungols Nath*, (1890) 5 Cal., 111.

⁸ *Khema v. Dhanji*, (1890) 14 Bom., 101.

⁹ *Waghela v. Masludin*, (1889) 13 Bom., 330; *Ranee Pershad v. Radha Pershad*, (1871) 15 W. R., 143, but see, *Amrit Lal v. Madho*, (1884) 6 All., 292; *Panchanan Bose v. Gurudas Roy*, (1871) 9 B. L. R., 187; 18 W. R., 317.

Shall be made.—It is sufficient if after presentation, the Judge issues service of notice should ground other than those

In the North-West, it has been held that under this rule it is not sufficient that the application has been presented to the same Judge; it must be heard and determined by him.⁴

3. The provisions as to the form of preferring appeals

Form of applications shall apply, *mutatis mutandis*, to applications for review.

Act XIV of 1882, s. 625.

This rule applies to H. C.

Practice.—A petition for review must be in the form of a memorandum of appeal,⁵ and accompanied with a copy of the order,⁶ and, if it requires a certificate, the proper persons to certify are those pleaders who argued the case.⁷

If the ground be new matter or evidence, the petition and affidavit must set out the nature of the evidence relied on, and state when it was discovered. In granting a review the Court should not travel beyond the grounds mentioned in the application.⁸

4. (1) Where it appears to the Court that there is not

Application where sufficient ground for a review, it shall rejected. reject the application.

Application where (2) Where the Court is of opinion granted. that the application for review should be granted, it shall grant the same :

Provided that—

(a) no such application shall be granted without previous notice to the opposite party, to enable him to appear and be heard in support of the decree or order, a review of which is applied for : and

(b) no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made, without strict proof of such allegation.

⁴ Ramasami v. Kurisu, (1890) 13 Mad., 178 : Kara Singh v. Deo Nain, (1884) 10 Cal., 89 ; 13 C. L. R., 261.

⁵ Fazel Biswas v. Jamedar, (1886) 13 Cal., 231.

⁶ Ganpat v. Jivan, (1892) 16 Bom., 603, but see the case of Cheru v. Cheru, (1889) 12 Mad., 509.

⁷ Pancham v. Jhinguri, (1892) 4 All., 278.

⁸ Mahadaji Ramchandra v. Vithal Vishvanath, (1862) 1 Bom., H. C. 185.

⁹ Adarji Edulji v. Mavikji, (1880) 4 Bom., 414.

¹⁰ Tong Oung v. British Steam Navigation Co., (1874) 24 W. R., 430 ; see also, Rousseau v. Pinto, (1868) 10 W. R., 54. See O. XL, r. 1.

¹¹ Purna Chandra v. Nilmadhub, (1900) 5 Cal., W. N., 485. See "Strict Proof," r. 4, *infra*.

Act XIV of 1882, s. 626.

Form of notice—See App G, No 14

This rule does not apply to judgments on review; but only to orders admitting or rejecting reviews.¹ A decree of a division Bench of the High Court dismissing an appeal for default in depositing the estimated costs of preparation of the paper-book under rule 17 of the High Court Rules, Part II, Chap VIII, can only be set aside by an order under this rule.²

Judgment—The Judge should record his reasons for admitting the review, but if he omits to do so, the act is not void as done without jurisdiction,³ and the proper procedure would be, to deal with it on the same principle on which cases of unrecorded judgments are dealt with, and to remand the suit with a direction that the Judge should record his reasons. Such an order is bad and the case must be remanded.⁴ In cases under the Dekhan Agriculturists Relief Act (Bom. Act XVII of 1879) the conduct of proceedings before a District or Assistant Judge when sitting in revision is within his own discretion and the granting of a review on the ground of mistake as to the nature of defendant's income is a reasonable exercise of such discretion.⁵ He can review an *ex parte* order.⁶

Notice.—Before a suit can be reviewed, notice should be served on the opposite party appointing a day on which he may appear in support of the original decree,⁷ and the case should not be re-heard until cause has been shown and the review granted.⁸

But where an application was made to review an order rejecting a special appeal, and it was opposed on the ground that no notice had been given, the Court held that the application to appeal being *ex parte*, notice was not necessary.⁹

New matter—This rule contemplates, first, a decision on the matter referred to in clause (b), second, an order admitting the appeal. Both may be recorded in the same proceedings.¹⁰

Strict proof.—The applicant must satisfy the Court by strict proof, unless

¹ *Apcar v. Howah Bye*, (1886) 1 Ind. Jur., N. S., 237; *Rughoonath v. Anundo Parray*, (1868) 10 W. R., 387.

² *Fatimunnissa v. Deoki Perahad*, (1897) 24 Cal., 330; 1 Cal. W. N., 21.

³ *Ashrufoonnissa v. Enayet Hossein*, (1870) 13 W. R., 439; 5 B. L. R., 316; *Gunesh Ram v. Rohinee*, (1870) 14 W. R., 236; *Manicka Mudahar v. Gurusami Mudahar*, (1903) 23 Mad., 496.

⁴ *Gyanund Aaram v. Bepin Mohun Sen*, (1893) 22 Cal., 734.

⁵ *Badaricharya v. Ram Chandra Gopal*, (1893) 19 Bom., 113; *Ramsing v. Kisansing*, (1893) 19 Bom., 118.

⁶ *Ramchandra Narayan v. Draupadi*, (1906) 20 Bom., 281.

⁷ *Huro Mohun v. Mohendronath*, (1871) 16 W. R., 135; see also, *Rup Chand v. Bulant*, (1887) 11 Bom., 591.

⁸ *Rajendro Protap v. Bhowabul*, (1871) 14 W. R., 105.

⁹ *Joy Koomar v. Esharee Nund*, (1874) 18 W. R., 475; 10 B. L. R., 155.

¹⁰ *Aujoonnissa v. Soorjo Kant*, (1869) 11 W. R., 56.

¹¹ *Ram Joy v. Jugodessuree*, (1874) 22 W. R., 399.

¹² *Land Credit Co. v. Lord Fermoy*, (1870) L. R., 5 Ch., 763; *Nissa Bibee v. Neka Nkonya*, (1874) App., 35; 10 W. R., 424, note; 17 B. L. R., 174.

on the discovery of new evidence, and the Judge has admitted it without proof, the order cannot be supported on the ground that he admitted it for sufficient reason.¹ An affidavit that the applicant did not know of the existence of the new evidence, but not stating that he had used diligence, and made inquiries, is insufficient.²

An applicant applying for a review on the ground of error in construing a document is entitled to file new evidence to show the Court that an error has been committed and the objection that he did not produce it previously will not prevail.³

Appeal.—An appeal lies from an order under this rule granting an application for review.—Sec. O. XLIII, r. 1, (w), *ante*.

5. Where the Judge or Judges, or any one of the Judges,

Application for review
in Court consisting of
two or more Judges

who passed the decree or made the order,
a review of which is applied for, conti-
nues or continue attached to the Court

at the time when the application for a review is presented, and is not or are not precluded by absence or other cause for a period of six months next after the application from considering the decree or order to which the application refers, such Judge or Judges or any of them shall hear the application, and no other Judge or Judges of the Court shall hear the same.

Act XIV of 1882, s. 627.

This rule applies to H. C.

In *Ramhari Sahu v. Madan Mohan Mitter*,⁴ it was held that an application for re-admission of an appeal dismissed under rule 17 of the High Court Rules Pt. I, Chap. VII, for non-deposit of the costs of preparation of the paper-book is not an application for review of judgment, and cannot be disposed of by a single Judge of the High Court under this rule but this was overruled in the case of *Fatimunnissa v. Deoki Pershad*,⁵ in which it was laid down that a decree of a division Bench dismissing an appeal for the above mentioned reason can only be set aside by an order under this rule.

Attached to the Court.—Where a Judge of the High Court was absent on leave and another was appointed to officiate for him; *held*, he was not attached to the Court within the meaning of this rule.⁶

No other Judge shall hear. . . .
to the Ju
and if ad
Judge. . . .
District

¹ *Khetat Chunder v. Pran Kristo*, (1869) 12 W. R., 461; 11 B. L. R., 423, *note*;
Omrao Thakoor v. Gocool, (1871) 16 W. R., 7; 8 B. L. R., App., 31; see also,
Jhubboo Sahoo v. Jusooli Koer, (1872) 17 W. R., 230; *Brojeudro Coomar v. Wise*, (1873) 19 W. R., 130.

² *Netanath Ghose v. Sama Soondaree*, (1870) 14 W. R., 26; 8 B. L. R., App., 37, *note*.

³ *Gunesli Ram v. Rahinee*, (1870) 14 W. R., 236.

⁴ *Ramhari Sahu v. Madan Mohan Mitter*, (1896) 23 Cal., 339.

⁵ *Fatimunnissa v. Deoki Pershad*, (1897) 24 Cal., 350; 1 Cal. W. N., 21.

⁶ *Audhoy Churn v. Shamont*, (1889) 16 Cal., 753.

⁷ *Jardine Skinner v. Dhun Kothen*, (1870) 13 W. R., 82; *Audhoy Churn v. Shamont*, (1890) 16 Cal., 759.

Judge to his own Court for trial, his order was set aside as passed without jurisdiction¹

6. (1) Where the application for a review is heard by more than one Judge and the Court is equally divided, the application shall be rejected.

(2) Where there is a majority, the decision shall be according to the opinion of the majority.

Act XIV of 1882, s 628

This rule applies to H C

7. (1) An order of the Court rejecting the application shall not be appealable; but an order granting an application may be objected to on the ground that the application was—

Order of rejection not appealable, objections to order granting application

(a) in contravention of the provisions of rule 2,

(b) in contravention of the provisions of rule 4, or

(c) after the expiration of the period of limitation prescribed therefor and without sufficient cause.

Such objection may be taken at once by an appeal from the order granting the application or in any appeal from the final decree or order passed or made in the suit.

(2) Where the application has been rejected in consequence of the failure of the applicant to appear, he may apply for an order to have the rejected application restored to the file, and, where it is proved to the satisfaction of the Court that he was prevented by any sufficient cause from appearing when such application was called on for hearing, the Court shall order it to be restored to the file upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for hearing the same.

(3) No order shall be made under sub-rule (2) unless notice of the application has been served on the opposite party.

Act XIV of 1882, s 629

This rule applies to H C

Reason for a different opinion—A Court should give reasons, on review of judgment, for coming to a different conclusion from that which it had previously formed²

¹ Ram Nath v Gowhur, (1870) 2 All. H. C., 230. See also Golam Esha v. Hurrish Chundler, W. R., (1864) M. s., 29.

² Anundomoyee v. Kalee Koomar, (1866) 6 W. R., 18.

Order rejecting final.—An order rejecting a review is final,¹ even if passed by a single Judge on the Original Side of the High Court.² There is no subsequent decree that can be appealed. Thus, where a pleader was allowed to withdraw it, was refused :
 making an application for review
 non-payment of process fees
 in order setting aside an order

Review refused.—Where an issue was fixed by the Judge and sent down for trial without objection, a review was refused.³ Where an applicant applied on the ground of new evidence ; but he knew previously where to find it ;⁴ and did not show that the evidence did not be adduced

Effect of order.—Nothing in the judgment rejecting the application can affect the previous decree.⁵

Second application.—Though the order rejecting is final, it does not prohibit the admission of a subsequent application for review on a different ground ;⁶ or for new trial,⁷ in Madras no second application is allowed.⁸

Appeal from order.—An order admitting a review is not a final order.⁹ A first appeal lies from such an order, this rule.¹⁰ No appeal lies from an order in cases specified in this rule.¹¹ That the

¹ *Nobin v. Giridhars, (1869) 11 W. R., 264* ; *Banco Ram v. Hossain Ali, (1869) 11 W. R., 184.*

² *Achaya v. Ratnavelu, (1886) 9 Mad., 253* ; *Auboy Churn v. Shamont, (1889) 16 Cal., 788.*

³ *Mothoomutty v. Dhusput Singh, (1870) 13 W. R., 167.*

⁴ *Pudmanund Singh v. Doorga Pershad, (1899) 4 Cal. W. N., 39.*

⁵ *Kanti Chunder Mookerjee v. Saligram, (1897) 24 Cal., 319.* *Foll., Jamal v. Abdul, (1907) 6 Cal. W. N., 225.*

⁶ *Bose v. Wise, 12 W. R., 409.*

⁷ *Brojendro Coomar v. Wise, (1869) 19 W. R., 130.*

⁸ *Ram Dhan v. Joy Narain, (1869) 12 W. R., 516* ; 8 B. L. R., App., 36, *note.*

⁹ *Ramburry v. Mothoor Mohur, (1873) 20 W. R., 450.*

¹⁰ *Narayan v. D. K. S. v. D. K. S. v. D. K. S., (1893) 20 W. R., 12.*
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 ()
 ()

¹¹ *Surat Kumari Dassee v. Radha Mohun Roy, (1893) 22 Cal., 784.* See, *Bisessar v. Smidt, (1906) 4 Cal. L. J., 46.*

¹² *Vencama v. Pameo, (1869) 5 Mad. D. C., 327.*

¹³ *Auboy Churn v. Shamont, (1889) 16 Cal., 788.*

¹⁴ *Narayan v. D. K. S. v. D. K. S. v. D. K. S., (1893) 20 W. R., 12.*
Sahai v. Behari Singh, (1895) 22 Cal., 784.
Tewary, (1895) 22 Cal., 784.
 5 Cal. W. N., 485.

¹⁵ *Mahabir Prasad v. Nathan Thakur, (1897) 1 Cal. W. N., 338* ; *Lalit Mohun Roy v. Purna Chandra Rai, (1899) 3 Cal. W. N., 338* ; *Chunilal v. Sonilal, (1897) 21 Bom., 330.*

Court which has granted the review has done so without sufficient reasons is not a valid ground of appeal under this rule.¹ There is no second appeal.²

Revision—An order of a Small Cause Court Judge admitting an application for review is subject to revision under Act IX of 1887, s. 25³

Appeal from final decree—When an appeal order has been entered, the order cannot be set aside. If the appeal lies from the final decree, the appeal is not a review, and the Judge admitting the appeal is not bound by his own decision. He exercises his judicial discretion.⁴ If the order has been acted regularly, the order cannot be questioned in second appeal.⁵ So, if a Judge admits a review on the ground that by going through the evidence he might come to a different conclusion,⁶ or to have the case re-argued,⁷ the order may be set aside on special appeal. The appeal lies from the final order granting or rejecting the review. No appeal lies from an interlocutory order, entertaining the application, and calling for evidence.⁸

After time has expired—Whenever a petition for review of judgment is presented after ninety days, it is indispensable that the party preferring such petition should, in the first instance, account for the delay,⁹ to the satisfaction of the Court,¹⁰ otherwise the order granting the review would be improper and would be set aside.¹¹ If there be just and reasonable cause for the delay,

has expired. In the former case, the Court has jurisdiction, whether the Judge is the same or not, provided s. 624, former Code, (r. 2, *supra*), is not violated, and his order can only be set aside in appeal,¹⁵ and where the Judges of the High Court had, in the opinion of their lordships of the Privy Council, improperly admitted a review, their lordships considered it would not be right to exclude the new evidence from their consideration.¹⁴ But where the order admitting a review of judgment after the period of limitation does not state that there was, or that it had been shown to the satisfaction of the Judge that there was, sufficient cause for not having made the application within

¹ *Munni Ram v. Bishen Perakash*, (1897) 24 Cal. , 873.

1. *Ge. v. Dhanu*, 11 F.R. 2000 (1941). *Singh v. Chandan Singh*,
12 Mad. 123; but see,
v. Bhiva Natha. (1589)

* Ramasami v. Kurisu, (1890) 13 Mad., 178.

* *Reasut v. Abdoolah*, (1875) L. R., 3 I. A., 221; 2 Calc., 131; *Madho Das v. Rukman*, (1879) 2 All., 287.

⁸ *Salabian v. Sufdar Ali*, (1874) 22 W. R., 288.

* Chunder Churn v. Loodu ram, (1876) 23 W. R., 324.

¹ Kuleemooddeen v. Heerun, (1875) 24 W. R., 186

* *Dwarkanath v Bhabatarini*, (1896) 1 Cal W. N., vii

* *Kasheenath v Luckheeramm*, W. R., (1864) 91; *Jhubboo Sahoo v. Jusoda Koor*, (1872) 17 W. R., 230.

¹⁰ *Asur Ali v. Woolfintunna*, (1870) 13 W. R., 33; *Joogul Kishore v. Oogur Narain*, (1867) 8 W. R., 483.

¹¹ Luchman Singh v. Tirbani Buksh, (1875) 14 B. L. R., 373; Gour Pershad v. Anjub Ali, (1875) 24 W. R., 291; Gurga Narain v. Gonnemonee, (1867) 8 W. R., 184; Kristo Gobind v. Jugobandhoor, (1869) 12 W. R., 94; Sreenath v. Kristattemovee, (1872) 18 W. R., 236.

¹¹ *Aujounnissa Bibee v. Sarja Kant*, (1869) 2 B. L. R., A. C., 181; 11 W. R., 56; see also, *Ashrafunnissa v. Inaet Hossein*, (1870) 5 B. L. R., 316; 13 W. R., 439.

¹² Reasut v. Abdoolah, (1873) L. R., 3 I. A., 221; 2 Calc., 131; but see, Roman v. Karunatha, (1878) 2 Mad., 11.

¹⁴ Raj Lukhee Dabee v. Gokool Chunder, (1869) 13 Moo. I. A., 226; 12 W. R., P. C., 47; but see, Pran Nath v. Sree Kant, (1878) 2 C. L. R., 257.

time, the review and all proceedings under it are invalid and must be set aside,¹ and this may be done in regular or in special appeal,² or in revision for want of jurisdiction.³

Limitation.—Where a decision is unquestioned by appeal, its finality should be left in doubt no longer than the requisites of justice imperatively demand;⁴ but under s. 5, Act XV of 1877, (ss. 4 and 5 Act IX of 1908), an application for review of judgment may be admitted after the prescribed period of limitation for sufficient cause. A new exposition of the law is not sufficient cause;⁵ nor the pendency of a special appeal.⁶ But this rule does not apply where the review will not interfere with previous decisions of the Court.⁷ The pendency of the special appeal is of the benefit of the record,¹² or

of the existence of evidence which could have been adduced in proper time—is insufficient,¹³ apparently even if the applicant was a minor during the whole or most of the litigation.¹⁴ The period for an application for review under art. 173, Sch I, Act IX of 1908, is ninety days, except in the High Court, Original Side, where the period is twenty. The time occupied in prosecuting an appeal should not be deducted.¹⁵

Court-Fees—In computing the period within which an application for review may be presented on payment of half the fee leviable on the plaint or memorandum of appeal—art 5 of Sched I of the Court-Fees Act—the time during which the Court is closed for vacation cannot be excluded;¹⁶ nor can the time occupied in prosecuting a previous application for review.¹⁷

8. When an application for review is granted, a note thereof shall be made in the register and the Court may at once re-hear the case or make such order in regard to the re-hearing as it thinks fit.

Registry of application granted, and order for re-hearing

¹ *Luchman Singh v. Shumshere*, (1874) L. R., 2 I. A., 58, p. 69.

² *Gour Pershad v. Anjub Ah*, (1875) 24 W. R., 291; *Shama Churn v. Bindabun*, (1868) 9 W. R., 181.

³ *Sreenath Chowdhury, in re*, (1872) 18 W. R., 286.

⁴ *Moheshur Sing v. Bengal Government*, (1879) 7 Moo I. A., 304; 3 W. B., P. C., 45.

⁵ *Shama Churn v. Bindabun*, (1868) 9 W. R., 181; *Amrit Lall v. Madho*, (1884) 6 All., 292; *Onoop Chunder v. Ekkowree*, (1866) 6 W. R., 166; *Frankishen v. Bakshee Cateer*, (1868) 10 W. R., 26; *Ramkuvarbai v. Damodhar*, (1869) 6 Bom. H. C., A. C., 146.

⁶ *Lucas v. Stephen*, (1868) 9 W. R., 301; *Fakira v. Basapa*, (1871) 8 Bom. H. C., A. C., 231.

⁷ *Jonmenjoy v. Dismoney*, (1882) 8 Cal., 700.

⁸ *Gulam Husen v. Musa Miya*, (1881) 8 Bom., 260.

⁹ *Chudasma v. Ishwargar*, (1892) 16 Bom., 249.

¹⁰ *Chudasma v. Ishwargar*, (1892) 16 Bom., 219.

¹¹ *Munro v. Cawnpore Municipal Board*, (1899) 12 All., 57.

¹² *Gopal Chandra v. Solomon*, (1886) 13 Cal., 62.

¹³ *Madho Das v. Rukman*, (1879) 2 All., 287.

¹⁴ *Gopal Narhar v. Hanmant*, (1882) 6 Bom., 107; *Appa Rao, in re*, (1887) 10 Mad., 73; but see, *Hoghton v. Fiddley*, L. R., 18 Eq., 573.

¹⁵ *Gulam Husen v. Musa Miya*, (1881) 8 Bom., 260.

¹⁶ *Kola, in re*, (1886) 9 Mad., 131.

¹⁷ *Vaman v. Malhari*, (1902) 26 Bom., 495.

Act XIV of 1882, s 630

This rule applies to H. C. and Prov S. C. C.

Extent of review : Hearing—In Bombay, when a review is granted, the whole case is re-opened,¹ in Bengal only to the extent allowed in granting the review,² but the Court enlarge his grounds, even on oral case on the merits for so doing.³ In to the extent the review should be carried. In each case it must consider whether the review is necessary to correct any error or omission, or is otherwise requisite for the ends of justice, and there is no rule that no point can be raised on review which has already been discussed and decided at the original hearing or that no new point which had not been raised at the hearing can be argued on review.⁴

Re-hear—A review re-opens the case, an appeal lies, and limitation runs from the final order on re-hearing, which is a decree, whatever may be the result; but if the application is rejected time runs from the original decree, though probably, the existence of an application for review pending might be looked upon as sufficient reason for not appealing sooner.⁵ And hence reviews for clerical mistakes should be dismissed with leave to apply under s 149.⁶

Interpretation—If the procedure laid down by the Code were strictly followed, there would be three distinct applications, and three distinct stages in the proceedings on review; first, the application *ex parte*, then, if the Court thought fit, notice to come in and show cause why a review should not be granted, and lastly, the re-hearing. In practice these separate stages are not always kept distinct, but are often combined, and so it may be sometimes difficult to determine whether the final order is an order on re-hearing or not.⁷ Before a review of judgment is granted, an order granting the application for review and the reasons for granting the same should be recorded.⁸

Effect of order—Where a party obtained a review on the ground that upon the record, he was entitled to the full relief he sought, the other side was not allowed to adduce new evidence.⁹

9. No application to review an order made on an application for a review or a decree or order passed or made on a review shall be entertained

This rule applies to H. C. and Prov S. C. C.

This new provision codifies the law as laid down in the Privy Council case of *Muhammad Yusuf v. Abdul*¹⁰

¹ *Sainal v. Dullibh*, (1873) 10 Bom. H. C., 360.

² *Dhantonidhar v. Agri Bank*, (1880) 5 Cal., p. 89; see also, *Hurro Chander v. Runkhissore*, W. R., (1864) 142, *Byjnath v. Wazzer Naram*, (1875) 24 W. R., 427.

³ *Hurbans Sahye v. Thikoor Purshad*, (1837) 9 Cal., 209; 13 C. L. R., 285; *Thakoor Prosad v. Biluck Ram*, (1882) 12 C. L. R., 64.

⁴ *Chinta Monoo v. Pearce Mohun*, (1871) 15 W. R., (F. B.) 1; 6 B. L. R., 126.

⁵ *Soudamnee Dossie v. Mahtab Chand*, (1864) B. L. R., (F. B.), 595.

⁶ *Joykishen v. Ataoor Rahman*, (1881) 6 Cal., 22.

⁷ *Lekhraj Roy v. Kanhya Singh*, (1872) 18 W. R., 494.

⁸ *Bharon Din v. Ram Sahai*, (1889) 3 All., 316.

⁹ *Ranee Madhub v. Shahzadi Palaktar*, (1873) 20 W. R., 225.

¹⁰ *Muhammad Yusuf v. Abdul*, (1888) 16 L. A., 101.

ORDER XLVIII.

Miscellaneous.

1. (1) Every process issued under this Code shall be served at the expense of the party on whose behalf it is issued, unless the Court otherwise directs.

Process to be served
at expense of party
issuing

(2) The court-fee chargeable for such service shall be paid within a time to be fixed before the process is issued.

Costs of service.

Act XIV of 1882, s. 93.

This rule applies to H. C. and Prov. S. C. C.

Under Act XXIII of 1861, the Courts should, on receipt and registration of a plaint or memorandum of appeal, and when fixing the date for the hearing of the case, also fix the period within which the costs of the service of the summons or notice on defendant or respondent should be paid. A reasonable period by which the costs should be paid. In the case of a claim, the case was remanded.¹

Proof of service—Service of processes should be proved by the affidavit or solemn declaration of the person who actually effected it, as also of the person who is personally acquainted with the party to be served, and who was present while the service was made on him. The service should be personal in all cases in which personal service is practicable.²

Refusal to receive notices—As to the effect of the refusal to receive notices, see the undernoted cases.³

Process fees—See Civil Rules and Orders (Calcutta High Court) Vol. I, pp 105-128. No fee is chargeable for service of any process issued by any Court of its own motion, for the purpose of taking cognisance of any act in contempt of its authority, p. 16, Civil Rules and orders. The Court has no power to grant remission of process fees. The fees prescribed by the rules must be levied.⁴

Refund.—No general rule can be laid down respecting the refund of the value of the Court-fee stamps in cases where the fees have been paid into Court for the issue of processes and such processes have not issued. Each case must

¹ *Parasdi Lal v. Amlaka Prasad*, (1869) 3 B. L. R., App., 25; 11 W. R., 290; and see, *Mohun Mundor v. Brij Bhokun*, (1868) 9 W. R., 123.

² See Rule 10, page 4, Civil Rules and Orders of the Calcutta High Court.

³ *Laxdhar Meah v. Pearce Mohun Roy*, (1871) 16 W. R., 223; *Jogendra Chunder v. Dwarka Nath*, (1888) 15 Cal. 681; *Rajoni v. Hafizomissa*, (1879) 4 Cal. W. N., 572; *Subadini v. Durga Charan*, (1900) 28 Cal., 118; 4 Cal. W. N., 790.

⁴ *Stodd, v. re*, (1868) 26 Cal., 124; 3 Cal. W. N., 82. But see, Rules, Appellate side, High Court, Calcutta, Chap. XIV, p. 93.

be left to the discretion of the Court and decided on its merits.⁷ Where the amount is large, it may well be refunded.¹

2. All orders, notices and other documents required by this Code to be given to or served on any person shall be served in the manner provided for the service of summons.

Orders and notices how served.

Act XIV of 1882, s. 94

This rule applies to H C and Prov S C C

3. The forms given in the appendices, with such variation as the circumstances of each case may require, shall be used for the purposes therein mentioned.

Use of forms in appendices

Act XIV of 1882, s. 644.

This rule applies to H C and Prov S C C and cover all rules hereinafter to be made under part, X

¹ Calc. H. C., June 1882, p. 190, Civil Rules and Orders, Calcutta High Court Vol. I.

ORDER XLIX.

Chartered High Courts.

1. Notice to produce documents, summonses to witnesses, and every other judicial process, issued in the exercise of the original civil jurisdiction of the High Court, and of its matrimonial, testamentary and intestate jurisdictions, except summonses to defendants, writs of execution and notices to respondents may be served by the attorneys in the suits, or by persons employed by them, or by such other persons as the High Court, by any rule or order, directs.

Act XIV of 1882, sect. 636.

2 Nothing in this schedule shall be deemed to limit or otherwise affect any rules in force at the commencement of this Code for the taking of evidence or the recording of judgments and orders by a Chartered High Court.

3. The following rules shall not apply to any Chartered High Court in the exercise of its ordinary or extraordinary original civil jurisdiction, namely :—

(1) rule 10 and rule 11, clauses (b) and (c), of Order VII ;

(2) rule 3 of Order X ;

(3) rule 2 of Order XVI ;

(4) rules 5, 6, 8, 9, 10, 11, 13, 14, 15 and 16 (so far as relates to the manner of taking evidence) of Order XVIII ;

(5) rules 1 to 8 of Order XX ; and

(6) rule 7 of Order XXXIII (so far as relates to the making of a memorandum) ;

and rule 35 of Order XLI shall not apply to any such High Court in the exercise of its appellate jurisdiction.

Act XIV of 1882, sect. 638

ORDER L

Provincial Small Cause Courts

1. The provisions hereinafter specified shall not extend to Courts constituted under the Provincial Small Causes Courts Act, 1887, or to Courts exercising the jurisdiction of a Court of Small Causes under that Act, that is to say—

(a) so much of this schedule as relates to—

(i) suits excepted from the cognizance of a Court of Small Causes or the execution of decrees in such suits ;

(ii) the execution of decrees against immoveable property or the interest of a partner in partnership property ;

(iii) the settlement of issues ; and

(b) the following rules and orders,—

Order II, r. 1 (frame of suit) ;

Order X, r. 3 (record of examination of parties) ;

Order XV, except so much of rule 4 as provides for the pronouncement at once, of judgment ;

Order XVIII, rules 5 to 12 (evidence) ;

Orders XLI to XLV (appeals) ;

Order XLVII, rules 2, 3, 5, 6, 7 (review) ;

Order LI.

This rule is new

ORDER LI.

Presidency Small Cause Courts.

1. Save as provided in rules 22 and 23 of Order V, Presidency Small Cause Courts. rules 4 and 7 of Order XXI, and rule 4 of Order XXVI, and by the Presidency Small Cause Courts Act, 1882, this schedule shall not extend to any suit or proceeding in any Court of Small Causes established in the towns of Calcutta, Madras and Bombay.

This order is new.

APPENDIX A.

PLEADINGS.

(1) TITLES OF SUITS.

IN THE COURT OF

A. B (<i>add description and residence</i>)	...	...	<i>Plaintiff</i>
	<i>against</i>		
C. D. (<i>add description and residence</i>)	..	...	<i>Defendant</i>

(2) DESCRIPTION OF PARTIES IN PARTICULAR CASES.

The Secretary of State for India in Council

The Advocate General of

The Collector of

The State of

The A. B Company, Limited, having its registered office at

A. B., a public officer of the C D Company.

A. B. (*add description and residence*), on behalf of himself and all other creditors of C D, late of (*add description and residence*)

A B. (*add description and residence*), on behalf of himself and all other holders of debentures issued by the Company, Limited.

The Official Receiver.

A. B, a minor (*add description and residence*), by C. D. [*or by the Court of Wards*], his next friend.

A. B (*add description and residence*), a person of unsound mind [*or of weak mind*], by C. D. his next friend.

A. B., a firm carrying on business in partnership at

A. B. (*add description and residence*), by his constituted attorney C. D. (*add description and residence*)

A. B. (*add description and residence*), Shebait of Thakur

A. B. (*add description and residence*), executor of C. D., deceased.

A. B. (*add description and residence*), heir of C. D., deceased.

13) PLAINTS.

No. 1.

MONEY LENT

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. On the day of 19 , he lent the defendant rupees repayable on the day of .

2. The defendant has not paid the same, except rupees paid on the day of 19 .

If the plaintiff claims exemption from any law of limitation, say :—

3. The plaintiff was a minor [*or insane*] from the day of till the day of .

4. [*Facts showing when the cause of action arose and that the Court has jurisdiction*]

5. The value of the subject-matter of the suit for the purpose of jurisdiction is rupees and for the purpose of court-fees is rupees.

6. The plaintiff claims rupees, with interest at per cent. from the day of 19 .

No 2.

MONEY OVERPAID

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. On the day of 19 , the plaintiff agreed to buy and the defendant agreed to sell lars of silver at annas per tola of fine silver.

2. The plaintiff procured the said bars to be assayed by E. F., who was paid by the defendant for such assay, and E. F. declared each of the bars to contain 1,500 tolas of fine silver, and the plaintiff accordingly paid the defendant rupees.

3. Each of the said bars contained only 1,200 tolas of fine silver, of which act the plaintiff was ignorant when he made the payment.

4. The defendant has not repaid the sum so overpaid

[*As in paras. 4 and 5 of Form No. 1, and Relief claimed*]

No 3

GOODS SOLD AT A FIXED PRICE AND DELIVERED

(Title)

A B, the above named plaintiff, states as follows .—

1 On the day of 19 , *E F* sold and delivered to the defendant [one hundred barrels of flour, *or* the goods mentioned in the schedule hereto annexed, *or* sundry goods]

2 The defendant promised to pay rupees for the said goods on delivery [*or* on the day of *some day before the plaint was filed.*]

3 He has not paid the same.

4 *E F* died on the day of 19 By his last will he appointed his brother, the plaintiff, his executor

[*As in paras 4 and 5 of Form No 1*]

5 The plaintiff as executor of *E F* claims [*Relief claimed*].

No 4

GOODS SOLD AT A REASONABLE PRICE AND DELIVERED

(Title)

A B, the above-named plaintiff, states as follows —

1 On the day of 19 , plaintiff sold and delivered to the defendant [sundry articles of house-furniture], but no express agreement was made as to the price

2 The goods were reasonably worth rupees.

3 The defendant has not paid the money.

[*As in paras 4 and 5 of Form No 1 and Relief claimed*]

No 5

GOODS MADE AT DEFENDANT'S REQUEST, AND NOT ACCEPTED

(Title)

A B, the above-named plaintiff, states as follows :—

1. On the day of 19 , *E. F.* agreed with the plaintiff that the plaintiff should make for him [*six tables and fifty chairs*], and that *E. F.* should pay for the goods on delivery rupees

2. The plaintiff made the goods, and on the day of 19 offered to deliver them to *E F.*, and has ever since been ready and willing so to do

3 *E F.* has not accepted the goods or paid for them

[*As in paras 4 and 5 of Form No 1, and Relief claimed*].

No 6

DEFICIENCY UPON A RE-SALE [GOODS SOLD AT AUCTION]

(Title)

A B, the above-named plaintiff, states as follows :—

1. On the day of 19 , the plaintiff put up at auction sundry [*goods*], subject to the condition that all goods not paid for and removed by the purchaser within *ten days* after the sale should be re-sold by auction on his account, of which condition the defendant had notice.
2. The defendant purchased [*one crate of crockery*] at the auction at the price of rupees
3. The plaintiff was ready and willing to deliver the goods to the defendant on the date of the sale and for [*ten days*] after.
4. The defendant did not take away the goods purchased by him, nor pay for them within [*ten days*] after the sale, nor afterwards
5. On the day of 19 , the plaintiff re-sold the [*crate of crockery*], on account of the defendant, by public auction, for rupees
6. The expenses attendant upon such re-sale amounted to rupees.
7. The defendant has not paid the deficiency thus arising, amounting to rupees.

[*As in paras. 4 and 5 of Form No. 1, and Relief claimed*]

No. 7.

SERVICES AT A REASONABLE RATE

(Title)

A. B., the above-named plaintiff, states as follows :—

1. Between the day of 19 , and the day of 19 , at , plaintiff (executed sundry drawings, designs and diagrams) for the defendant, at his request; but no express agreement was made as to the sum to be paid for such services.
2. The services were reasonably worth rupees.
3. The defendant has not paid the money.

[*As in paras. 4 and 5 of Form No. 1, and Relief claimed*]

No. 8

SERVICES AND MATERIALS AT A REASONABLE COST.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. On the day of 19 , at , the plaintiff built a house known as No , in , and furnished the materials therefor, for the defendant, at his request, but no express agreement was made as to the amount to be paid for such work and materials.
2. The work done and materials supplied were reasonably worth rupees.
3. The defendant has not paid the money.

[*As in paras. 4 and 5 of Form No. 1, and Relief claimed.*]

No. 9.

USE AND OCCUPATION

 $(T_2 t'_2)$

A B, the above-named plaintiff, executor of the will of *X. Y.*, deceased, states as follows —

That the defendant occupied the [house No. _____, Street], by permission of the said X Y from the _____ day of _____ 19____, until the _____ day of _____ 19____, and no agreement was made as to payment for the use of the said premises

2 That the use of the said premises for the said period was reasonably
worth rupees

3 The defendant has not paid the money.

[As in paras 4 and 5 of Form No 1.]

6 The plaintiff as executor of X. Y, claims [Relief claimed].

No 10

ON AN AWARD

(Title)

A B, the above-named plaintiff, states as follows.—

1. On the _____ day of _____, 19____, the plaintiff and defendant, having a difference between them concerning [a demand of the plaintiff for the price of ten barrels of oil, which the defendant refused to pay], agreed in writing to submit the difference to the arbitration of *E. F.*, and *G. H.*, and the original document is annexed hereto.

2 On the day of 19 , the arbitrators awarded
that the defendant should [pay the plaintiff rupees].

3 The defendant has not paid the money.

[As in paras 4 and 5 of Form No. 1, and Relief claimed.]

No. 11.

ON A FOREIGN JUDGMENT.

(Title)

A B, the above-named plaintiff, states as follows :—

I, On the day of 19, at of
the State (or Kingdom) of the Court of
and the

2. The defendant has not paid the money.

(As in paras. 4 and 5 of Form No. 1, and Relief claimed.)

No. 12.

AGAINST SURETY FOR PAYMENT OF RENT.

(Title)

A. B., the above-named plaintiff, states as follows :—

1. On the _____ day of _____, 19____, E. F. hired from the plaintiff for the term of _____ years, the [house No _____, _____ Street], at the annual rent of _____ rupees, payable [monthly].

2 The defendant agreed, in consideration of the letting of the premises to E. F., to guarantee the punctual payment of the rent.

3 The rent for the month of 19 , amounting to rupees, has not been paid

[If, by the terms of the agreement, notice is required to be given to the surety, add :—]

4 On the day of 19 , the plaintiff gave notice to the defendant of the non-payment of the rent, and demanded payment thereof.

5 The defendant has not paid the same

[As in paras. 4 and 5 of Form No. 1, and Relief claimed]

No. 13.

BREACH OF AGREEMENT TO PURCHASE LAND.

(Title)

A. B., the above named plaintiff, states as follows —

1. On the day of 19 , the plaintiff and defendant entered into an agreement, and the original document is hereto annexed.

[Or, On the day of 19 , the plaintiff and defendant mutually agreed that the plaintiff should sell to the defendant and that the defendant should purchase from the plaintiff forty bighas of land in the village of for rupees]

2 On the day of 19 , the plaintiff being then the absolute owner of the property [and the same being free from all incumbrances as was made to appear to the defendant], tendered to the defendant a sufficient instrument of transfer of the same *[or, was ready and willing, and is still ready and willing, and offered, to transfer the same to the defendant by a sufficient instrument]* on the payment by the defendant of the sum agreed upon.

3 The defendant has not paid the money

[As in paras. 4 and 5 of Form No. 1, and Relief claimed]

No. 14

NOT DELIVERING GOODS SOLD

(Title)

A. B., the above-named plaintiff, states as follows :—

1. On the day of 19 , the plaintiff and defendant mutually agreed that the defendant should deliver [one hundred barrels of flour] to the plaintiff on the day of 19 , and that the plaintiff should pay therefor rupees on delivery.

2. On the [said] day the plaintiff was ready and willing, and offered, to pay the defendant the said sum upon delivery of the goods.

3 The defendant has not delivered the goods, and the plaintiff has been deprived of the profits which would have accrued to him from such delivery.

[As in paras. 4 and 5 of Form No. 1, and Relief claimed]

No. 15.

WRONGFUL DISMISSAL

(Title)

A B, the above-named plaintiff, states as follows.—

1. On the day of 19 , the plaintiff and defendant mutually agreed that the plaintiff should serve the defendant as [an accountant, or in the capacity of foreman, or as the case may be], and that the defendant should employ the plaintiff as such for the term of [one year] and pay him for his services rupees (monthly).

2. On the day of 19 , the plaintiff entered upon the service of the defendant and has ever since been, and still is, ready and willing to continue in such service during the remainder of the said year whereof the defendant always has had notice

3. On the day of 19 , the defendant wrongfully discharged the plaintiff, and refused to permit him to serve as aforesaid, or to pay him for his services.

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 16.

Breach of Contract to Serve

(Title)

A B, the above-named plaintiff, states as follows:—

1. On the day of 19 , the plaintiff and defendant mutually agreed that the plaintiff should employ the defendant at an [annual salary of rupees, and that the defendant should serve the plaintiff as [an artist] for the term of [one year]

2. The plaintiff has always been ready and willing to perform his part of the agreement [and on the day of 19 , offered so to do]

3. The defendant [entered upon] the service of the plaintiff on the above-mentioned day, but afterwards, on the day of 19 , he refused to serve the plaintiff as aforesaid

[As in paras. 4 and 5 of Form No. 1, and Relief claimed]

No. 17.

AGAINST A BUILDER FOR DEFECTIVE WORKMANSHIP

(Title)

A B, the above-named plaintiff, states as follows.—

1. On the day of 19 , the plaintiff and defendant entered into an agreement, and the original document is hereto annexed. *[Or state the tenor of the contract]*

[2. The plaintiff duly performed all the conditions of the agreement on his part]

3. The defendant [built the house referred to in the agreement in a bad and unworkmanlike manner.]

[As in paras. 4 and 5 of Form No. 1, and Relief claimed]

No. 18.

ON A BOND FOR THE FIDELITY OF A CLERK.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. On the day of 19 , the plaintiff took *E. F.* into his employment as a clerk.

2. In consideration thereof on the day of 19 , the defendant agreed with the plaintiff that if *E. F.* should not faithfully perform his duties as a clerk to the plaintiff, or should fail to account to the plaintiff for all monies, evidences of debt or other property received by him for the use of the plaintiff, the defendant would pay to the plaintiff whatever loss he might sustain by reason thereof, not exceeding rupees.

by his bond of the same
of rupees, subject
in his duties as clerk and
he plaintiff for all monies,
at any time held by him

[Or, 2. In consideration thereof, on the same date the defendant executed a bond in favour of the plaintiff, and the original document is hereto annexed.]

3. Between the day of 19 and the day of 19 *E. F.* received money and other property, amounting to the value of rupees, for the use of the plaintiff, for which sum he has not accounted to him, and the same still remains due and unpaid.

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No 19

BY TENANT AGAINST LANDLORD, WITH SPECIAL DAMAGE

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. On the day of 19 , the defendant, by a registered instrument, let to the plaintiff [the house No Street] for the term of years, contracting with the plaintiff, that he, the plaintiff, and his legal representatives should quietly enjoy possession thereof for the said term

2. All conditions were fulfilled and all things happened necessary to entitle the plaintiff to maintain his suit.

3. On the day of during the said term, *E. F.*, who was the lawful owner of the said house, lawfully evicted the plaintiff therefrom, and still withholds the possession thereof from him.

4. The plaintiff was thereby [prevented from continuing the business of a tailor at the said place, was compelled to expend rupees in moving, and lost the custom of *G. H.*, and *I. J.* by such removal]

[As in paras. 4 and 5 of Form No. 1, and Relief claimed]

No 20.

ON AN AGREEMENT OF INDEMNITY.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. On the day of 19 , the plaintiff and defendant, being partners in trade under the style of *A. B* and *C. D.*, dissolved the partnership,

and mutually agreed that the defendant should take and keep all the partnership property, pay all debts of the firm and indemnify the plaintiff against all claims that might be made upon him on account of any indebtedness of the firm

2. The plaintiff duly performed all the conditions of the agreement on his part.

3. On the day of 19 , [a judgment was recovered against the plaintiff and defendant by *E F*, in the High Court of Judicature at , upon a debt due from the firm to *E F*, and on the day of 19 ,] the plaintiff paid rupees [in satisfaction of the same]

4. The defendant has not paid the same to the plaintiff

[*As in paras. 4 and 5 of Form No. 1, and Relief claimed*]

No. 21

PROCURING PROPERTY BY FRAUD

(Title)

A B, the above-named plaintiff, states as follows :—

1. On the day of 19 , the defendant, for the purpose of inducing the plaintiff to sell him certain goods, represented to the plaintiff that [he the defendant, was solvent, and worth rupees over all his liabilities]

2. The plaintiff was thereby induced to sell [and deliver] to the defendant [dry goods] of the value of rupees.

3. The said representations were false [*or, state the particular falsehoods*] and were then known by the defendant to be so

4. The defendant has not paid for the goods [*Or, if the goods were not delivered*] The plaintiff, in preparing and shipping the goods and procuring their restoration, expended rupees.

[*As in paras. 4 and 5 of Form No. 1, and Relief claimed*]

No. 22.

FRAUDULENTLY PROCURING CREDIT TO BE GIVEN TO ANOTHER PERSON.

(Title)

A. B., the above-named plaintiff, states as follows :—

1. On the day of 19 , the , held by be

2. The plaintiff was thereby induced to sell to *E. F* [rice] of the value of rupees [on months credit].

3. The said representations were false and were then known by the defendant to be so, and were made by him with intent to deceive and defraud the plaintiff [*or, to deceive and injure the plaintiff*]

4. *E. F* [did not pay for the said goods at the expiration of the credit aforesaid, *or*] has not paid for the said rice, and the plaintiff has wholly lost the same.

[*As in paras 4 and 5 of Form No 1, and Relief claimed.*]

No. 23.

POLLUTING THE WATER UNDER THE PLAINTIFF'S LAND.

(Title)

A. B., the above-named plaintiff, states as follows :—

1 The plaintiff is, and at all the times hereinafter mentioned was, possessed of certain land called _____ and situate in _____, and of a well therein, and of water in the well, and was entitled to the use and benefit of the well and of the water therein, and to have certain springs and streams of water which flowed and ran into the well to supply the same to flow or run without being fouled or polluted.

2 On the _____ day of _____ 19____, the defendant wrongfully fouled and polluted the well and the water therein and the springs and streams of water which flowed into the well

3. In consequence the water in the well became impure and unfit for domestic and other necessary purposes, and the plaintiff and his family are deprived of the use and benefit of the well and water.

[As in paras. 4 and 5 of Form No 1, and Relief claimed.]

No. 24.

CARRYING ON A NOXIOUS MANUFACTURE.

(Title)

A. B., the above-named plaintiff, states as follows :—

1. The plaintiff is, and at all the times hereinafter mentioned was, possessed of certain lands called _____, situate in _____.

2 Ever since the _____ day of _____ 19____, _____ has carried on _____ smoke and _____ upon the _____

3 Thereby the trees, hedges, herbage and crops of the plaintiff growing on the lands were damaged and deteriorated in value, and the cattle and live-stock of the plaintiff on the lands became unhealthy, and many of them were poisoned and died

4. The plaintiff was unable to graze the lands with cattle and sheep as he otherwise might have done, and was obliged to remove his cattle, sheep and farming-stock therefrom, and has been prevented from having so beneficial and healthy a use and occupation of the lands as he otherwise would have had.

[As in paras. 4 and 5 of Form No 1, and Relief claimed]

No 25.

OBSTRUCTING A RIGHT OF WAY.

(Title)

A. B., the above-named plaintiff, states as follows :—

1. The plaintiff is, and at the time hereinafter mentioned was, possessed of [a house in the village of _____]

2. He was entitled to a right of way from the [house] over a certain field to a public highway and back again from the highway over the field to the house, for himself and his servants [with vehicles, or on foot] at all times of the year.

3 On the _____ day of _____ 19____, defendant wrongfully obstructed the said way, so that the plaintiff could not pass [with vehicles, or on foot, or in any manner] along the way [and has ever since wrongfully obstructed the same]

4 *(State special damage if any)*

[As in paras 4 and 5 of Form No. 1, and Relief claimed.]

No 26

OBSTRUCTING A HIGHWAY

(Title)

1. The defendant wrongfully dug a trench and heaped up earth and stones in the public highway leading from _____ to _____ so as to obstruct it

_____ he said highway, fell broke his arm, and business for a long

[As in paras 4 and 5 of Form No. 1, and Relief claimed]

No 27

DIVERTING A WATER-COURSE.

(Title)

A B, the above-named plaintiff, states as follows :—

1 The plaintiff is, and at the time hereinafter mentioned was, possessed of a mill situated on a [stream] known as the _____, in the village of _____, district of _____.

2 By reason of such possession the plaintiff was entitled to the flow of the stream for working the mill

3 On the _____ day of _____ 19____, the defendant, by cutting the bank of the stream, wrongfully diverted the water thereof, so that less water ran into the plaintiff's mill

4 By reason thereof the plaintiff has been unable to grind more than _____ sacks per day, whereas, before the said diversion of water, he was able to grind _____ sacks per day.

[As in paras. 4 and 5 of Form No. 1, and Relief claimed]

No 28

OBSTRUCTING A RIGHT TO USE WATER FOR IRRIGATION.

(Title)

A B, the above-named plaintiff, states as follows :—

1 Plaintiff is, and was at the time hereinafter mentioned, possessed of certain lands situate, etc, and entitled to take and use a portion of the water of a certain stream for irrigating the said lands

2. On the _____ day of _____ 19____, the defendant prevented the plaintiff from taking and using the said portion of the said water as aforesaid, by wrongfully obstructing and diverting the said stream.

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 29.

INJURIES CAUSED BY NEGLIGENCE ON A RAILROAD.

(Title)

A. B., the above-named plaintiff, states as follows :—

1. On the day of 19 , the defendants were common carriers of passengers by railway between and

2. On that day the plaintiff was a passenger in one of the carriages of the defendants on the said railway.

3. While he was such passenger, at [or near the station of or between the stations of and], a collision occurred on the said railway, caused by the negligence and unskillfulness of the defendants' servants, whereby the plaintiff was much injured (having his leg broken, his head cut, etc., and state the special damage, if any, as), and incurred expense for medical attendance, and is permanently disabled from carrying on his former business as [a salesman]

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

[Or thus :—2. On that day the defendants by their servants so negligently and unskillfully drove and managed an engine and a train of carriages attached thereto upon and along the defendants' railway which the plaintiff was then lawfully crossing, that the said engine and train were driven and struck against the plaintiff, whereby, etc., as in para. 3.]

No. 30.

INJURIES CAUSED BY NEGLIGENT DRIVING

(Title)

A. B., the above-named plaintiff, states as follows :—

1. The plaintiff is a shoemaker, carrying on business at . The defendant is a merchant of .

by two horses under the charge and control of the defendant's servants, was negligently, suddenly and without any warning turned at a rapid and dangerous pace out of Middleton Street into Chowringhee. The pole of the carriage struck the plaintiff and knocked him down, and he was much trampled by the horses.

3. By the blow and fall and trampling the plaintiff's left arm was broken and he was bruised and injured on the side and back, as well as internally, and in consequence thereof the plaintiff was for four months ill and in suffering and unable to attend to his business, and incurred heavy medical and other expenses, and sustained great loss of business and profits

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 31.

FOR MALICIOUS PROSECUTION.

(Title)

A. B., the above-named plaintiff, states as follows :—

1. On the day of 19 , the defendant obtained a warrant of arrest from [a Magistrate of the said

city, or as the case may be] on a charge of _____, and the plaintiff was arrested thereon, and imprisoned for _____ [days, or hours, and gave bail in the sum of _____ rupees to obtain his release].

2 In so doing the defendant acted maliciously and without reasonable or probable cause.

3 On the _____ day of _____ 19____, the Magistrate dismissed the complaint of the defendant and acquitted the plaintiff.

_____ bearing of the do business situation as of body and mind, and was prevented from transacting his business, and was injured in his credit, and incurred expense in obtaining his release from the said imprisonment and in defending himself against the said complaint

[As in paras. 4 and 5 of Form No. 1, and Relief claimed]

No. 32

MOVEABLES WRONGFULLY DETAINED

(Title).

A. B., the above-named plaintiff, states as follows :—

1 On the _____ day of _____ 19____, plaintiff owned [or state facts showing a right to the possession] the goods mentioned in the schedule hereto annexed [or describe the goods], the estimated value of which is _____ rupees.

2 From that day until the commencement of this suit the defendant has detained the same from the plaintiff.

3 Before the commencement of the suit, to wit on the _____ day of _____ 19____ the plaintiff demanded the same from the defendant, but he refused to deliver them

[As in paras. 4 and 5 of Form No. 1.]

6. The plaintiff claims—

- (1) delivery of the said goods, or _____ rupees, in case delivery cannot be had;
- (2) _____ rupees compensation for the detention thereof

The Schedule.

No. 33

AGAINST A FRAUDULENT PURCHASER AND HIS TRANSFEREE WITH NOTICE.

(Title)

A. B., the above-named plaintiff, states as follows :—

1. On the _____ day of _____ 19____, the defendant C. D., for the purpose of inducing the plaintiff to sell him certain goods, represented to the plaintiff that [he was solvent, and worth _____ rupees over all his liabilities].

2 The plaintiff was hereby induced to sell and deliver to C. D., [one hundred boxes of tea], the estimated value of which is _____ rupees

3 The said representations were false, and were then known by C. D. to be so, or, at the time of making the said representations, C. D. was insolvent, and knew himself to be so.

4 C. D. afterwards transferred the said goods to the defendant E. F. without consideration [or who had notice of the falsity of the representation].

[As in paras. 4 and 5 of Form No. 1]

7. The plaintiff claims—

- (1) delivery of the said goods, or rupees, in case delivery cannot be had ;
- (2) rupees compensation for the detention thereof.

NO 34.

RESCISSION OF A CONTRACT ON THE GROUND OF MISTAKE.

Title.

A. B., the above-named plaintiff, states as follows —

1. On the day of 19 , the defendant represented to the plaintiff that a certain piece of ground belonging to the defendant, situated at , contained [ten bighas]
- 2 The plaintiff was thereby induced to purchase the same at the price of rupees in the belief that the said representation was true, and signed an agreement, of which the original is hereto annexed But the land has not been transferred to him
3. On the day of 19 the plaintiff paid the defendant rupees as part of the purchase-money
- 4 That the said piece of ground contained in fact only [five bighas]
[As in paras 4 and 5 of Form No. 1.]
- 7 The plaintiff claims—
 - (1) rupees, with interest from the day of 16 ;
 - (2) that the said agreement be delivered up and cancelled.

NO. 35

AN INJUNCTION RESTRAINING WASTE.

(Title.)

A. B., the above-named plaintiff, states as follows —

1. The plaintiff is the absolute owner of [*describe the property*]
- 2 The defendant is in possession of the same under a lease from the plaintiff.
3. The defendant has [cut down a number of valuable trees, and threatens to cut down many more for the purpose of sale] without the consent of the plaintiff
[As in paras 4 and 5 of Form No. 1.]
6. The plaintiff claims that the defendant be restrained by injunction from committing or permitting any further waste on the said premises.
[*Pecuniary compensation may also be claimed*]

NO 36

INJUNCTION RESTRAINING NUISANCE

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. Plaintiff is, and at all the times hereinafter mentioned was, the absolute owner of [the house No. Street, Calcutta]
2. The defendant is, and at all the said times was, the absolute owner of [a plot of ground in the same street].
- 3 On the day of 19 , the defendant erected upon his said plot a slaughter-house, and still maintains the same ; and from that day until

the present time has continually caused cattle to be brought and killed there [and has caused the blood and offal to be thrown into the street opposite the said house of the plaintiff]

4. In consequence the plaintiff has been compelled to abandon the said house, and has been unable to rent the same].

[As in paras. 4 and 5 of Form No. 1.]

The plaintiff claims that the defendant be restrained by injunction from committing or permitting any further nuisance

No 37

PUBLIC NUISANCE.

(Title)

A. B., the above-named plaintiff, states as follows :—

1. The defendant has wrongly heaped up earth and stones on a public road known as *Street at* so as to obstruct the passage of the public along the same and threatens and intends, unless restrained from so doing, to continue and repeat the said wrongful act

2. The plaintiff have obtained the consent in writing of the Advocate General [or of the Collector or other officer appointed in this behalf] to the institution of this suit

[As in paras. 4 and 5 Form No. 1.]

The plaintiff claims—

(1) a declaration that the defendant is not entitled to obstruct the passage of the public along the said public road :

(2) an injunction restraining the defendant from obstructing the passage of the public along the said public road and directing the defendant to remove the earth and stones wrongfully heaped up as aforesaid. .

No 38

INJUNCTION AGAINST THE DIVERSION OF A WATER-COURSE.

(Title)

A. B., the above-named plaintiff, states as follows :—

[As in Form No. 27.]

The plaintiff claims that the defendant be restrained by injunction from diverting the water as aforesaid.

No 39

RESTORATION OF MOVEABLE PROPERTY THREATENED WITH DESTRUCTION AND FOR AN INJUNCTION.

(Title)

A. B., the above-named plaintiff, states as follows :—

1. Plaintiff is, and at all times hereinafter mentioned was, the owner of [a portrait of his grand-father which was executed by an eminent painter,] and of which no duplicate exists or *states any facts showing that the property is of a kind that cannot be replaced by money*]

2. On the *day of* 19 , he deposited the same for safe keeping with the defendant.

3 On the day of 19 , he demanded the same from the defendant and offered to pay all reasonable charges for the storage of the same.

4. The defendant refuses to deliver the same to the plaintiff and threatens to conceal, dispose of, cut or injure the same if required to deliver it up.

5 No pecuniary compensation would be an adequate compensation to the plaintiff for the loss of the [painting].

[As in paras. 4 and 5 of Form No. 1.]

8. The plaintiff claims—

(1) that the defendant be restrained by injunction from disposing of, injuring or concealing the said painting];

(2) that he be compelled to deliver the same to the plaintiff.

No. 40

INTERPLEADER.

(Title)

A. B., the above-named plaintiff, states as follows :—

1. Before the date of the claims hereinafter mentioned *G. H.* deposited with the plaintiff [*describe the property*] for [*safe-keeping*]

2. The defendant *C. D.* claims the same [under an alleged assignment thereof to him from *G. H.*]

3. The defendant *E. F.* also claims the same [under an order of *G. H.* transferring the same to him]

4. The plaintiff is ignorant of the respective rights of the defendants.

5. He has no claim upon the said property other than for charges and costs and is ready and willing to deliver it to such persons as the Court shall direct.

6. The suit is not brought by collusion with either of the defendants.

[As in paras. 4 and 5 of Form No. 1.]

9 The plaintiff claims—

(1) that the defendants be restrained, by injunction, from taking any proceedings against the plaintiff in relation thereto ;

(2) that they be required to interplead together concerning their claims to the said property ;

[(3) that some person be authorized to receive the said property pending such litigation :]

(4) that upon delivering the same to such [person] the plaintiff be discharged from all liability to either of the defendants in relation thereto.

No. 41.

ADMINISTRATION BY CREDITOR ON BEHALF OF HIMSELF AND ALL OTHER CREDITORS.

(Title)

A. B., the above-named plaintiff, states as follows :—

1. *E. F.*, late of , was at the time of his death, and his estate still is, indebted to the plaintiff in the sum of [*here insert nature of debt and security, if any*].

2. *E. F.* died on or about the day of . By his last will, dated the day of , he appointed *C. D.*, his executor [*or devised his estate in trust, etc., or died intestate as the case may be*]

3 The will was proved by *C. D.* [or letters of administration were granted, etc.]

4. The defendant has possessed himself of the moveable [and immoveable, or the proceeds of the immoveable] property of *E. F.*, and has not paid the plaintiff his debt.

[As in paras 4 and 5 of Form No 1]

7 The plaintiff claims that an account may be taken of the moveable [and immoveable] property of *E. F.*, deceased, and that the same may be administered under the decree of the Court

No 42.

ADMINISTRATION BY SPECIFIC LEGATEE.

(Title)

[Alter Form No. 41 thus]—

[Omit paragraph 1 and commence paragraph 2] *E. F.*, late of _____, died on or about the _____ day of _____ By his last will, dated the _____ day of _____ he appointed *C. D.* his executor, and bequeathed to the plaintiff [here state the specific legacy]

For paragraph 4 substitute—

The defendant is in possession of the moveable property of *E. F.*, and, amongst other things, of the said [here name the subject of the specific bequest]

For the commencement of paragraph 7 substitute—

The plaintiff claims that the defendant may be ordered to deliver to him the said [here name the subject of the specific bequest], or that, etc.

No 43

ADMINISTRATION BY PECUNIARY LEGATEE.

(Title).

[Alter Form No. 41 thus]—

[Omit paragraph 1 and substitute for paragraph 2] *E. F.*, late of _____, died on or about the _____ day of _____ By his last will, dated the _____ day of _____ he appointed *C. D.* his executor, and bequeathed to the plaintiff a legacy of _____ rupees.
In paragraph 4 substitute "legacy" for "debt"

Another form

(Title)

E. F., the above-named plaintiff states as follows:—

1. *A. B.* of *K* in the _____ died on the _____ day of _____ By his last will, dated the _____ day of _____ he appointed _____ [who died in the _____] _____ whether moveable _____ income thereof to _____ of his having a son who should attain twenty-one, or a daughter who should attain that age or marry, upon trust as to his immoveable property for the person who would be the testator's heir-at-law, and as to his moveable property for the persons who would be the testator's next-of-kin if he had died intestate at the time of the death of the plaintiff, and such failure of his issue as aforesaid.

2 The will was proved by the defendant on the _____ day of _____. The plaintiff has not been married.

3. The testator was at his death entitled to moveable and immoveable property; the defendant entered into the receipt of the rents of the immoveable property and got in the moveable property; he has sold some part of the immoveable property.

[As in paras. 4 and 5 of Form No. 1.]

6 The plaintiff claims—

- (1) to have the moveable and immoveable property of *A. B.* administered in this Court, and for that purpose to have all proper directions given and accounts taken;
- (2) such further or other relief as the nature of the case may require.

No. 44

EXECUTION OF TRUSTS.

(Title)

A. B., the above-named plaintiff, states as follows :—

1. He is one of the trustees under an instrument of settlement bearing date on or about the _____ day of _____ made upon the marriage of *E. F.* and *G. H.*, the father and mother of the defendant [or an instrument of transfer of the estate and effects of *E. F.* for the benefit of *C. D.*, the defendant, and the other creditors of *E. F.*]

2 *A. B.* has taken upon himself the burden of the said trust, and is in possession of [or of the proceeds of] the moveable and immoveable property transferred by the said instrument

3 *C. D.* claims to be entitled to a beneficial interest under the instrument.

[As in paras. 4 and 5 of Form No. 1]

6. The plaintiff is desirous to account for all the rents and profits of the said immoveable property [and the proceeds of the sale of the said, or of part of the said, immoveable property, or moveable, or the proceeds of the sale of, or of part of, the said moveable property, or the profits accruing to the plaintiff as such trustee in the execution of the said trust]; and he prays that the Court will take the accounts of the said trust, and also that the whole of the said trust estate may be administered in the Court for the benefit of *C. D.*, the defendant, and all other persons who may be interested in such administration, in the presence of *C. D.*, and such other persons so interested as the Court may direct, or that *C. D.* may show good cause to the contrary

[*N.B.*—Where the suit is by a beneficiary, the plaint may be modelled, mutatis mutandis, on the plaint by a legatee]

No. 45.

FORECLOSURE OR SALE

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. The plaintiff is mortgagee of lands belonging to the defendant.
- 2 The following are the particulars of the mortgage :—
 - (a) (date);
 - (b) (names of mortgagor and mortgagee);
 - (c) (sum secured);
 - (d) (rate of interest);

(e) (property subject to mortgage) ;

(f) (amount now due) ;

(g) (if the plaintiff's title is derivative, state shortly the transfers or devolution under which he claims).

(If the plaintiff is mortgagee in possession, add)

3. The plaintiff took possession of the mortgaged property on the _____ day of _____ and is ready to account as mortgagee in possession from that time.

[As in paras. 4 and 5 of Form No. 1.]

6. The plaintiff claims —

(1) payment, or in default [sale *or*] foreclosure [and possession] ;

[Where Order 34, rule 6, applies]

(2) in case the proceeds of the sale are found to be insufficient to pay the amount due to the plaintiff, then that liberty be reserved to the plaintiff to apply for a decree for the balance

No. 46.

REDEMPTION.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. The plaintiff is mortgagor of lands of which the defendant is mortgagee.

2 The following are the particulars of the mortgage :—

(a) (date) ;

(b) (names of mortgagor and mortgagee) ;

(c) (sum secured) ;

(d) (rate of interest) ;

(e) (property subject to mortgage) ;

(f) (if the plaintiff's title is derivative, state shortly the transfers or devolution under which he claims).

(If the defendant is mortgagee in possession, add)

3. The defendant has taken possession [*or* has received the rents] of the mortgaged property.

[As in paras. 4 and 5 of Form No. 1.]

6 The plaintiff claims to redeem the said property and to have the same reconveyed to him [and to have possession thereof]

No. 47.

SPECIFIC PERFORMANCE (No. 1).

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. By an agreement dated the _____ day of _____ and signed by the defendant, he contracted to buy of [*or* sell to] the plaintiff certain immoveable property therein described and referred to, for the sum of _____ rupees.

2. The plaintiff has applied to the defendant specifically to perform the agreement on his part, but the defendant has not done so.

3 The plaintiff has been and still is ready and willing specifically to perform the agreement on his part of which the defendant has had notice

[As in paras 4 and 5 of Form No 1.]

6 The plaintiff claims that the Court will order the defendant specifically to perform the agreement and to do all acts necessary to put the plaintiff in full possession of the said property [or to accept a transfer and possession of the said property] and to pay the costs of the suit.

No. 48.

SPECIFIC PERFORMANCE (No. 2)

(Title)

A. B., the above-named plaintiff, states as follows :—

1. On the day of 19 , the plaintiff and defendant entered into an agreement, in writing, and the original document is hereto annexed.

The defendant was absolutely entitled to the immoveable property described in the agreement.

2. On the day of 19 , the plaintiff tendered rupees to the defendant, and demanded a transfer of the said property by a sufficient instrument.

3 On the day of 19 , the plaintiff again demanded such transfer [or the defendant refused to transfer the same to the plaintiff].

4. The defendant has not executed any instrument of transfer,

5. The plaintiff is still ready and willing to pay the purchase-money of the said property to the defendant.

[As in paras. 4 and 5 of Form No 1]

8. The plaintiff claims—

(1) that the defendant transfers the said property to the plaintiff by a sufficient instrument [following the terms of the agreement];

(2) rupees compensation for withholding the same.

No. 49.

PARTNERSHIP.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. He and C. D., the defendant have been for years [or months] past carrying on business together under articles of partnership in writing, [or under a deed, or under a verbal agreement]

2. Several disputes and differences have arisen between the plaintiff and defendant as such partners whereby it has become impossible to carry on the business in partnership with advantage to the partners. [Or the defendant has committed the following breaches of the partnership articles :—

(1)

(2)

(3)

}

[As in paras 4 and 5 of Form No. 1.]

5 The plaintiff claims—

- (1) dissolution of the partnership ;
- (2) that accounts be taken ,
- (3) that a receiver be appointed

(N B — In suit for the winding-up of any partnership, omit the claim for dissolution, and instead insert a paragraph stating the facts of the partnership having been dissolved)

(4) WRITTEN STATEMENTS

General defences.

Denial		The defendant denies that <i>(set out facts)</i>
		The defendant does not admit that <i>(set out facts)</i>
Protest		The defendant admits that but says that
		The defendant denies that he is a partner in the defendant firm of
		The defendant denies that he made the contract alleged or any contract with the plaintiff
		The defendant denies that he contracted with the plaintiff as alleged or at all
		The defendant admits assets but not the plaintiff's claim
		The defendant denies that the plaintiff sold to him the goods mentioned in the plaint or any of them.
Limitation		The suit is barred by article or article of the second schedule to the Indian Limitation Act, 1877.
Jurisdiction		The Court has no jurisdiction to hear the suit on the ground that <i>set forth the grounds</i> .
Insolvency		On the day of a diamond ring was delivered by the defendant to and accepted by the plaintiff in discharge of the alleged cause of action.
		The defendant has been adjudged an insolvent.
Minority		The plaintiff before the institution of the suit was adjudged an insolvent and the right to sue vested in the receiver.
		The defendant was a minor at the time of making the alleged contract
Payment into Court	into	The defendant as to the whole claim (or as to Rs. part of the money claimed, <i>or as the case may be</i>) has paid into Court Rs. and says that this sum is enough to satisfy the plaintiff's claim (or the part aforesaid)
Performance remitted	re-	The performance of the promise alleged was remitted on the <i>(date)</i>
Rescission		The contract was rescinded by agreement between the plaintiff and defendant.
Res judicata		The plaintiff's claim is barred by the decree in suit <i>(give the reference)</i>
Estoppel		The plaintiff is estopped from denying the truth of <i>(insert statement as to which estoppel is claimed)</i> because <i>(here state the facts relied on as creating the estoppel)</i>
Ground of defence subsequent to institution of suit.		Since the institution of the suit, that is to say, on the day of <i>(set out facts)</i>

No. 1.

DEFENCE IN SUITS FOR GOODS SOLD AND DELIVERED.

1. The defendant did not order the goods.
2. The goods were not delivered to the defendant.
3. The price was not Rs

[or]

- | | | | | | | |
|----|---|------------------|---|---------|---|----|
| 4. | } | Except as to Rs. | , | same as | } | 1. |
| 5. | | | | | | 2. |
| 6. | | | | | | 3. |

7. The defendant [or A. B., the defendant's agent] satisfied the claim by payment before suit to the plaintiff or to C. D., the plaintiff's agent] on the day of 19 .

8. The defendant satisfied the claim by payment after suit to the plaintiff on the day of 19 .

No. 2

DEFENCE IN SUITS ON BONDS.

1. The bond is not the defendant's bond.
2. The defendant made payment to the plaintiff on the day according to the condition of the bond
3. The defendant made payment to the plaintiff after the day named and before suit of the principal and interest mentioned in the bond

No. 3.

DEFENCE IN SUIT ON GUARANTEES

1. The principal satisfied the claim by payment before suit.
2. The defendant was released by the plaintiff giving time to the principal debtor in pursuance of a binding agreement.

No. 4.

DEFENCE IN ANY SUIT FOR DEBT.

1. As to Rs. 200 of the money claimed, the defendant is entitled to set off for goods sold and delivered by the defendant to the plaintiff.

Particulars are as follows :—

									Rs.
1907, January 25th	.	.	.	.	.	.	.	.	150
" February 1st	.	.	.	.	.	.	.	.	50
Total									200

2. As to the whole [or as to Rs. , part of the money claimed] the defendant made tender before suit of Rs. , and has paid the same into Court

No 5

DEFENCE IN SUITS FOR INJURIES CAUSED BY NEGLIGENT DRIVING

1 The defendant declares that the carriage mentioned in the plaint was the defendant's carriage, and that it was under the charge or control of the defendant's servants. The carriage belonged to _____ of _____ Street, Calcutta, livery stable keepers employed by the defendant to supply him with carriages and horses, and the person under whose charge and control the said carriage was, was the servant of the said _____.

2 The defendant does not admit that the said carriage was turned out of Middleton Street, either negligently, suddenly or without warning, or at a rapid or dangerous pace.

3 The defendant says the plaintiff might and could, by the exercise of reasonable care and diligence, have seen the said carriage approaching him, and avoided any collision with it.

4 The defendant does not admit the statements contained in the third paragraph of the plaint.

No. 6

DEFENCE IN ALL SUITS FOR WRONGS

1. Denial of the several acts [or matters] complained of.

No. 7

DEFENCE IN SUITS FOR DETENTION OF GOODS

1 The goods were not the property of the plaintiff.

2 The goods were detained for a lien to which the defendant was entitled. Particulars are as follows.—

1907, May 3rd. To carriage of the goods claimed from Delhi to Calcutta.—

45 maunds at Rs. 2 per maund Rs.

No 8.

DEFENCE IN SUITS FOR INFRINGEMENT OF COPYRIGHT

1. The plaintiff is not the author [assignee, etc].
2. The book was not registered.
3. The defendant did not infringe.

No. 9.

DEFENCE IN SUITS FOR INFRINGEMENT OF TRADE MARK.

1. The trade mark is not the plaintiff's.
2. The alleged trade mark is not a trade mark.
3. The defendant did not infringe.

No 10.

DEFENCES IN SUITS RELATING TO NUISANCES.

1. The plaintiff's lights are not ancient [or deny his other alleged prescriptive rights].

2. The plaintiff's lights will not be materially interfered with by the defendant's buildings.

3. The defendant denies that he or his servants pollute the water [or do what is complained of]

[If the defendant claims the right by prescription or otherwise to do what is complained of, he must say so, and must state the grounds of the claim, i e, whether by prescription grant or what.]

4 The plaintiff has been guilty of laches of which the following are particulars .—

1870 Plaintiff's mill began to work.

1871. Plaintiff came into possession.

1883 First complaint.

5 As to the plaintiff's claim for damages the defendant will rely on the above grounds of defence, and says that the acts complained of have not produced any damage to the plaintiff [If other grounds are relied on, they must be stated e. g limitation as to past damage.]

No. 11.

DEFENCE TO SUIT FOR FORECLOSURE.

1. The defendant did not execute the mortgage.

2. The mortgage was not transferred to the plaintiff [if more than one transfer is alleged, say which is denied]

3 The suit is barred by article _____ of the second schedule to the Indian Limitation Act, 1877.

4. The following payments have been made, viz .—

					Rs.
(Insert date)	_____	...	...	...	1,000
(Insert date)	_____	...	...	...	500

5. The plaintiff took possession on the _____ of _____, and has received the rents ever since

6. That plaintiff released the debt on the _____ of _____.

7. The defendant transferred all his interest to A B. by a document, dated _____

No 12.

DEFENCE TO SUIT FOR REDEMPTION.

1. The plaintiff's right to redeem is barred by article _____ of the second schedule to the Indian Limitation Act, 1877.

2. The plaintiff transferred all interest in the property to A. B.

3 The defendant, by a document dated the _____ day of _____ transferred all his interest in the mortgage-debt and property comprised in the mortgage to A. B.

4. The defendant never took possession of the mortgaged property, or received the rents thereof

[If the defendant admits possession for a time only, he should state the time, and deny possession beyond what he admits.]

No 13.

DEFENCE TO SUIT FOR SPECIFIC PERFORMANCE

- 1 The defendant did not enter into the agreement
- 2 A B was not the agent of the defendant (*if alleged by plaintiff*)
- 3 The plaintiff has not performed the following conditions—(*Conditions*).
- 4 The defendant did not—(*alleged acts of part performance*)
- 5 The plaintiff's title to the property agreed to be sold is not such as the defendant is bound to accept by reasons of the following matter—(*State why*)
- 6 The agreement is uncertain in the following respects—(*State them*).
7. (*or*) The plaintiff has been guilty of delay.
8. (*or*) The plaintiff has been guilty of fraud (*or misrepresentation*)
- 9 (*or*) The agreement is unfair ;
10. (*or*) The agreement was entered into by mistake.
11. The following are particulars of (7), (8), (9) (10) (*or as the case may be*).
12. The agreement was rescinded under Conditions of Sale, No 11 (*or by mutual agreement*)

(*In cases where damages are claimed and the defendant disputes his liability to damages, he must deny the agreement or the alleged breaches, or show whatever other ground of defence he intends to rely on, e. g., the Indian Limitation Act, accord and satisfaction, release, fraud, etc.*)

No 14

DEFENCE IN ADMINISTRATION SUIT BY PECUNIARY LEGATEE

- 1 A B's will contained a charge of debts ; he died insolvent ; he was entitled at his death to some immoveable property which the defendant sold and which produced the net sum of Rs _____, and the testator had some moveable property which the defendant got in, and which produced the net sum of Rs _____
- 2 The defendant applied the whole of the said sums and the sum of Rs _____ which the defendant received from rents of the immoveable property in the payment of the funeral and testamentary expenses and some of the debts of the testator
- 3 The defendant made up his accounts and sent a copy thereof to the plaintiff on the _____ day of _____ 19____, and offered the plaintiff free access to the vouchers to verify such accounts, but he declined to avail himself of the defendant's offer
- 4 The defendant submits that the plaintiff ought to pay the costs of this suit.

No 15

PROBATE OF WILL IN SOLEMN FORM.

1. The said will and codicil of the deceased were not duly executed according to the provisions of the Indian Succession Act, 1865 [*or of the Hindu Wills Act, 1870*]
- 2 The deceased at the time the said will and codicil respectively purport to have been executed, was not of sound mind, memory and understanding.
- 3 The execution of the said will and codicil was obtained by the undue influence of the plaintiff [and others acting with him whose names are at present unknown to the defendant].

No. 10.

DEFENCES IN SUITS RELATING TO NUISANCES.

1. The plaintiff's lights are not ancient [or deny his other alleged prescriptive rights].

2. The plaintiff's lights will not be materially interfered with by the defendant's buildings

3. The defendant denies that he or his servants pollute the water [or do what is complained of]

[If the defendant claims the right by prescription or otherwise to do what is complained of, he must say so, and must state the grounds of the claim, i. e., whether by prescription grant or what.]

4. The plaintiff has been guilty of laches of which the following are particulars :—

5. As to the plaintiff's claim for damages the defendant will rely on the above grounds of defence, and says that the acts complained of have not produced any damage to the plaintiff [If other grounds are relied on, they must be stated e. g. limitation as to past damage.]

No 11

DEFENCE TO SUIT FOR FORECLOSURE.

1. The defendant did not execute the mortgage.

2. The mortgage was not transferred to the plaintiff [if more than one transfer is alleged, say which is denied].

3. The suit is barred by article _____ of the second schedule to the Indian Limitation Act, 1877.

4. The following payments have been made, viz. :—

					Rs.
(Insert date)	_____	...	...	...	1,000
(Insert date.)	_____	...	...	...	500

5. The plaintiff took possession on the _____ of _____, and has received the rents ever since

6. That plaintiff released the debt on the _____ of _____.

7. The defendant transferred all his interest to A B by a document, dated _____

No 12.

DEFENCE TO SUIT FOR REDEMPTION.

1. The plaintiff's right to redeem is barred by article _____ of the second schedule to the Indian Limitation Act, 1877.

2. The plaintiff transferred all interest in the property to A. B.

3. The defendant, by a document dated the _____ day of _____ transferred all his interest in the mortgage-debt and property comprised in the mortgage to A. B.

4. The defendant never took possession of the mortgaged property, or received the rents thereof

[If the defendant admits possession for a time only, he should state the time, and deny possession beyond what he admits]

No 13

DEFENCE TO SUIT FOR SPECIFIC PERFORMANCE.

1. The defendant did not enter into the agreement
2. A B was not the agent of the defendant (*if alleged by plaintiff*)
3. The plaintiff has not performed the following conditions—(*Conditions*)
4. The defendant did not—(*alleged acts of part performance*)
5. The plaintiff's title to the property agreed to be sold is not such as the defendant is bound to accept by reasons of the following matter—(*State why*)
6. The agreement is uncertain in the following respects—(*State them*)
7. (*or*) The plaintiff has been guilty of delay,
8. (*or*) The plaintiff has been guilty of fraud (*or* misrepresentation)
9. (*or*) The agreement is unfair,
10. (*or*) The agreement was entered into by mistake
11. The following are particulars of (7), (8), (9) (10) (*or as the case may be*).
12. The agreement was rescinded under Conditions of Sale, No 11 (*or by mutual agreement*)

(*In cases where damages are claimed and the defendant disputes his liability to damages, he must deny the agreement or the alleged breaches, or show whatever other ground of defence he intends to rely on, e.g., the Indian Limitation Act, accord and satisfaction, release, fraud, etc.*)

No 14

DEFENCE IN ADMINISTRATION SUIT BY PECUNIARY LEGATEE.

1. A. B's will contained a charge of debts; he died insolvent; he was entitled at his death to some immoveable property which the defendant sold and which produced the net sum of Rs. , and the testator had some moveable property which the defendant got in, and which produced the net sum of Rs.

2. The defendant applied the whole of the said sums and the sum of Rs. which the defendant received from rents of the immoveable property in the payment of the funeral and testamentary expenses and some of the debts of the testator

3. The defendant made up his accounts and sent a copy thereof to the plaintiff on the day of 19, and offered the plaintiff free access to the vouchers to verify such accounts, but he declined to avail himself of the defendant's offer

4. The defendant submits that the plaintiff ought to pay the costs of this suit.

No 15.

PROBATE OF WILL IN SOLEMN FORM.

1. The said will and codicil of the deceased were not duly executed according to the provisions of the Indian Succession Act, 1865 [*or of the Hindu Wills Act, 1870*]

2. The deceased at the time the said will and codicil respectively purport to have been executed, was not of sound mind, memory and understanding.

3. The execution of the said will and codicil was obtained by the undue influence of the plaintiff [and others acting with him whose names are at present unknown to the defendant].

4. The execution of the said will and codicil was obtained by the fraud of the plaintiff, such fraud, so far as is within the defendant's present knowledge, being *[state the nature of the fraud]*

5. The deceased at the time of the execution of the said will and codicil did not know and approve of the contents thereof, *[or of the contents of the residuary clause in the said will, as the case may be]*

6. The deceased made his true last will, dated the 1st January, 1873, and thereby appointed the defendant sole executor thereof.

The defendant claims .—

(1) that the Court will pronounce against the said will and codicil pronounced by the plaintiff :

(2) that the Court will decree probate of the will of the deceased, dated the 1st January, 1873, in solemn form of law.

NO. 16.

PARTICULARS. (O. 6, r. 5)

(Title of suit)

Particulars

The following are the particulars of *(here state the matters in respect of which particulars have been ordered)* delivered pursuant to the order of the of
(Here set out the particulars ordered in paragraphs if necessary)

APPENDIX B.

PROCESS.

No. 1.

SUMMONS FOR DISPOSAL OF SUIT. (O. 5, rr. 1, 5.)

(Title.)

To

[Name, description and place of residence.]

WHEREAS has instituted a suit against you for you are hereby summoned to appear in this Court in person or by a pleader duly instructed, and able to answer all material questions relating to the suit, or who shall be accompanied by some person able to answer all such questions, on the day of 19 , at o'clock in the noon, to answer the claim; and as the day fixed for your appearance is appointed for the final disposal of the suit, you must be prepared to produce on that day all the witnesses upon whose evidence and all the documents upon which you intend to rely in support of your defence.

Take notice that, in default of your appearance on the day before mentioned, the suit will be heard and determined in your absence.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

- NOTICE.—1. Should you apprehend your witnesses will not attend of their own accord, you can have a summons from this Court to compel the attendance of any witness, and the production of any document that you have a right to call upon the witness to produce, on applying to the Court and on depositing the necessary expenses.
2. If you admit the claim, you should pay the money into Court together with the costs of the suit, to avoid execution of the decree, which may be against your person or property, or both.

No. 2.

SUMMONS FOR SETTLEMENT OF ISSUES (O. 5, rr. 1, 5)

(Title.)

To

[Name, description and place of residence.]

WHEREAS has instituted a suit against you for you are hereby summoned to appear in this Court in person, or by a pleader duly instructed, and able to answer all material questions relating to the suit, or who shall be accompanied by some person able to answer all such questions, on the day of 19 , at o'clock in the noon, to answer the claim; and as the day fixed for your appearance is appointed for the final disposal of the suit, you must be prepared to produce on that day all the witnesses upon whose evidence and all the documents upon which you intend to rely in support of your defence.

Take notice that, in default of your appearance on the day before mentioned, the suit will be heard and determined in your absence.

GIVEN under my hand and the seal of the Court, this
day of 19 .

Judge.

- NOTICE.—1. Should you apprehend your witnesses will not attend of their own accord, you can have a summons from this Court to compel the attendance of any witness, and the production of any document that you have a right to call on the witness to produce, on applying to the Court and on depositing the necessary expenses.
2. If you admit the claim, you should pay the money into Court together with the costs of the suit, to avoid execution of the decree, which may be against your person or property or both.

No 3

SUMMONS TO APPEAR IN PERSON. (O. 3, r. 3)

(Title)

To

[Name, description and place of residence.]

WHEREAS has instituted a suit against you for you are hereby summoned to appear in this Court in person on the day of 19 at o'clock in the noon, to answer the claim; and you are directed to produce on that day all the documents upon which you intend to rely in support of your defence.

Take notice that, in default of your appearance on the day before mentioned, the suit will be heard and determined in your absence.

GIVEN under my hand and the seal of the Court, this
day of 19 .

Judge

No 4

SUMMONS IN SUMMARY SUIT ON NEGOTIABLE INSTRUMENT (O. 37, r. 2.)

(Title)

To

[Name, description and place of residence]

WHEREAS has instituted a suit against you under Order XXXVII of the Code of Civil Procedure, 1908, for Rs. , balance of principal and interest due to him as the of a of which a copy is hereto annexed, you are hereby summoned to obtain leave from the Court within ten days from the service thereof to appear and defend the suit, and within such time to cause an appearance to be entered for you. In default whereof the plaintiff will be entitled at any time after the expiration of such ten days to obtain a decree for any sum not exceeding the sum of Rs. and the sum of Rs. for costs.

Leave to appear may be obtained on an application to the Court supported by affidavit or declaration showing that there is a defence to the suit on the merits, or that it is reasonable that you should be allowed to appear in the suit.

GIVEN under my hand and the seal of the Court, this
day of 19 .

Judge.

No 5.

NOTICE TO PERSON WHO, THE COURT CONSIDERS, SHOULD BE ADDED
AS CO-PLAINTIFF. (O. 1, r 10)

(Title)

To

[Name, description and place of residence.]

WHEREAS _____ has instituted the above suit
against _____ for _____ and whereas it appears
necessary that you should be added as a plaintiff in the said suit in order to en-
able the Court effectually and completely to adjudicate upon and settle all the
questions involved :

Take notice that you should on or before _____ day of _____ 19
signify to this Court whether you consent to be so added

GIVEN under my hand and the seal of the Court this
day of _____ 19 .

Judge.

No 6

SUMMONS TO LEGAL REPRESENTATIVE OF A DECEASED DEFENDANT.

(O. 22, r. 4)

(Title.)

To

WHEREAS the plaintiff _____ instituted a suit in this Court on
the _____ day of _____ 19 against the defendant _____

You are hereby summoned to attend in this Court on the _____ day
of _____ 19 at _____ AM. to defend the said suit, and, in default of
your appearance on the day specified, the said suit will be heard and determined
in your absence.

GIVEN under my hand and the seal of the Court, this
day of _____ 19 .

Judge.

No 7.

ORDER FOR TRANSMISSION OF SUMMONS FOR SERVICE IN THE
JURISDICTION OF ANOTHER COURT.

(O. 5, r. 21.)

(Title.)

WHEREAS it is stated that

^{defendant}
witness _____ in the above suit is at present residing in _____

It is ordered that a summons returnable on the _____ day of _____
19 , be forwarded to the _____ Court of
for service on the said ^{defendant}
witness _____ with a duplicate of this proceeding.

The court-fee of _____ chargeable in respect to the summons has been realized in this Court in stamps.

Dated 19 .

Judge.

No. 8.

ORDER FOR TRANSMISSION OF SUMMONS TO BE SERVED ON
A PRISONER. (O. 5, r. 24.)

(Title.)

To

The Superintendent of the Jail at

UNDER the provisions of Order V, rule 24, of the Code of Civil Procedure, 1908, a summons in duplicate is herewith forwarded for service on the defendant who is _____ a prisoner in jail. You are requested to cause a copy of the said summons to be served upon the said defendant and to return the original to this Court signed by the said defendant, with a statement of service endorsed thereon by you.

Judge.

No. 9

ORDER FOR TRANSMISSION OF SUMMONS TO BE SERVED ON
A PUBLIC SERVANT OR SOLDIER. (O. 5, rr. 27, 28.)

(Title.)

To

UNDER the provisions of Order V, rule 27 (or 28, as the case may be), of the Code of Civil Procedure, 1908, a summons in duplicate is herewith forwarded for service on the defendant who is stated to be serving under you. You are requested to cause a copy of the said summons to be served upon the said defendant and to return the original to this Court signed by the said defendant, with a statement of service endorsed thereon by you.

Judge.

No. 10

TO ACCOMPANY RETURNS OF SUMMONS OF ANOTHER COURT. (O. 5, r. 23.)

(Title.)

Read proceeding from the

forwarding

in Suit No. _____ of 19 _____

for service on
of that Court.

Read Serving Officer's endorsement stating that the
above having been duly taken by me on the oath of _____

and proof of the
and

it is ordered that the

be returned to the

with a copy of this proceeding.

Judge.

Note.—This form will be applicable to process other than summons, the service of which may have to be effected in the same manner.

No. 11.

AFFIDAVIT OF PROCESS-SERVER TO ACCOMPANY RETURN OF A
SUMMONS OR NOTICE. (O 5, r 18.)

(Title)

The Affidavit of _____ son of _____
I _____ make oath
and say as follows:—

(1) I am a process-server of this Court.

(2) On the _____ day of _____ 19 _____ I received a Summons
issued by the Court of _____ notice
in Suit No. _____
of 19 _____ in the said Court, dated the _____ day of _____ 19 _____ for service
on _____

(3) The said _____ was at the
time personally known to me, and I served the said summons on him on the _____ day of
19 _____ at about _____ o'clock in the _____ noon at _____ by tendering a
copy thereof to him and requiring his signature to the original summons
her notice

(a)

(b)

(a) Here state whether the person served signed or refused to sign the process, and in whose
(b) Signature of process-server

or,

(c) The said not being personally known to me

_____ day of _____
19 _____ at about _____ o'clock in the _____ noon at _____ by
tendering a copy thereof to him and requiring his signature to the original summons
her notice

(a)

(b)

(4) Here state whether the person served signed or refused to sign the process, and in whose presence

(b) Signature of process-server

or

(3) The said _____ and the house in which he ordinarily resides being
personally known to me, I went to the said house, in _____ and there on
the _____ day of _____ 19 _____ at about _____ o'clock in the
noon, I did not find the said _____

(a)

(b)

(a) Enter fully and exactly the manner in which the Process was served, with special reference to Order 5, rules 15 and 11.

(b) Signature of process-server.

or

(3) One _____ accompanied me to _____ and there
pointed out to me _____ which he said was the house in which
ordinarily resides I did not find the said _____ there,

(a)

(b)

(a) Enter fully and exactly the manner in which the process was served, with special reference to Order 5 rules 15 and 11.

(b) Signature of process-server.

or,

If substituted service has been ordered, state fully and exactly the manner in which the summons was served with special reference to the terms of the order for substituted service.

Sworn
Affirmed by the said
day of

before me this

19

Empowered under section 139 of the Code of Civil Procedure
to administer the oath to deponents.

No 12.

NOTICE TO DEFENDANT. (O. 9, r. 6)

(Title.)

To

(Name, description and place of residence)

said summons ;

Notice is hereby given to you that the hearing of the suit is adjourned this day and that the day of 19 is now fixed for the hearing of the same ; in default of your appearance on the day last mentioned the suit will be heard and determined in your absence

GIVEN under my hand and the seal of the Court, this day of 19

Judge

No 13.

SUMMONS TO WITNESS (O. 16, rr. 1, 5)

(Title)

To

WHEREAS your attendance is required to

on behalf of the in the above suit, you are hereby required [personally] to appear before this Court on the day of 19, at o'clock in the forenoon, and to bring with you [or to send to this Court]

A sum of Rs being your travelling and other expenses and subsistence allowance for one day, is herewith sent. If you fail to comply with this order without lawful excuse, you will be subject to the consequences of non-attendance laid down in rule 12 of Order XVI of the Code of Civil Procedure

GIVEN under my hand and the seal of the Court, this day of 19

Judge.

- NOTICE—(1) If you are summoned only to produce a document and not to give evidence, you shall be deemed to have complied with the summons if you cause such document to be produced in this Court on the day and hour aforesaid
- (2) If you are detained beyond the day aforesaid, a sum of Rs. _____ will be tendered to you for each day's attendance beyond the day specified

No. 14

PROCLAMATION REQUIRING ATTENDANCE OF WITNESS (O 16, r. 10)

(Title)

To

WHEREAS it appears from the examination on oath of the serving officer that the summons could not be served upon the witness in the manner prescribed by law, and whereas it appears that the evidence of the witness is material, and he absconds and keeps out of the way for the purpose of evading the service of the summons. This proclamation is therefore, under rule 10 of Order XVI of the Code of Civil Procedure, 1908, issued requiring the attendance of the witness in this Court on the _____ day of _____ 19____ at _____ o'clock in the forenoon, and from day to day until he shall have leave to depart; and if the witness fails to attend on the day and hour aforesaid he will be dealt with according to law.

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19____

Judge.

No. 15.

PROCLAMATION REQUIRING ATTENDANCE OF WITNESS. (O 16, r. 10)

(Title)

To

WHEREAS it appears from the examination on oath of the serving officer that the summons has been duly served upon the witness, and whereas it appears that the evidence of the witness is material and he has failed to attend in compliance with such summons. This proclamation is therefore, under rule 10 of Order XVI of the Code of Civil Procedure, 1908, issued, requiring the attendance of the witness in this Court on the _____ day of _____ 19____ at _____ o'clock in the forenoon, and from day to day until he shall have leave to depart; and if the witness fails to attend on the day and hour aforesaid he will be dealt with according to law.

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19____

Judge

No. 16

WARRANT OF ATTACHMENT OF PROPERTY OF WITNESS. (O. 16, r. 10.)

(Title)

To

The Bailiff of the Court

WHEREAS the witness
cited by

has not, after the expiration of the period limited in the proclamation issued for

his attendance, appeared in Court ; You are hereby directed to hold under attachment property belonging to the said witness to the value of _____ and to submit a return, accompanied with an inventory thereof, within _____ days

GIVEN under my hand and the seal of the Court, this day of 19
Judge.

No 17.

WARRANT OF ARREST OF WITNESS (O. 16, r. 10)

(Title)

To

The Bailiff of the Court.

WHEREAS
to attend [absco
of a summons],
before the Court

You are further ordered to return this warrant on or before the _____ day of _____ 19____ with an endorsement certifying the day on and the manner in which it has been executed or the reason why it has not been executed.

GIVEN under my hand and the seal of the Court, this day of 19
Judge.

WARRANT OF COMMITMENT. (O. 16, r. 16)

(Title.)

To

The Officer in charge of the Jail at

WHEREAS the plaintiff (or defendant) in the abovenamed suit has made
 day of _____
 you to
 receive the said _____ into your custody in the civil prison and to produce
 him before this Court at _____ on the said day and on such other day or
 days as may be hereafter ordered.

GIVEN under my hand and the seal of the Court, this day of 19
Judge.

No 19

WARRANT OF COMMITTAL (O 16, r. 18.)

(Title)

To

The Officer in charge of the Jail at

WHEREAS, whose attendance is required before this Court in the above named case to give evidence (or to produce a document, has been arrested and brought before the Court in custody; and whereas owing to the absence of the plaintiff (or defendant), the said cannot give

such evidence (or produce such document); and whereas the Court has called upon the said _____ to give security for his appearance on the _____ day of _____ 19____, at _____, which he has failed to do; This is to require you to receive the said _____ into your custody in the civil prison and to produce him before this Court at _____ on the _____ day of _____ 19____.

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19____.

Judge

his attendance, appeared in Court ; You are hereby directed to hold under attachment property belonging to the said witness to the value of and to submit a return, accompanied with an inventory thereof, within days

GIVEN under my hand and the seal of the Court, this day of 19
Judge.

No 17.

WARRANT OF ARREST OF WITNESS. (O. 16, r. 10)

(Title)

To

The Bailiff of the Court.

WHEREAS [redacted] has been duly served with a summons but has failed to attend [redacted] and keeps out of the way for the purpose of avoiding service of a summons; You are hereby ordered to arrest and bring the said [redacted] before the Court.

You are further ordered to return this warrant on or before the _____ day of _____ 19____ with an endorsement certifying the day on and the manner in which it has been executed or the reason why it has not been executed.

GIVEN under my hand and the seal of the Court, this day of 19
Judge.

WARRANT OF COMMITTAL. (O. 16, r. 16.)

(Title)

Tg

The Officer in charge of the Jail at

WHEREAS the plaintiff (or defendant) in the abovenamed suit has made application to this Court that security be taken for the appearance of to give evidence (or to produce a document), on the day of 19 ; and whereas the Court has called upon the said to furnish such security, which he has failed to do ; This is to require you to receive the said into your custody in the civil prison and to produce him before this Court at on the said day and on such other day or days as may be hereafter ordered

GIVEN under my hand and the seal of the Court, this day of 19
Judge.

No 19

WARRANT OF COMMITTAL, (O. 16, r. 18.)

(Title)

To

The Officer in charge of the Jail at

WHEREAS _____, whose attendance is required before this Court in the above named case to give evidence (or to produce a document, has been arrested and brought before the Court in custody; and whereas owing to the absence of the plaintiff (or defendant), the said _____ cannot give

such evidence (*or* produce such document); and whereas the Court has called upon the said to give security for his appearance on the day of 19 , at which he has failed to do; This is to require you to receive the said into your custody in the civil prison and to produce him before this Court at day of 19 . on the

GIVEN under my hand and the seal of the Court, this
19 .

day of

Judge

such evidence (*or produce such document*) ; and whereas the Court has called upon the said to give security for his appearance on the day of 19 , at which he has failed to do ; This is to require you to receive the said into your custody in the civil prison and to produce him before this Court at day of 19 on the

GIVEN under my hand and the seal of the Court, this
19 .

day of

Judge.

APPENDIX C.

DISCOVERY, INSPECTION AND ADMISSION.

No. 1.

ORDER FOR DELIVERY OF INTERROGATORIES. (O. 11, r. 1.)

In the Court of

Civil Suit No.

of

19

A. B

...

...

...

...

Plaintiff,

against

C. D, E. F. and G. H

...

...

Defendants.

Upon hearing filed the day of and upon reading the affidavit of 19 ; It is ordered that the be at liberty to deliver to the interrogatories in writing, and that the said do answer the interrogatories as prescribed by Order XI, rule 8, and that the costs of this application be

No. 2.

INTERROGATORIES (O. 11, r. 4)

(Title as in No. 1, supra)

Interrogatories on behalf of the above-named [*plaintiff or defendant C. D.*] for the examination of the above-named [*defendants E. F. and G. H. or plaintiff.*]

1. Did not, etc.

2. Has not, etc.

etc.,

etc.,

etc

[*The defendant E. F. is required to answer the interrogatories numbered*]

[*The defendant G. H. is required to answer the interrogatories numbered.*]

No. 3.

ANSWER TO INTERROGATORIES. (O. 11, r. 9.)

(Title as in No. 1, supra)

The answer of the above-named defendant E. F. to the interrogatories for his examination by the above-named plaintiff.

In answer to the said interrogatories, I, the above-named E. F., make oath and say as follows ---

1. } Enter answers interrogatories in paragraphs numbered consecutively.

3. I object to answer the interrogatories on the ground that
[*state grounds of objection*]

No. 4.

ORDER FOR AFFIDAVIT AS TO DOCUMENTS (O. 11, r. 12.)

(Title as in No. 1, supra.)

Upon hearing _____ do within _____ days from the date of this order, answer on affidavit stating which documents are or have been in his possession or power relating to the matter in question in this suit and that the costs of this application be _____

No 5

AFFIDAVIT AS TO DOCUMENTS (O. 11, r. 13.)

(Title as in No. 1, supra.)

I, the above-named defendant C. D., make oath and say as follows :—

1 I have in my possession or power the documents relating to the matters in question in this suit set forth in the first and second parts of the first schedule hereto

2 I object to produce the said documents set forth in the second part of the first schedule hereto [*state grounds of objection*]

3 I have had, but have not now, in my possession or power the documents relating to the matters in question in this suit set forth in the second schedule hereto

4 The last-mentioned documents were last in my possession or power on [*state when and what has become of them, and in whose possession they now are*]

5 According to the best of my knowledge, information and belief I have not now, and never had, in my possession, custody or power, or in the possession, custody or power of my pleader or agent, or in the possession, custody or power of any other person on my behalf, any account, book of account, voucher, receipt, letter, memorandum, paper or writing, or any copy of or extract from any such document, or any other document whatsoever, relating to the matters in question in this suit or any of them, or wherein any entry has been made relative to such matters or any of them, other than and except the documents set forth in the said first and second schedules hereto

No. 6

ORDER TO PRODUCE DOCUMENTS FOR INSPECTION. (O. 11, r. 14.)

(Title as in No. 1, supra.)

Upon hearing _____ and upon reading the affidavit of _____ filed the day of _____ 19____; It is ordered that the do, at all seasonable times, on reasonable notice, produce at _____, situate at _____, the following documents, namely, _____, and that the _____ be at liberty to inspect and peruse the documents so produced and to make notes of their contents. In the meantime it is ordered that all further proceedings be stayed and that the costs of this application be _____

• No 7.

NOTICE TO PRODUCE DOCUMENTS. (O. 11, r. 16)

(Title as in No 1, *supra*.)

Take notice that the [*plaintiff or defendant*] requires you to produce for his inspection the following documents referred to in your [*plaint or written statement or affidavit*] dated the _____ day of _____ 19 ____

[*Describe documents required.*]X. Y., *Pleader for the*To Z., *Pleader for the*

No 8.

NOTICE TO INSPECT DOCUMENTS. (O. 11, r. 17.)

(Title as in No 1, *supra*.)

Take notice that you can inspect the documents mentioned in your notice of the _____ day of _____ 19 ____ [*except the documents numbered in that notice*] at [*insert place of inspection*] on Thursday next, the instant, between the hours of 12 and 4 o'clock.

Or, that the [*plaintiff or defendant*] objects to giving you inspection of documents mentioned in your notice of the _____ day of _____ 19 ____, on the ground that [*state the ground*].—

No. 9.

NOTICE TO ADMIT DOCUMENTS. (O. 12, r. 3)

(Title as in No. 1, *supra*.)

Take notice that the plaintiff [*or defendant*] in this suit proposes to adduce in evidence the several documents hereunder specified, and that the same may be inspected by the defendant [*or plaintiff*], his pleader or agent, at _____ on _____ between the hours of _____ ; and the defendant [*or plaintiff*] is hereby required, within forty-eight hours from the last-mentioned hour, to admit that such of the said documents as are specified to be originals were respectively written, signed or executed, as they purport respectively to have been, that such as are specified as copies are true copies; and such documents as are stated to have been served, sent or delivered were so served, sent or delivered, respectively, saving all just exceptions to the admissibility of all such documents as evidence in this suit

G. H., *pleader [or agent] for plaintiff [or defendant]*To E. F., *pleader [or agent] for defendant [or plaintiff]*

[*Here describe the documents and specify as to each document whether it is original or a copy.*]

No. 10.

NOTICE TO ADMIT FACTS (O. 12, r. 5)

(Title as in No. 1, *supra*.)

Take notice that the plaintiff [*or defendant*] in this suit requires the defendant [*or plaintiff*] to admit for the purposes of this suit only, the several facts respectively hereunder specified; and the defendant [*or plaintiff*] is hereby

required, within six days from the service of this notice, to admit the said several facts, saving all just exceptions to the admissibility of such facts as evidence in this suit

G. H., *pleader [or agent] for plaintiff [or defendant]*

To E. F., *pleader [or agent] for defendant [or plaintiff]*

The facts, the admission of which is required, are—

1. That M. died on the 1st January, 1890
2. That he died intestate
3. That N. was his only lawful son
4. That O. died on the 1st April, 1896
5. That O. was never married.

No 11

ADMISSION OF FACTS PURSUANT TO NOTICE (O. 12, r 5)

(Title as in No 1, *supra*)

The defendant [or plaintiff] in this suit, for the purposes of this suit only hereby admits the several facts respectively hereunder specified, subject to the qualifications or limitations, if any, hereunder specified, saving all just exceptions to the admissibility of any such facts, or any of them, as evidence in this suit.

Provided that this admission is made for the purposes of this suit only, and is not an admission to be used against the defendant [or plaintiff] on any other occasion or by any one other than the plaintiff [or defendant, or party requiring the admission]

E. F., *pleader [or agent] for defendant [or plaintiff]*

To G. H., *pleader or agent] for plaintiff [or defendant]*

Facts admitted	Qualifications or limitations, if any, subject to which they are admitted
1. That M. died on the 1st January, 1890	1.
2. That he died intestate	2.
3. That N. was this lawful son	3. But not that he was his only lawful son.
4. That O. died	4. But not that he died on the 1st April, 1896.
5. That O. was never married	5.

No 12.

NOTICE TO PRODUCE (GENERAL FORM) (O. 12, r 8)

(Title as in No 1, *supra*)

Take notice that you are hereby required to produce and show to the Court at the first hearing of this suit all books, papers, letters, copies of letters and other writings and documents in your custody, possession or power containing any entry, memorandum or minute relating to the matters in question in this suit, and particularly

G. H., *pleader [or agent] for plaintiff [or defendant]*.

To E. F., *[or agent] for defendant [or plaintiff]*

• No. 7.

NOTICE TO PRODUCE DOCUMENTS. (O 11, r. 16)

(Title as in No. 1, *supra*)

Take notice that the [*plaintiff or defendant*] requires you to produce for his inspection the following documents referred to in your [*plaint or written statement or affidavit*] dated the _____ day of _____ 19 ____.

[Describe documents required.]

X. Y., Pleader for the

To Z., Pleader for the

No 8

NOTICE TO INSPECT DOCUMENTS. (O. 11, r. 17.)

(Title as in No 1, *supra*.)

Take notice that you can inspect the documents mentioned in your notice of the _____ day of _____ 19 [except the documents numbered in that notice] at [insert place of inspection] on Thursday next, the instant, between the hours of 12 and 4 o'clock.

Or, that the [plaintiff or defendant] objects to giving you inspection of documents mentioned in your notice of the _____ day of _____ 19____, on the ground that [state the ground]:—

No 9

NOTICE TO ADMIT DOCUMENTS. (O. 12, r. 3)

(Title as in No. 1, *supra*)

Take notice that the plaintiff [or defendant] in this suit proposes to adduce in evidence the several documents hereunder specified, and that the same may be inspected by the defendant [or plaintiff], his pleader or agent, at _____ on _____ between the hours of _____; and the defendant [or plaintiff] is hereby required, within forty-eight hours from the last-mentioned hour, to admit that such of the said documents as are specified to be originals were respectively written, signed or executed, as they purport respectively to have been; that such as are specified as copies are true copies; and such documents as are stated to have been served, sent or delivered were so served, sent or delivered, respectively, saving all just exceptions to the admissibility of all such documents as evidence in this suit.

G. H., pleader [or agent] for plaintiff [or defendant]

To L. F., *pleader* [or *agent*] for defendant [or plaintiff]

[Here describe the documents and specify as to each document whether it is original or a copy.]

No. 10.

NOTICE TO ADMIT FACTS (O. 12, r. 5.)

(Title as in No. 1, *supra*)

Take notice that the plaintiff [or defendant] in this suit requires the defendant [or plaintiff] to admit for the purposes of this suit only, the several facts respectively hereunder specified; and the defendant [or plaintiff] is hereby

required, within six days from the service of this notice, to admit the said several facts, saving all just exceptions to the admissibility of such facts as evidence in this suit.

G. H., *pleader* [or *agent*] for *plaintiff* [or *defendant*].

To E. F., *pleader* [or *agent*] for *defendant* [or *plaintiff*]

The facts, the admission of which is required, are—

1. That M. died on the 1st January, 1890
2. That he died intestate
3. That N. was his only lawful son.
4. That O. died on the 1st April, 1896
5. That O. was never married.

No. 11

ADMISSION OF FACTS PURSUANT TO NOTICE (O. 12, r. 5)

(Title as in No. 1, *supra*)

The defendant [or plaintiff] in this suit, for the purposes of this suit only hereby admits the several facts respectively hereunder specified, subject to the qualifications or limitations, if any, hereunder specified, saving all just exceptions to the admissibility of any such facts, or any of them, as evidence in this suit.

Provided that this admission is made for the purposes of this suit only, and is not an admission to be used against the defendant [or plaintiff] on any other occasion or by any one other than the plaintiff [or defendant, or party requiring the admission]

E. F., *pleader* [or *agent*] for *defendant* [or *plaintiff*]

To G. H., *pleader* or *agent*] for *plaintiff* [or *defendant*]

Facts admitted	Qualifications or limitations, if any, subject to which they are admitted
1. That M. died on the 1st January, 1890	1.
2. That he died intestate	2.
3. That N. was this lawful son	3. But not that he was his only lawful son.
4. That O. died	4. But not that he died on the 1st April, 1896.
5. That O. was never married	5.

No. 12.

NOTICE TO PRODUCE (GENERAL FORM) (O. 12, r. 8)

(Title as in No. 1, *supra*)

Take notice that you are hereby required to produce and show to the Court at the first hearing of this suit all books, papers, letters, copies of letters and other writings and documents in your custody, possession or power containing any entry, memorandum or minute relating to the matters in question in this suit, and particularly

G. H., *pleader* [or *agent*] for *plaintiff* [or *defendant*].

To E. F., [or *agent*] for *defendant* [or *plaintiff*]

APPENDIX D.

DECREES.

No. 1.

DECREE IN ORIGINAL SUIT. (O. 20, rr 6, 7.)

(Title.)

Claim for

This suit coming on this day for final disposal before
 presence of _____ for the plaintiff and of _____ in the
 it is ordered and decreed that _____ for the defendant,
 sum of Rs. _____ be paid by the _____ and that the
 on account of the costs of this suit, with interest thereon at the rate of _____ per
 cent. per annum from this date to date of realization.

GIVEN under my hand and the seal of the Court, this _____ day of
 19. _____

Judge.

Costs of Suit

Plaintiff.				Defendant.			
	Rs.	A.	P.		Rs.	A.	P.
1. Stamp for plaint . . .				Stamp for power . . .			
2. Do for power . . .				Do for petition . . .			
3 Do. for exhibits . . .				Pleader's fee . . .			
4 Pleader's fee on Rs . . .				Subsistence for witnesses			
5 Subsistence for witnesses .				Service of process . .			
6. Commissioner's fee . . .				Commissioner's fee . .			
7. Service of process . . .							
Total				Total			

No. 2

SIMPLE MONEY DECREE (Section 34)

(Title)

Claim for

This suit coming on this day for final disposal before presence of for the plaintiff and of in the
 it is ordered that the do pay to the for the defendant,
 with interest thereon at the rate of per cent per annum from the sum of Rs
 to the date of realization of the said sum and do also pay Rs. the costs
 of this suit with interest thereon at the rate of per cent. per annum from this
 date to the date of realization

GIVEN under my hand and the seal of the Court, this day of

19

Judge.

Costs of Suit

Plaintiff			Defendant		
	Rs	A	P		Rs A P.
1. Stamp for plaint				Stamp for power	
2. Do. for power				Do for petition	
3 Do. for exhibits				Pleader's fee	
Pleader's fee on Rs				Subsistence for witnesses	
Subsistence for witnesses				Service of process	
Commissioner's fee				Commissioner's fee	
Service of process					
Total					

No 3

PRELIMINARY DECREE FOR FORECLOSURE (O 34, r 2)

(Title)

This suit coming on this day, etc. It is hereby declared that the amount due to the plaintiff on account of principal, interest and costs calculated up to the day of 19 is Rs. and it is decreed as follows —

(1) That if the defendant does not pay the sum of Rs. before the said day of 19 the plaintiff shall be entitled to the said sum of Rs. with interest thereon at the rate of per cent per annum from the said day of 19 to the date of realization of the said sum and do also pay Rs. the costs of this suit with interest thereon at the rate of per cent. per annum from this date to the date of realization

created by the plaintiff or any person claiming under him [Where the plaintiff claims by derived title add *or by those under whom he claims*] [Where the plaintiff is in possession add *and shall put the defendant in possession of the property.*]

(2) That if such payment is not made on or before the said day of 19 the defendant shall be debarred from all right to redeem the property.

Schedule.

Description of the mortgaged property

No. 4.

PRELIMINARY DECREE FOR SALE (O. 34, r. 4)

(Title.)

This suit coming on this day, etc., It is hereby declared that the amount due to the plaintiff on account of principal, interest and costs calculated up to the day of 19 is Rs. and that such amount shall carry interest at the rate of per cent per annum until realization; and it is decreed as follows —

(1) That if the defendant pays into Court the amount so declared due on or before the said day of 19, the plaintiff shall deliver up to the

if is in possession add and shall put defendant in possession of the property'

(2) That if such payment is not made on or before the said

(3) That if the net proceeds of the sale are insufficient to pay such amount and such subsequent interest and costs in full, the plaintiff shall be at liberty to apply for a personal decree for the amount of the balance.

Schedule.

Description of the mortgaged property.

No. 5.

PRELIMINARY DECREE FOR REDEMPTION. (O. 34, r. 7)

(Title.)

This suit coming on this day, etc.; It is hereby declared that the amount due to the defendant on account of principal, interest and costs calculated up to the day of 19 is Rs. ; and it is decreed as follows :—

(1) That if the plaintiff pays into Court the amount so declared due on or before the said day of 19, the defendant shall deliver up to the plaintiff, or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, retransfer the property to the plaintiff free from the mortgage and

from all incumbrances created by the defendant or any person claiming under him. [Where the defendant claims by derived title add *or by those under whom he claims.*] [Where the defendant is in possession add *and shall put the plaintiff in possession of the property*]

(2) That if such payment is not made on or before the said day of 19 , the plaintiff shall be debarred from all right to redeem the property. [If the mortgage is simple or usufructuary substitute *the property shall be sold*]

Schedule.

Description of the mortgaged property

NO. 6.

DECREE FOR FORECLOSURE—FIRST MORTGAGE *v* SECOND MORTGAGEE AND MORTGAGOR.—SUCCESSIVE PERIODS FOR REDEMPTION.

(Title)

It is hereby declared that the amount due to the plaintiff on account of principal, interest and costs calculated up to the day of 19 (a) is Rs *x*, and that on the day of 19 (b) there will be due to the plaintiff for interest the further sum of Rs *y*, making in all Rs *y*, and it is further declared that on the day of 19 (b) there will be due to the first defendant on account of principal, interest and costs Rs *z*, and it is decreed as follows—

(1) That if the first defendant pays into Court the said sum of Rs *x* on or before the said day of 19 (a) the plaintiff shall deliver up, etc (as in form No 3)

(2) That in default of the first defendant paying the said sum on or before the said day he shall be debarred from all right to redeem the property

(3) That in case Court the said sum of 19

(4) That in default of the second defendant paying the said sum on or before the said day he shall be debarred from all right to redeem the property

(5) That in case the first defendant shall redeem the mortgaged property, if the second defendant pays into Court the said sums of Rs *y* and Rs *z* on or before the day of 19 (b) the first defendant shall deliver up, etc (as in Form No 3)

(6) That in default of the second defendant paying the said sums on or before the said day he shall be debarred from all right to redeem the property. [Where the second defendant is in possession add *and shall put the first defendant in possession of the property*]

NO 7

DECREE FOR SALE—FIRST MORTGAGE *v* SECOND MORTGAGEE AND MORTGAGOR.—ONE PERIOD FOR REDEMPTION

(Title)

It is hereby declared that the amount due to the plaintiff on account of principal, interest and costs calculated up to the day of

(a) Insert a day within six months from the date of decree

(b) Insert a day within three months from the date mentioned in (a).

99. is Rs. x , and that on the said day there will be due to the first defendant on account of principal, interest and costs Rs. y ; and it is decreed as follows:

(1) That if the defendants or either of them pay into Court the said sum of Rs. x on or before the said day of 19, the plaintiff shall deliver up, etc. (as in Form No. 4).

(2) That if payment of the said sum is not made on or before the day of 19, the mortgaged property or a sufficient part thereof be sold, and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court to the credit of this suit, and

(3) That in case the defendants or either of them shall pay the said sum of Rs. x as aforesaid, he or they shall be at liberty to apply to the Court that the plaintiff's mortgage may be kept alive for the benefit of the person making the said payment or otherwise as he or they may be advised.

(4) That if the net proceeds of the sale are insufficient to pay the said sum of Rs. x and such subsequent interest and costs in full, the plaintiff shall be at liberty to apply for a personal decree for the amount of the balance.

No 8

DECREE FOR SALE.—SECOND MORTGAGEE v. FIRST MORTGAGEE AND MORTGAGOR.—ONE PERIOD FOR REDEMPTION.

(Title.)

[Insert declaration of the amounts due to the plaintiff Rs. y and to the first defendant Rs. x as in Form No. 7]

And it is decreed as follows:—

(1) That if the plaintiff or the second defendant pays into Court the said sum of Rs. x on or before the said day of 19, the first defendant shall deliver up, etc. (as in Form No. 4)

(2) That if payment of the said sum is not made on or before the day of 19, the first defendant shall be at liberty to apply that the suit be dismissed or for the sale of the mortgaged property; and in case he shall apply for a sale the mortgaged property or a sufficient part thereof shall be sold free from the incumbrances of the plaintiff and first defendant, and the proceeds of the sale (after defraying thereout the expenses of the sale) shall be paid the said sum of by the Court; such subsequent be paid to the

second defendant.

(3) That if the plaintiff shall pay the said sum of Rs. x into Court on or before the day of 19, the second defendant shall be at liberty to pay into Court the said sum and the sum of Rs. y on or before the day of 19, and thereupon the plaintiff shall deliver up, etc. (as in Form No. 4)

(4) That if the plaintiff shall pay the said sum as aforesaid but the second defendant shall fail to pay the said sums as aforesaid the mortgaged property or a sufficient part thereof shall be sold, and the proceeds of the sale (after defraying thereout the expenses of the sale) shall be applied in payment to the plaintiff of the said sums of Rs. x and Rs. y and such subsequent interest and costs as may be allowed by the Court, and that the balance, if any, be paid to the second defendant.

(5) That if the net proceeds of the sale are insufficient to pay the said sums, interest and costs in full, the plaintiff shall be at liberty to apply for a personal decree for the amount of the balance.

NO. 9

DECREE FOR SALE—SUB-MORTGAGEE & MORTGAGEE AND MORTGAGOR, THE AMOUNT OF THE ORIGINAL MORTGAGE EXCEEDING THAT OF THE SUB-MORTGAGE

(Title)

[Insert declarations of the amounts due to the plaintiff Rs *x* and to the first defendant Rs *y* as in Form No. 7.]

And it is decreed as follows—

(1) The first defendant and the second defendant shall be at liberty to pay into Court the said sums of Rs *x* and Rs *y* respectively on or before the day of 19 , and upon either of the said payments being made the plaintiff shall deliver up, etc. (as in Form No. 4), and thereupon the sum of Rs *x* shall be paid to the plaintiff.

(2) In the event of payment by the second defendant as aforesaid the first defendant shall also deliver up, etc. as in Form No. 4), and thereupon the residue (after payment to the plaintiff as aforesaid) shall be paid to the first defendant.

(3) In default of payment by the first and second defendants as aforesaid the mortgaged property or a sufficient part thereof shall be sold, and the proceeds of the sale (after deducting thereout the expenses of the sale) shall be paid into Court and applied first in payment to the plaintiff of the said sum of Rs *x* and such subsequent interest and costs as may be allowed by the Court (but so that the aggregate amount of principal and interest shall not exceed the amount of principal and interest due to the first defendant), secondly, in payment to the first defendant of the excess of Rs *y* over Rs *x* and such subsequent interest and costs as aforesaid, and that the balance, if any, be paid to the second defendant.

(4) In the event of payment by the first defendant and in default of payment by the second defendant as aforesaid, the first defendant shall be at liberty to apply for the sale of the mortgaged property, and thereupon the same or a sufficient part thereof shall be sold, and the net sale-proceeds shall be applied in payment to the first defendant of the said sum of Rs *y* and such further interest and costs as may be allowed by the Court, and the balance, if any shall be paid to the second defendant.

(5) That if the net proceeds of the sale are insufficient to pay the aforesaid sums with further interest and costs the plaintiff or the first defendant, as the case may be, shall be at liberty to apply for a personal decree for the amount of the balance.

NO. 10

FINAL DECREE FOR FORCLOSURE (O. 34, r. 3)

(Title)

Upon reading the decree passed in the above suit on the day of 19 , and the application of the plaintiff dated the day of 19 and after hearing pleader for the plaintiff and pleader for the defendant, and it appearing that the payment directed by the said decree has not been made

It is hereby decreed as follows :—

That the defendant and all persons claiming through or under him be debarred from all right to redeem the mortgaged property set out and described in the schedule hereunto annexed. [Where the defendant is in possession add *and shall put the plaintiff in possession of the said property*]

Schedule.

Description of the mortgaged property.

No. 11.

DECREE AGAINST MORTGAGOR PERSONALLY. (O. 34, r. 6)

(Title.)

Whereas the net proceeds of the sale held under the final decree for sale passed in this suit on the day of 19 , and now in Court to the credit of this suit, amount to Rs. *y*, and there is now due to the plaintiff the sum of Rs. *x* mentioned in the said decree together with the further sum of Rs. interest thereon at the rate of 6 per cent. per annum from the day of 19 to this day, and also the sum of Rs. for his costs of this suit subsequent in the decree, making a balance due to the plaintiff of Rs. *z* ; And whereas it appears to this Court that the defendant is personally liable for the said balance

It is hereby decreed as follows :—

(1) That the said sum of Rs. *y* be paid out of Court to the plaintiff.

(2) That the defendant do pay to the plaintiff the said sum of Rs. *z* with interest thereon at the rate of 6 per cent. per annum from this day to the date of realization of the said sum

No. 12

DECREE FOR RECTIFICATION OF INSTRUMENT.

(Title.)

It is hereby declared that the dated the day of 19 , does not truly express the intention of the parties to such

And it is decreed that the said be rectified by

No. 13

DECREE TO SET ASIDE A TRANSFER IN FRAUD OF CREDITORS

(Title.)

It is hereby declared that the dated the day of 19 , and made between and is void as against the plaintiff and all other the creditors, if any, of the defendant

No. 14.

INJUNCTION AGAINST PRIVATE NUISANCE

(Title.)

Let the defendant , his agents, servant and workmen, be perpetually restrained from in the defendant's a nuisance to the arden mentioned

No 15

INJUNCTION AGAINST BUILDING HIGHER THAN OLD LEVEL

(Title)

Let the defendant _____, his contractors, agents and workmen, be perpetually restrained from continuing to erect upon his premises in _____ any house or building of a greater height than the buildings which formerly stood upon his said premises and which have been recently pulled down, so or in such manner as to darken, injure or obstruct such of the plaintiff's windows in his said premises as are ancient lights

No 16

INJUNCTION RESTRAINING USE OF PRIVATE ROAD

(Title)

Let the defendant _____ his agents, servants and workmen, be perpetually restrained from using or permitting to be used any part of the lane at _____ the soil of which belongs to the plaintiff, as a carriage way for the passage of carts, carriages or other vehicles, either going to or from the land marked B in the annexed plan or for any purpose whatsoever

No 17

PRELIMINARY DECREE IN AN ADMINISTRATION-SUIT

(Title)

It is ordered that the following accounts and inquiries be taken and made that is to say —

In creditor's suit—

1 That an account be taken of what is due to the plaintiff and all other creditors of the deceased

In suits by legatees—

2 That an account be taken of the legacies given by the testator's will

In suits by next-of-kin—

3 That an inquiry be made and account taken of what, or of what share, if any, the plaintiff is entitled to as next of kin [or one of the next-of-kin] of the intestate

[After the first paragraph, the decree will, where necessary, order, in a creditor's suit, inquiry and accounts for legatees, heirs-at-law and next-of-kin. In suits by claimants other than creditors, after the first paragraph, in all cases, an order to inquire and take an account of creditors will follow the first paragraph and such of the others as may be necessary will follow, omitting the first formal words. The form is continued as in a creditor's suit

4. An account of the funeral and testamentary expenses

5. An account of the moveable property of the deceased come to the hands of the defendant, or to the hands of any other person by his order or for his use.

6. An inquiry what part (if any) of the moveable property of the deceased is outstanding and undisposed of

7. And it is further ordered that the defendant do on or before the _____ day of _____ next, pay into Court all sums of money which shall be found to have come to his hands, or to the hands of any person by his order or for his use.

8. And that if the * shall find it necessary for carrying out the objects of the suit to sell any part of the moveable property of the deceased, that the same be sold accordingly, and the proceeds paid into Court.

9. And that Mr. E. F. be receiver in the suit (or proceedings), and receive and get in all outstanding debts and outstanding moveable property of the deceased, and pay the same into the hands of the * (and shall give security by bond for the due performance of his duties to the amount of rupees.)

10. And it is further ordered that if the moveable property of the deceased be found insufficient for carrying out the objects of the suit, then the following further inquiries be made, and accounts taken, that is to say—

- (a) an inquiry what immoveable property the deceased was seized of or entitled to at the time of his death ;
- (b) an inquiry what are the incumbrances* (if any) affecting the immoveable property of the deceased or any part thereof ;
- (c) an account, so far as possible, of what is due to the several incumbrancers, and to include a statement of the priorities of such of the incumbrancers as shall consent to the sale hereinafter directed.

11. And that the immoveable property of the deceased, or so much thereof as shall be necessary to make up the fund in Court sufficient to carry out the object of the suit, be sold with the approbation of the Judge, free from incumbrancers (if any) of such incumbrancers as shall consent to the sale and subject to the incumbrancers of such of them as shall not consent

* to give the conduct of the sale of the
conditions and contracts of sale
at in case any doubt or difficulty
Judge to settle

12. And it is further ordered that, for the purpose of the inquiries hereinbefore directed, the * shall advertise in the newspapers according to the practice of the Court, or shall make such inquiries in any other way which shall appear to the * to give the most useful publicity to such inquiries.

13. And it is ordered that the above inquiries and accounts be made and taken, and that all other acts ordered to be done be completed, before the day of and that the * do certify the result of the inquiries, and the accounts, and that all other acts ordered are completed, and have his certificate in that behalf ready for the inspection of the parties on the day of

14. And, lastly, it is ordered that this suit [or proceeding] stand adjourned for making final decree to the day of

[Such part only of this decree is to be used as is applicable
to the particular case.]

No 18.

FINAL DECREE IN AN ADMINISTRATION-SUIT BY A LEGATEE.

(Title)

1. It is ordered that the defendant do, on or before the day of pay into Court the sum of Rs. , the balance by the said certificate found to be due from the said defendant on account of the estate of , the testator, and also the sum of Rs for interest, at the rate of Rs. per cent. per annum, from the day of to the day of , amounting together to the sum of Rs

2. Let the * of the said Court tax the costs of the plaintiff and defendant in this suit, and let the amount of the said costs, when so taxed, be

* Here insert name of proper officer.

paid out of the said sum of Rs.
aforesaid, as follows —

ordered to be paid into Court as

(a) The costs of the plaintiff to Mr. _____ his attorney [or, pleader]
or, and the costs of the defendant to Mr. _____, his attorney
[or pleader]

(b) And (if any debts are due) with the residue of the said sum of Rs.
after payment of the plaintiff's and defendant's costs as aforesaid, let
the sums, found to be owing to the several creditors mentioned in
the _____ schedule to the certificate, of the _____ * together
with subsequent interest on such of the debts
as bear interest, be paid, and, after making such payments, let the
amount coming to the several legatees mentioned in the
schedule, together with subsequent interest (to be verified as afore-
said), be paid to them

3 And if there should then be any residue, let the same be paid to the
residuary legatee.

No 19.

PRELIMINARY DECREE IN AN ADMINISTRATION SUIT BY A LEGATEE, WHERE AN EXECUTOR IS HELD PERSONALLY LIABLE FOR THE PAYMENT OF LEGACIES

(Title)

1 It is declared that the defendant is personally liable to pay the legacy
of Rs. _____ bequeathed to the plaintiff;

2 And it is ordered that an account be taken of what is due for principal
and interest on the said legacy,

3 And it is also ordered that the defendant do, within _____ weeks
after the date of the certificate of the _____ * pay to the plaintiff the amount of
what the _____ * shall certify to be due for principal and interest,

4 And it is ordered that the defendant do pay the plaintiff his costs of suit,
the same to be taxed in case the parties differ

No. 20

FINAL DECREE IN AN ADMINISTRATION-SUIT BY NEXT-OF-KIN

(Title)

1. Let the _____ * of the said Court tax the costs of the plaintiff and defen-

of such sum her costs, when taxed

2 And it is ordered that the residue of the said sum of Rs. _____, after
payment of the plaintiff's and defendant's costs as aforesaid, be paid and applied
by defendant as follows —

(a) Let the defendant, within one week after the taxation of the said costs
by the _____ * as aforesaid, pay one-third share of the said residue
to the plaintiff, A B, and C D, his wife, in her right as the sister
and one of the next of kin of the said E F, the intestate.

* Here insert name of proper officer

- (b) Let the defendant retain for her own use one other third share of the said residue, as the mother and one of the next-of-kin of the said E. F., the intestate.
- (c) And let the defendant, within one week after the taxation of the said costs by the * as aforesaid, pay the remaining one-third share of the said residue to G. H., as the brother and the other next-of-kin of the said E. F., the intestate.

No. 21.

PRELIMINARY DECREE IN A SUIT FOR DISSOLUTION OF PARTNERSHIP
AND THE TAKING OF PARTNERSHIP ACCOUNTS.

(Title)

It is declared that the proportionate shares of the parties in the partnership are as follows :—

It is declared that this partnership shall stand dissolved [or shall be deemed to have been dissolved] as from the day of , and it is ordered that the dissolution thereof as from that day be advertised in the Gazette, etc.

And it is ordered that be the receiver of the partnership-estate and effects in this suit and do get in all the outstanding book debts and claims of the partnership

And it is ordered that the following accounts be taken :—

1. An account of the credits, property and effects now belonging to the said partnership ;
2. An account of the debts and liabilities of the said partnership :—
3. An account of all dealings and transactions between the plaintiff and defendant, from the foot of the settled amount exhibited in this suit and marked (A), and not disturbing any subsequent settled accounts

And it is ordered that the of the business heretofore carried on by do, be of the either

And it is ordered that the above accounts be taken, and all the other acts required to be done be completed, before the day of , and that the * do certify the result of the accounts, and that all other acts are completed, and have his certificate in that behalf ready for the inspection of the parties on the day of .

And, lastly, it is ordered that this suit stand adjourned for making a final decree to the day of .

No. 22

FINAL DECREE IN A SUIT FOR DISSOLUTION OF PARTNERSHIP AND THE
TAKING OF PARTNERSHIP ACCOUNTS.

(Title.)

It is ordered that the fund now in Court, amounting to the sum of Rs. , be applied as follows:—

1. In payment of the debts due by the partnership set forth in the certificate of the * amounting the whole to Rs

* Here insert name of proper officer.

2. In payment of the costs of all parties in this suit, amounting to Rs.

[These costs must be ascertained before the decree is drawn up.]

3 In payment of the sum of Rs. _____ to the plaintiff as his share of the
partnership-assets, of the sum of Rs. _____, being the residue of the said
sum of Rs. _____ now in Court, to the defendant as his share of the
partnership-assets.

[Or, And that the remainder of the said sum of Rs. be paid to the said plaintiff [or defendant] in part payment of the sum of Rs. certified to be due to him in respect of the partnership-accounts]

4 And that the defendat [or plaintiff] do on or before the _____ day of _____ pay to the plaintiff [or defendant] the sum of Rs _____ being the balance of the said sum of Rs _____ due to him, which will then remain due

No. 23

DEGREE FOR RECOVERY OF LAND AND MESNE PROFITS.

(Title)

It is hereby decreed as follows —

(t) That the defendant do put the plaintiff in possession of the property specified in the schedule hereunto annexed

(2) That the defendant do pay to the plaintiff the sum of Rs _____ with interest thereon at the rate of _____ per cent per annum to the date of realization on account of mesne profits which have accrued due prior to the institution of the suit.

Or

(2) That an inquiry be made as to the amount of mesne profits which have accrued due prior to the institution of the suit

(3) That an inquiry be made as to the amount of mesne profits from the institution of the suit until [the delivery of possession to the decree-holder] [the relinquishment of possession by the judgment-debtor with notice to the decree-holder through the Court] [the expiration of three years from the date of the decree]

Schedule

APPENDIX E.

EXECUTION.

 No 1.

NOTICE TO SHOW CAUSE WHY A PAYMENT OR ADJUSTMENT SHOULD NOT BE
RECORDED AS CERTIFIED.

(O 21, r. 2.)

(Title.)

To

WHEREAS in execution of the decree in the above-named suit
has applied to this Court that the sum of Rs recoverable under the
decree has been ^{paid}_{adjusted} and should be record as certified, this is to give you
notice that you are to appear before this Court on the date of 19 1
to show cause why the ^{payment}_{adjustment} aforesaid should not be recorded as certified.

GIVEN under my hand and the seal of the Court, this day
of 19 .

Judge.

 No 2.

PRECEPT. (Section 46)

(Title)

UPON hearing the decree-holder it is ordered that this precept be sent to the
Court of at under section 46 of the Code of Civil Procedure,
1908, with directions to attach the property specified in the annexed schedule
and to hold the same pending any application which may be made by the decree-
holder for execution of the decree.

Schedule.

Dated the day of 19 .

Judge.

 No 3

ORDER SENDING DECREE FOR EXECUTION TO ANOTHER COURT.

(O. 21, r. 6)

(Title)

WHEREAS the decree holder in the above suit has applied to this Court for
a certificate to be sent to the Court of at for execu-
tion of the decree in the above suit by the said Court, alleging that the judgment-
debtor resides or has property within the local limits of the jurisdiction of the
said Court, and it is deemed necessary and proper to send a certificate to the
said Court under Order XXVI, rule 6, of the Code of Civil Procedure, 1908, it is

Ordered

That a copy of this order be sent to _____ with a copy of the decree and of any order which may have been made for execution of the same and a certificate of non-satisfaction.

Dated the day of 19 .
Judge.

No 4

CERTIFICATE OF NON-SATISFACTION OF DECREE (O 21, r. 6.)

(Title)

Certified that no (1) satisfaction of the decree of this Court in Suit No of 19 , a copy which is herewith attached, has been obtained by execution within the jurisdiction of this Court.

Dated the day of 19 .
Judge

(1) If partial, strike out "no" and state to what extent

No 5

CERTIFICATE OF EXECUTION OF DECREE TRANSFERRED TO ANOTHER

COURT (O 21, r. 6)

(Title)

1	2	3	4	5	6	7	8	9
Number of suit and the Court by which the decree was passed	Names of parties	Date of application for execution	Number of the execution case	Processes issued and dates of service there of	Costs of execution	Amount realized	How the exec is disposed of	Remarks
					Rs A, P	Rs A P		

Signature of Mukharir in charge

Signature of Judge.

No. 6.

APPLICATION FOR EXECUTION OF DECREE. (O 21, r. 11.)

In the Court of

I, _____, decree-holder, hereby apply for execution of the decree herein below set forth, —

No. of suit.	Names of parties.	Date of decree.	Whether any appeal preferred from decree.	Payment or adjustment made, if any.	Previous application, if any, with date and result.	Amount with interest due upon the decree or other relief granted therein by together with particulars of any cross decrees.	Amount of costs, if any, awarded.	Against whom to be executed.	Mode in which the assistance of the Court is required.
1	2	3	4	5	6	7	8	9	10
789 of 1897.	A. B — Plaintiff. C. D — Defendant.	October 11th, 1897.	No	None.	Rs. 72 4 recorded on application, dated the 4th March, 1899	Rs. 314 8 2 principal [interest at 6 per cent per annum, from date of decree till payment]	Rs. A P. As awarded in the decrees 17 10 4 Subsequently incurred 3 2 0 Total 53 12 4	Against the defendant C. D	<p>[When attachment and sale of moveable property is sought]</p> <p>I pray that the total amount of Rs [together with interest on the principal sum up to date of payment] and the costs of taking out this execution, be realized by attachment and sale of defendant's moveable property as per annexed list and paid to me.</p> <p>[When attachment and sale of immoveable property is sought]</p> <p>I pray that the total amount of Rs [together with interest on the principal sum up to date of payment] and the costs of taking out this execution be realized by the attachment and sale of defendant's immoveable property specified at the foot of this application and paid to me.</p>

I declare that what is stated herein is true to the best of my knowledge and belief.

Dated the

Signed
day of

Decree-holder.

19

[When attachment and sale of immoveable property is sought.]

Description and Specification of Property.

The undivided one-third share of the judgment-debtor in a house situated in the village of value Rs 40 and bounded as follows :—

East by G's house, west by H's house; south by public road; north by private land and J's house.

I declare that what is stated in the above description is true to the best of my knowledge and belief, and so far as I have been able to ascertain the interest of the defendant in the property therein specified

Signed

Decree-holder

No 7

NOTICE TO SHOW CAUSE WHY EXECUTION SHOULD NOT ISSUE

(O 21, r 22)

(Title)

To

WHEREAS

has made application to this Court for execution of decree in Suit No of 19, on the allegation that the said decree has been transferred to him by assignment, this is to give you notice that you are to appear before this Court on the day of 19, to show cause why execution should not be granted

GIVEN under my hand and the seal of the Court, this day of 19

Judge.

No. 8.

WARRANT OF ATTACHMENT OF MOVEABLE PROPERTY IN EXECUTION

OF A DECREE FOR MONEY. (O. 21, r 30.)

(Title)

To

The Bailiff of the Court

WHEREAS was ordered by decree of this Court passed on the day

Principal
Interest
Costs

Costs of execution
Further interest

Total

of 19, in Suit No of 19, to pay to the plaintiff the sum of Rs as noted in the margin, and whereas the said sum of Rs has not been paid, These are to command you to attach the moveable property of the said as set forth in the schedule hereunto annexed, or which shall be pointed out to you by the said

, and unless the said shall pay to you the said sum of Rs together with Rs. costs of this attachment, to hold the same until further orders from this Court.

You are further commanded to return this warrant on or before the day of 19 , with an endorsement certifying the day on which and manner in which it has been executed, or why it has not been executed.

GIVEN under my hand and the seal of the Court, this day of 19 .
Schedule.

Judge

No. 9

WARRANT FOR SEIZURE OF SPECIFIC MOVEABLE PROPERTY ADJUDGED
BY DECREE (O. 12, r. 31.)

(Title)

To

The Bailiff of the Court

WHEREAS was ordered by decree of this Court passed on the day of 19 in suit No of 19 , to deliver to the plaintiff the moveable property (or a share in the moveable property) specified in the schedule hereunto annexed, and whereas the said property (or share) has not been delivered ;

These are to command you to seize the said moveable property (or a share of the said moveable property) and to deliver it to the plaintiff or to such person as he may appoint in his behalf.

GIVEN under my hand and the seal of the Court, this day of 19 .
Schedule.

No. 10.

NOTICE TO STATE OBJECTIONS TO DRAFT OF DOCUMENT. (O. 21, r. 34)
(Title.)

To

TAKE notice that on the day of 19 , the decree-holder in the above suit presented an application to this Court that the Court may execute on your behalf a deed of , whereof a draft is hereunto annexed, of the immoveable property specified hereunder, and that the day of 19 , is appointed for the hearing of the said application ; and that you are at liberty to appear on the said day and to state in writing any objections to the said draft.

Description of Property.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 11.

WARRANT TO THE BAILIFF TO GIVE POSSESSION OF LAND, ETC.
(O. 21, r. 35.)
(Title)

To

The Bailiff of the Court.

WHEREAS the undermentioned property in the occupancy of has been decreed to , the plaintiff in this suit ; You are

hereby directed to put the said _____ in possession of the same, and you are hereby authorized to remove any person bound by the decree who may refuse to vacate the same.

GIVEN under my hand and the seal of the Court, this _____ day of 19 ____.

Schedule.

Judge.

No. 12

NOTICE TO SHOW CAUSE WHY WARRANT OF ARREST SHOULD NOT ISSUE.

(O 21, r. 37.)

(Title.)

To

WHEREAS _____ has made application to this Court for execution of decree in suit No _____ of 19 ____ by arrest and imprisonment of your person, you are hereby required to appear before this Court on the _____ day of _____ 19 ____, to show cause why you should not be committed to the civil prison in execution of the said decree.

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19 ____.

Judge.

No. 13

WARRANT OF ARREST IN EXECUTION (O 21, r. 38)

(Title.)

To

The Bailiff of the Court

WHEREAS _____
Suit No. _____ of 19 ____, dated the _____

_____ was adjudged by a decree of the Court in _____ day of _____ 19 ____, to pay to the decree holder the sum of Rs _____ as noted in the margin and whereas the said sum of Rs _____ has not been paid to the said decree holder in satisfaction of the said decree, there are to command you to arrest the said judgment-debtor and unless the said judgment-debtor shall pay to you the said sum of Rs _____, together with Rs _____ for the costs of executing this process, to bring the said defendant before the Court with all convenient speed. You are further commanded to return this warrant on or before the _____ day of _____ 19 ____,

with an endorsement certifying the day on which and manner in which it has been executed, or the reason why it has not been executed.

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19 ____.

Judge.

Principal . . .			
Interest . . .			
Costs . . .			
Execution . . .			
Total . . .			

No 14.

WARRANT OF COMMITTAL OF JUDGMENT-DEBTOR TO JAIL. (O. 21, r. 40)

(Title)

To

The Officer in charge of the Jail at

WHEREAS who has been brought before this day of 19 , under a warrant in execution of a decree which was made and pronounced by the said Court on the day of 19 , and by which decree it was ordered that the said should pay ; And whereas the said has not obeyed the decree, nor satisfied the Court that he is entitled to be discharged from custody ; You are hereby, in the name of the King-Emperor of India, commanded and required to take and receive the said into the civil prison and keep him imprisoned therein for a period not exceeding or until the said decree shall be fully satisfied, or the said shall be otherwise entitled to be released according to the terms and provisions of section 58 of the Code of Civil Procedure, 1908 , and the Court does hereby fix annas per diem as the rate of the monthly allowance for the subsistence of the said during his confinement under this warrant of committal

GIVEN under my signature and the seal of this Court, this day of 19 .

Judge.

No 15.

ORDER FOR THE RELEASE OF A PERSON IMPRISONED IN EXECUTION OF A DECREE (Sections 58, 59)

(Title)

To

The Officer in charge of the Jail at

UNDER orders passed this day, you are hereby directed to set free judgment-debtor now in your custody

Dated

Judge.

No. 16.

ATTACHMENT IN EXECUTION.

PROHIBITORY ORDER, WHERE THE PROPERTY TO BE ATTACHED CONSISTS OF MOVEABLE PROPERTY TO WHICH THE DEFENDANT IS ENTITLED SUBJECT TO A LIEN OR RIGHT OF SOME OTHER PERSON TO THE IMMEDIATE POSSESSION THEREOF. (O 21, r 46)

(Title)

To

WHEREAS has failed to satisfy a decree passed against on the day of 19 in Suit No of 19 , in favour of for Rs ; It is ordered that the defendant be, and is hereby, prohibited and restrained, until the further order of this Court, from receiving from the following property in the possession of the said defendant is entitled, subject to any claim of the said , that is to say, , to which the , and the said

is hereby prohibited and restrained, until the further order of this Court, from delivering the said property to any person or persons whomsoever

GIVEN under my hand and the seal of the Court, this day of
19 .

Judge.

No 17

ATTACHMENT IN EXECUTION

PROHIBITORY ORDER, WHERE THE PROPERTY CONSISTS OF DEBTS
NOT SECURED BY NEGOTIABLE INSTRUMENTS (O 21, r. 46)

(Title)

To

WHEREAS
has failed to satisfy a decree passed against on the day of
19 , in Suit No of 19 , in favour of , for
Rs. ; It is ordered that the defendant be, and is hereby, prohibited and
restrained, until the further order of this Court, from receiving from you a certain
debt alleged now to be due from the said defendant, and
and that you, the said
restrained, until the further order
debt, or any part thereof, to any
Court

GIVEN under my hand and the seal of the Court, this day of
19 .

Judge

No 18

ATTACHMENT IN EXECUTION

PROHIBITORY ORDER, WHERE THE PROPERTY CONSISTS OF SHARES
IN THE CAPITAL OF A CORPORATION (O 21, r. 46)

(Title)

To Defendant, and to , Secretary of
Corporation

WHEREAS has failed to satisfy a decree passed against
on the day of 19 , in Suit No of 19 , in favour of ,
for Rs , It is ordered that you, the defendant, be, and you are hereby,
prohibited and restrained, until the further order of this Court, from making any
transfer of shares in the aforesaid Corporation, namely, , or
from receiving payment of any dividends thereon, and you, , the
Secretary of the said Corporation, are hereby prohibited and restrained from
permitting any such transfer or making any such payment

GIVEN under my hand and the seal of the Court, this day of
19 .

Judge

No. 19

ORDER TO ATTACH SALARY OF PUBLIC OFFICER OR SERVANT OF RAILWAY
COMPANY OR LOCAL AUTHORITY. (O. 21, r. 48.)

(Title.)

To

WHEREAS , judgment-debtor in the above-named case, is a (*describe office of judgment-debtor*) receiving his salary (*or allowances*) at your hands; and whereas , decree-holder in the said case, has applied in this Court for the attachment of the salary (*or allowances*) of the said to the extent of due to him under the decree; You are hereby required to withhold the said sum of from the salary of the said in monthly instalments of and to remit the said sum (*or monthly instalments*) to this Court

GIVEN under my hand and the seal of the Court, this day of
19 .
Judge.

No. 20.

ORDER OF ATTACHMENT OF NEGOTIABLE INSTRUMENT. (O. 21, r. 51.)

(Title.)

To

The Bailiff of the Court.

WHEREAS an order has been passed by this Court on the day of
19 , for the attachment of ; You are
hereby directed to seize the said and bring the same into Court.

GIVEN under my hand and the seal of the Court, this day of
19 .
Judge.

No. 21.

ATTACHMENT.

PROHIBITORY ORDER, WHERE THE PROPERTY CONSISTS OF MONEY OR OF ANY
SECURITY IN THE CUSTODY OF A COURT OF JUSTICE OR OFFICER OF
GOVERNMENT. (O. 21, r. 52.)

(Title.)

To

SIR,

The plaintiff having applied, under rule 22 of Order XXI of the Code of Civil Procedure, 1908, for an attachment of certain money now in your hands (*there state how the money is supposed to be in the hands of the person addressed, on what account etc.*), I request that you will hold the said money subject to the further order of this Court.

I have the honour to be,

SIR,

Your most obedient Servant,

Judge.

Dated he day of 19 .

No. 22

NOTICE OF ATTACHMENT OF A DECREE TO THE COURT WHICH

PASSED IT. (O 21, r. 53.)

(Title)

To

The Judge of the Court of

SIR,

I have the honour to inform you that the decree obtained in your Court on the _____ day of _____ 19____, by _____ in Suit No _____ of 19____, in which he was _____ and _____ was _____ has been attached by this Court on the application of _____ the _____ in the suit specified above. You are therefore requested to stay the execution of the decree of your Court until you receive an intimation from this Court that the present notice has been cancelled or until execution of the said decree is applied for by the holder of the decree now sought to be executed or by his judgment debtor.

I have the honour, etc.,

Judge

Dated the _____ day of _____ 19____

No 23

NOTICE OF ATTACHMENT OF A DECREE TO THE HOLDER OF

THE DECREE (O. 21, r. 53)

(Title)

To

WHEREAS an application has been made in this Court by the decree-holder in the above suit for the attachment of a decree obtained by you on the _____ day of _____ 19____, in the Court of _____ in Suit No _____ of 19____, in which _____ was _____ and _____ was _____, It is ordered that you, the said _____, be, and you are hereby, prohibited and restrained, until the further order of this Court, from transferring or charging the same in any way.

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19____

Judge

No 24

ATTACHMENT IN EXECUTION

PROHIBITORY ORDER, WHERE THE PROPERTY CONSISTS OF IMMOVEABLE
PROPERTY. (O 21, r. 51)

(Title)

To

Defendant.

WHEREAS you have failed to satisfy a decree passed against you on the _____ day of _____ 19____, in Suit No _____ of 19____, in favour of _____, for Rs _____; it is ordered that you, the said _____, be, and you are hereby, prohibited and restrained, until the further order of this Court, from transferring or charging the property specified in the schedule hereunto annexed, by sale, gift or otherwise, and that all

No. 19.

ORDER TO ATTACH SALARY OF PUBLIC OFFICER OR SERVANT OF RAILWAY
COMPANY OR LOCAL AUTHORITY. (O. 21, r. 48)

(Title)

To

WHEREAS _____, judgment-debtor in the above-named case, is a (*describe office of judgment-debtor*) receiving his salary (*or allowances*) at your hands; and whereas _____, decree-holder in the said case, has applied in this Court for the attachment of the salary (*or allowances*) of the said _____ to the extent of due to him under the decree; You are hereby required to withhold the said sum of _____ from the salary of the said _____ in monthly instalments of _____ and to remit the said sum (*or monthly instalments*) to this Court

GIVEN under my hand and the seal of the Court, this _____ day of 19 _____.

Judge.

No. 20.

ORDER OF ATTACHMENT OF NEGOTIABLE INSTRUMENT. (O. 21, r. 51.)

(Title)

To

The Bailiff of the Court.

WHEREAS an order has been passed by this Court on the _____ day of 19 _____, for the attachment of _____; You are hereby directed to seize the said _____ and bring the same into Court.

GIVEN under my hand and the seal of the Court, this _____ day of 19 _____.

Judge.

No 21.

ATTACHMENT.

PROHIBITORY ORDER, WHERE THE PROPERTY CONSISTS OF MONEY OR OF ANY
SECURITY IN THE CUSTODY OF A COURT OF JUSTICE OR OFFICER OF
GOVERNMENT. (O. 21, r. 52)

(Title)

To

SIR,

The plaintiff having applied, under rule 22 of Order XXI of the Code of Civil Procedure, 1908, for an attachment of certain money now in your hands (*there state how the money is supposed to be in the hands of the person addressed, on what account etc.*), I request that you will hold the said money subject to the further order of this Court

I have the honour to be,

SIR,

Your most obedient Servant,

Judge.

Dated the _____

day of _____

19 _____.

No. 22.

NOTICE OF ATTACHMENT OF A DECREE TO THE COURT WHICH

PASSED IT (O 21, r. 53.)

(Title)

To

The Judge of the Court of

SIR,

I have the honour to inform you that the decree obtained in your Court on the day of 19 , by in Suit No of 19 , in which he was and was has been attached by this Court on the application of the in the suit specified above. You are therefore requested to stay the execution of the decree of your Court until you receive an intimation from this Court that the present notice has been cancelled or until execution of the said decree is applied for by the holder of the decree now sought to be executed or by his judgment debtor.

I have the honour, etc.,

Dated the day of 19

Judge

No 23

NOTICE OF ATTACHMENT OF A DECREE TO THE HOLDER OF

THE DECREE (O. 21, r. 53)

(Title)

To

WHEREAS an application has been made in this Court by the decree-holder in the above suit for the attachment of a decree obtained by you on the day of 19 , in the Court of in Suit No of 19 , in which was and was , It is ordered that you, the said , be, and you are hereby, prohibited and restrained, until the further order of this Court, from transferring or charging the same in any way.

GIVEN under my hand and the seal of the Court, this day of 19

Judge

No 24

ATTACHMENT IN EXECUTION

PROHIBITORY ORDER, WHERE THE PROPERTY CONSISTS OF IMMOVABLE
PROPERTY (O 21, r. 54)

(Title)

To

Defendant.

WHEREAS you have failed to satisfy a decree passed against you on the day of 19 , in Suit No of 19 , in favour of , for Rs , it is ordered that you, the said , be, and you are hereby prohibited and restrained, until the further order of this Court, from transferring or charging the property specified in the schedule hereunto annexed, by sale, gift or otherwise, and that all

persons be, and that they are hereby, prohibited from receiving the same by purchase, gift or otherwise.

GIVEN under my hand and the seal of the Court, this day of 19

Schedule

Judge.

No. 25.

ORDER FOR PAYMENT TO THE PLAINTIFF, ETC., OF MONEY

ETC., IN THE HANDS OF A THIRD PARTY.

(O. 21, r. 56)

(Title.)

To

WHEREAS the following property has been attached in execution of a decree in Suit No of 19 , passed on the day of 19 , in favour of for Rs ; It is ordered that the property so attached, consisting of Rs. in money and Rs. in currency-notes, or a sufficient part thereof to satisfy the said decree shall be paid over by you, the said , to .

GIVEN under my hand and the seal of the Court, this day of 19

Judge

No 26.

NOTICE TO ATTACHING CREDITOR (O. 21, r. 58)

(Title.)

To

WHEREAS has made application to this Court for the removal of attachment on placed at your instance in execution of the decree in Suit No. of 19 , this is to give you notice to appear before this Court on , the day of 19 , either in person or by a pleader of the Court duly instructed to support your claim, as attaching creditor.

GIVEN under my hand and the seal of the Court, this day of 19

Judge.

No 27. .

WARRANT OF SALE OF PROPERTY IN EXECUTION OF A DECREE FOR MONEY. (O. 21, r. 66)

(Title)

To

The Bailiff of the Court.

THESE are to command you to sell by auction, after giving days previous notice, by affixing the same in this Court-house, and after making due proclamation, the

property attached under a warrant from this Court, dated the day of 19 , in execution of a decree in favour of in Suit No. of 19 , or so much of the said property as shall realize the sum of Rs. being the of the said decree and costs still remaining unsatisfied.

You are further commanded to return this warrant on or before the day of 19 , with an endorsement certifying the manner in which it has been executed, or the reason why it has not been executed.

GIVEN under my hand and the seal of the Court, this day of 19 *Judge*

—
No 28.

NOTICE OF THE DAY FIXED FOR SETTLING A SALE PROCLAMATION.

(O 21, r 66)

(Title)

To Judgment-debtor
WHEREAS in the above-named suit the decreer-bolder has
applied for the sale of ; You are hereby informed
that the day of 19 has been fixed for
settling the terms of the proclamation of sale

GIVEN under my hand and the seal of the Court, this day of 19 *Judge*

—
No 29

PROCLAMATION OF SALE (O. 21, r 66)

(Title)

Notice is hereby given that, under rule 64 of Order XXI of the Code of Civil Procedure, 1908, an order has been passed by this Court for the sale of the attached property mentioned in the annexed schedule, in satisfaction of the claim of the decree-holder in the suit (1) mentioned in the margin

Suit No	of 19	
decided by the	of	in which
was plaintiff and		
was defendant		

amounting with costs and interest

up to date of sale to the sum of

The sale will be by public auction, and the property will be put up for sale in the lots specified in the schedule. The sale will be of the property of the judgment-debtors above-named as mentioned in the schedule below, and the liabilities and claims attaching to the said property, so far as they have been ascertained are those specified in the schedule against each lot.

In the absence of any order of postponement, the sale will be held by at the monthly sale commencing at o'clock on the at In the event, however, of the debt above specified and of the costs of the sale being tendered or paid before knocking down of any lot, the sale will be stopped.

At the sale the public generally are invited to bid, either personally or by duly authorized agent. No bid by, or on behalf of, the judgment-creditors above-mentioned, however, will be accepted, nor will any sale to them be valid without the express permission of the Court previously given. The following are the further

Conditions of Sale

1 The particulars specified in the schedule below have been stated to the best of the information of the Court, but the Court will not be answerable for any error, mis-statement or omission in this proclamation.

2 The amount by which the biddings are to be increased shall be determined by the officer conducting the sale. In the event of any dispute arising as to the amount bid, or as to the order, the lot shall at once be again put up to auction.

3 The highest bidder shall be declared to be the purchaser of any lot, provided always that he is legally qualified to bid, and provided that it shall be in the discretion of the Court or officer holding the sale to decline acceptance of

the said properties and afterwards on the court-house, and then to submit to this Court a report showing the dates on which and the manner in which the proclamations have been published.

Dated the _____ day of _____ 19 .
Judge.

SCHEDULE.

No 31

CERTIFICATE BY OFFICER HOLDING A SALE OF THE DEFICIENCY OF PRICE
ON A RE-SALE OF PROPERTY BY REASON OF THE PURCHASER'S DEFAULT.

(O 21, r. 71)

(Title)

Certified that at the re-sale of the property in execution of the decree in the above-named suit, in consequence of default on the part of the purchaser, there was a deficiency in the price of the said property amounting to Rs. _____ and that the expenses attending such re-sale amounted to Rs. _____, making a total of Rs. _____, which sum is recoverable from the defaulter

Dated the _____ day of _____ 19 .
Officer holding the sale

No 32.

NOTICE TO PERSON IN POSSESSION OF MOVEABLE PROPERTY SOLD IN
EXECUTION (O. 21, r. 79)

(Title)

To

WHEREAS

has become the purchaser at a public sale in execution of the decree in the above suit of _____ now in your possession, you are hereby prohibited from delivering possession of the said _____ to any person except the said _____

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19 .
Judge.

No 33

PROHIBITORY ORDER AGAINST PAYMENT OF DEBTS SOLD IN EXECUTION
TO ANY OTHER THAN THE PURCHASER. (O 21, r. 79)

(Title)

To

and to

WHILEAS

has become the purchaser at a public sale in execution of the decree in the above suit of _____ being debts due from you _____ to you

It is ordered that you _____ be, and you

are hereby, prohibited from receiving, and you
payment of, the said debt to any persons except the said

from making

GIVEN under my hand and the seal of the Court, this
19 .

day of

Judge.

No. 34.

PROHIBITORY ORDER AGAINST THE TRANSFER OF SHARES SOLD IN EXECUTION.

(O. 21, r. 79

(Title)

To

and , Secretary of Corporation.

WHEREAS has become the purchaser at a public sale in execution of the decree, in the above suit, of certain shares in the above Corporation, that is to say, of standing in the name of you

; It is ordered that you be, and you are hereby, prohibited from making any transfer of the said shares to any person except the said , the purchaser aforesaid, from receiving any such any dividends thereon and you Secretary of the said Corporation, from permitting any such transfer or making any such payment to any person except the said , the purchaser aforesaid.

GIVEN under my hand and the seal of the Court, this day 19 .

Judge.

No 35.

CERTIFICATE TO JUDGMENT-DEBTOR AUTHORIZING HIM TO MORTGAGE, LEASE OR
SELL PROPERTY. (O. 21, r. 83)

(Title)

WHILEAS in execution of the decree passed in the above suit an order was made on the day of 19 , for the sale of the under-mentioned property of the judgment-debtor , and whereas Court has, on the application of the said judgment-debtor, postponed the said sale to enable him to raise the amount of the decree by mortgage, lease or private sale of the said property or of some part thereof ;

This is to certify that the Court doth hereby authorize the said judgment-debtor to make the proposed mortgage, lease or sale within a period of from the date of this certificate ; provided that all monies payable under such mortgage, lease or sale shall be paid into this Court and not to the said judgment-debtor

Description of property.

GIVEN under my hand and the seal of the Court, this day 19 .

Judge.

No. 36

NOTICE TO SHOW CAUSE WHY SALE SHOULD NOT BE SET ASIDE (O. 21, rr. 90, 92.)

(Title.)

To

WHEREAS the under-mentioned property was sold on the day of 19 in execution of the decree passed in the above-named suit, and whereas the decree-holder [or judgment-debtor] has applied to this Court to set aside the sale of the said property on the ground of a material irregularity [or fraud] in publishing [or conducting] the sale, namely, that Take notice that if you have any cause to show why the said application should not be granted, you should appear with your proofs in this Court on the day of 19 , when the said application will be heard and determined.

GIVEN under my hand and the seal of the Court, this day of 19 .

*Description of property**Judge.*

No 37.

NOTICE TO SHOW CAUSE WHY SALE SHOULD NOT BE SET ASIDE (O. 21, rr. 91, 92)

(Title)

To

WHEREAS , the purchaser of the under-mentioned property sold on the day of 19 , in execution of the decree passed in the above named suit, has applied to this Court to set aside the sale of the said property on the ground that , the judgment debtor, had no saleable interest therein

Take notice that if you have any cause to show why the said application should not be granted, you should appear with your proofs in this Court on the day of 19 when the said application will be heard and determined

GIVEN under my hand and the seal of the Court, this day of 19 .

*Description of property**Judge*

No. 38

CERTIFICATE OF SALE OF LAND (O. 21, r. 94)

(Title)

THIS is to certify that has been declared the purchaser at a sale by a public auction on the day of 19 of in execution of decree in this suit, and that the said sale has been duly confirmed by this Court

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 39

ORDER FOR DELIVERY TO CERTIFIED PURCHASER OF LAND AT A SALE IN
EXECUTION. (O. 21, r 93).

(Title.)

To

The Bailiff of the Court.

... of 19 ; You
 aforesaid, in possession of the same. tied purchaser, as

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 40.

SUMMONS TO APPEAR AND ANSWER CHARGE OF OBSTRUCTING
EXECUTION OF DECREE. (O. 21, r 97.)

(Title.)

To

WHEREAS , the decree-holder in the
 above suit, has complained to this Court that you have resisted (or obstructed) the
 officer charged with the execution of the warrant for possession :

You are hereby summoned to appear in this Court on the day of
 19 at A.M., to answer said complaint

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 41.

WARRANT OF COMMITTAL. (O. 21, r 98.)

(Title.)

To

The Officer in Charge of the Jail at

WHEREAS the undermentioned property has been decreed to
 that , the plaintiff in this suit, and whereas the Court is satisfied
 [or obstructing] the said without any just cause resisted [or obstructed] and is still resisting
 and whereas the said in obtaining possession of the property,
 the said has made application to this Court that
 he committed to the civil prison ;

You are hereby commanded and required to take and receive the said
 of into the civil prison and to keep him imprisoned therein for the period
 days,

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 42.

AUTHORITY OF THE COLLECTOR TO STAY PUBLIC SALE OF LAND. (SECTION 72.)

(Title)

To

Collector of

Sir,

In answer to your communication No. , dated , representing that the sale in execution of the decree in this suit of land situate within your district is objectionable, I have the honour to inform you that you are authorized to make provision for the satisfaction of the said decree in the manner recommended by you

I have the honour to be,

Sir,

Your obedient Servant,

Judge

APPENDIX F.

SUPPLEMENTAL PROCEEDINGS.

No. 1.

WARRANT OF ARREST BEFORE JUDGMENT. (O. 38, r 1)

(Title)

To

The Bailiff of the Court.

WHEREAS , the plaintiff in the above suit, claims the sum of Rs. as noted in the margin and has proved to the satisfaction of the Court

Principal			
Interest			
Costs			
TOTAL			

that there is probable cause for believing that the defendant is about to

These are to command you to demand and receive from the said the sum of Rs. .

as sufficient to satisfy the plaintiff's claim, and unless the

said sum of Rs. is forthwith delivered to you by or on behalf of the said , to take the said into custody, and to bring him before this Court, in order that he may show cause why he should not furnish security to the amount of Rs. for his personal appearance before the Court, until such time as the said suit shall be fully and finally disposed of, and until satisfaction of any decree that may be passed against him in the suit.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge

No. 2.

SECURITY FOR APPEARANCE OF A DEFENDANT ARRESTED BEFORE JUDGMENT.

(O. 38, r 2)

(Title.)

WHEREAS at the instance of , the plaintiff in the above suit, the defendant, has been arrested and brought before the Court ;

And whereas on the failure of the said defendant to show cause why he should not furnish security for his appearance, the Court has ordered him to furnish such security :

Therefore I myself, my heirs appear at any time tion of any decree default of such appearance I bind myself, my heirs and executors, to pay to the said Court, at its order, any sum of money that may be adjudged against the said defendant in the said suit.

[illegible]

Witnesses

12

No 3

SUMMONS TO DEFENDANT TO APPEAR ON SURETY'S APPLICATION FOR DISCHARGE

 $(0, 3^2, r, 3)$

(Title)

To _____
 WHEREAS _____ who became surety on the _____ day of _____ 19____
 for your appearance in the above suit, has applied to this Court to be discharged
 from his obligation :

You are hereby summoned to appear in this Court in person on the day of 19 , at A M, when the said application will be heard and determined.

[illegible]

No. 4

ORDER FOR COMMITTAL (O. 38, r. 4.)

(Title)

To _____, plaintiff in this suit, has made application to the Court that security be taken for the appearance of _____, the defendant, to answer any judgment that may be passed against him in the suit, and whereas the Court has called upon the defendant to furnish such security, or to offer a sufficient deposit in lieu of security, which he has failed to do; It is ordered that the said defendant _____ be committed to the civil prison until the decision of the suit, or, if judgment be pronounced against him until satisfaction of the decree

GIVEN under my hand and the seal of the Court, this day of
19 .
Judge

No. 5

ATTACHMENT BEFORE JUDGMENT, WITH ORDER TO OAIL FOR SECURITY FOR
FULFILMENT OF DECREE (O 38, r 5)

(Title)

To
The Bailiff of the Court

WHEREAS _____ has proved to the satisfaction of
the Court that the defendant in the above suit
These are to command you to call upon the said defendant
on or before the _____ day of _____
either to furnish security for the sum of rupees _____
place at the disposal of this Court when required _____
19 _____
to produce and

or the value thereof, or such portion of the value as may be sufficient to satisfy any decree that may be passed against him ; or to appear and show cause why he should not furnish security ; and you are further ordered to attach the said and keep the same under safe and secure custody until the further order of the Court ; and you are further commanded to return this warrant on or before the day of 19 , with an endorsement certifying the date on which and manner in which it has been executed, or the reason why it has not been executed.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No 6

SECURITY FOR THE PRODUCTION OF PROPERTY. (O. 38, r. 5)

(Title.)

WHEREAS at the instance of , the plaintiff in the above suit, the defendant has been directed by the Court to furnish security in the sum of Rs. to produce and place at the disposal of the Court the property specified in the schedule hereunto annexed ;

Therefore I have voluntarily become surety and do hereby bind myself my heirs and executors to the said Court, that the said defendant shall produce and place at the disposal of the Court, when required, the property specified in the said schedule, and keep the same under safe and secure custody until the further order of the Court ; and you are further commanded to return this warrant on or before the day of 19 , with an endorsement certifying the date on which and the manner in which it has been executed, or the reason why it has not been executed.

Schedule.

Witness my hand at this day of 19 .
Witnesses (Signed)

1.
2

No 7.

ATTACHMENT BEFORE JUDGMENT, ON PROOF OF FAILURE TO FURNISH SECURITY. (O. 38, r. 6)

(Title)

To

The Bailiff of the Court.

WHEREAS the plaintiff in this suit, has applied to the Court to call upon , the defendant, to furnish security to fulfil any decree that may be passed against him in the suit, and whereas the Court has called upon the said to furnish such security, which he has failed to do ; there are to command you to attach the property of the said and keep the same under safe and secure custody until the further order of the Court ; and you are further commanded to return this warrant on or before the day of 19 with an endorsement certifying the date on which and the manner in which it has been executed, or the reason why it has not been executed.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No 8.

TEMPORARY INJUNCTIONS (O 39, r. 1.)

(Title.)

Upon motion made unto this Court by _____, Pleader of [or Counsel for] the plaintiff A B, and upon reading the petition of the said plaintiff in this matter filed this day [or the plaint filed in this suit on the _____ day of _____, or the written statement of the said plaintiff filed on the _____ day of _____] and upon hearing the evidence of _____ and _____ in support thereof [if after notice and defendant not appearing: add, and also the evidence of _____ as to service of notice of this motion upon the defendant C D] This Court doth order that an injunction be awarded to restrain the defendant C D, his servants, agents and workmen, from pulling down, or suffering to be pulled down, the house in the plaint in the said suit of the plaintiff mentioned [or, in the written statement, or petition, of the plaintiff and evidence at the hearing of this motion mentioned] being No. 9, Oilmongers Street, Hindupur, in the Taulk of _____, and from selling the materials whereof the said house is composed, until the hearing of this suit or until the further order of this Court

Dated this _____

day of _____

19 _____

Judge.

[If here the injunction is sought to restrain the negotiation of a note or bill, the ordering part of the order may run thus —]

to restrain the defendants _____ and _____ from parting with out of the custody of them or any of them or endorsing, assigning or negotiating the promissory note [or bill of exchange] in question, dated on or about the _____, etc, mentioned in the plaintiff's plaint [or petition] and the evidence heard at this motion until the hearing of this suit, or until the further order of this Court

[In Copyright cases]

to restrain the defendant C D, his servants, agents or workmen, from printing, publishing or vending a book, called _____, or any part thereof, until the, etc

[If here part only of a book is to be restrained]

to restrain the defendant C D, his servants, agents or workmen, from printing, publishing, selling or otherwise disposing of such parts of the book in the plaint [or petition and evidence etc] mentioned to have been published by the defendant as hereinafter specified, namely, that part of the said book which is entitled _____ and also that part which is entitled _____

[or which is contained in page _____ to page _____ both inclusive] until _____, etc.

[In Patent cases]

to restrain the defendant C D, his agents, servants and workmen, from making or vending any perforated bricks [or as the case may be] upon the principle of the inventions in the plaintiff's plaint [or petition, etc, or written statement, etc.] mentioned, _____ of the respective _____ be mentioned _____, or either _____ from, until the

hearing etc.

[In cases of Trade mark]

to restrain the defendant _____ from selling, or exposing for sale _____ [or as the case may be] by the plaintiff A. B., in _____ plaintiff's plaint [or petition, etc.] mentioned, or any other labels so contrived or expressed as, by colourable imitation or otherwise, to represent the composition or blacking sold by the defendant to be the same as the composition or blacking manufactured and sold

by the plaintiff A. B, and from using trade-cards so contrived or expressed as to represent that any composition or blacking sold or proposed to be sold by the defendant is the same as the composition or blacking manufactured or sold by the plaintiff A. B, until the, etc.

[To restrain a partner from in any way interfering in the business]

to restrain the defendant C D., his servants and agents, from entering into any contract, and from accepting, drawing, endorsing or negotiating any bill of exchange, note or written security in the name of the partnership-firm of B. and D., and from contracting any debt, buying and selling any goods, and from making or entering into any verbal or written promise, agreement or undertaking, and from doing, or causing to be done, any act, in the name or on the credit of the said partnership-firm of B and D, or whereby the said partnership-firm can or may in any manner become or be made liable to or for the payment of any sum of money, or for the performance of any contract, promise or undertaking until the, etc.

No 6

APPOINTMENT OF A RECEIVER (O 40, r 1)

(Title)

To

WHEREAS has been attached in execution of a decree passed in the above suit on the day of 19, in favour of ; You are hereby (subject to your giving security to the satisfaction of the Court) appointed receiver of the said property under Order XL of the Code of Civil Procedure, 1908, with full powers under the provisions of that Order.

You are required to render a due and proper account of your receipts and disbursements in respect of the said property on . You will be entitled to remuneration at the rate of per cent upon your receipts under the authority of this appointment.

GIVEN under my hand and the seal Court, this day of 19 .
Judge.

No. 7

BOND TO BE GIVEN BY RECEIVER (O, 40, r. 3.)

(Title.)

KNOW all men by these presents, that we and and are jointly and severally bound to of the Court of in Rs. to be paid to the said or his successor in office for the time being. For which payment to be made we bind ourselves, and each of us, in the whole, our and each of our heirs, executors and administrators, jointly and severally, by these presents.

Dated this day of 19 .

Whereas a plaint has been filed in this Court by against for the purpose of *[here insert the object of suit]*

And whereas the said has been appointed, by order of the above mentioned Court, to receive the rents and profits of the immoveable property and to get in the outstanding moveable property of in the said plaint named :

Now the condition of this obligation is such, that if the above-bounden
whi
pro
per
shall from time to time be certified to be due from him as the said Court hath

directed or shall hereafter direct, then this obligation shall be void, otherwise it shall remain in full force.

Signed and delivered by the above-bounden in the presence of

Note—If deposit of money is made, the memorandum thereof should follow the terms of the condition of the bond.

APPENDIX G.

APPEAL, REFERENCE AND REVIEW.

No. 1.

MEMORANDUM OF APPEAL. (O. 41, r. 1.)

(Title)

The

Court at _____ above-named appeals to the
 _____ in Suit No. _____ of 19 _____ from the decree of
 day of _____ 19 _____, and sets forth the following grounds of
 objection to the decree appealed from, namely :—

No. 2

SECURITY BOND TO THE GIVEN ON ORDER BEING MADE TO STAY EXECUTION OF
 DECREE. (O. 41, r. 5.)

(Title)

To

This security bond on stay of execution of decree executed by
 witnesseth :—

That _____, the plaintiff in Suit No. _____ of 19 _____, having

Now the plaintiff decree-holder having applied to execute the decree, the

the said properties are insufficient to pay the amount due, I and my legal representatives will be personally liable to pay the balance. To this effect I execute this security bond this _____ day of _____ 19 _____.

Schedule.

Witnessed by

(Signed)

1

2.

No 3

SECURITY BOND TO BE GIVEN DURING THE PENDENCY OF APPEAL. (O. 41, r. 6.)

SECURITY FOR COSTS OF APPEAL. (O. 41, r. 6.)

(Title)

To

This security bond on stay of execution of decree executed by witnesseth —

That _____, the plaintiff in Suit No _____ of 19 _____, having sued _____, the defendant, in this Court and a decree having been passed on the _____ day of _____ 19 _____ in favour of the plaintiff, and the defendant

having preferred an appeal from the said decree in the _____ Court, the said appeal is still pending

Now the plaintiff decree holder has applied for execution of the said decree and has been called upon to furnish security. Accordingly I, of my own free will, stand security to the extent of Rs _____ mortgaging the properties specified in the schedule hereunto annexed, and covenant that if the decree of the first Court be reversed or varied by the Appellate Court, the plaintiff shall restore any property which may be or has been taken in execution of the said decree and shall duly act in accordance with the decree of the Appellate Court and shall pay whatever may be payable by him thereunder, and if he should fail therein then any amount so payable shall be realized from the properties hereby mortgaged, and if the proceeds of the sale of the said properties are insufficient to pay the amount due, I and my legal representatives will be personally liable to pay the balance. To this effect I execute this security bond this _____ day of _____ 19 _____.

Schedule

Witnessed by

- 1.
- 2.

(Signed)

No. 4.

SECURITY FOR COSTS OF APPEAL. (O. 41, r. 10.)

(Title)

To

This security bond for costs of appeal executed by _____ witnesseth —

This appellant has preferred an appeal from the decree in Suit No _____ of 19 _____, against the respondent, and has been called upon to furnish security. Accordingly I, of my own free will, stand security for the costs of the appeal, mortgaging the properties specified in the schedule hereunto annexed. I shall not transfer the said properties or any part thereof, and in the event of any default on the part of appellant I shall duly carry out any order that may be made against me with regard to payment of the costs of appeal. Any amount so payable shall be realized from the properties hereby mortgaged, and if the proceeds of the sale of the said properties are insufficient to pay the amount due I and my legal representatives will be personally liable to pay the balance. To this effect I execute this security bond this _____ day of _____ 19 _____.

Schedule

Witnessed by

- 1.
- 2.

(Signed)

No. 5.

INTIMATION TO LOWER COURT OR ADMISSION OF APPEAL. (O. 41, r. 13.)

(Title.)

To

YOU are hereby directed to take notice that the in the above suit, has preferred an appeal to this Court from the decree passed by you therein on the day of 19 .

You are requested to send with al practicable despatch all material papers in the suit.

Dated the day of 19 .

Judge.

No. 6.

NOTICE TO RESPONDENT OF THE DAY FIXED FOR THE HEARING OF THE APPEAL.

(O. 41, r. 14.)

(Title.)

APPEAL from the of the Court of
dated the day of 19
To

Respondent

TAKE notice that an appeal from the decree of in this case has been presented by and registered in this Court, and that the day of 19 has been fixed by this Court for the hearing of this appeal.

If no appearance is made on your behalf by yourself, your pleader, or by some one by law authorized to act for you in this appeal, it will be heard and decided in your absence.

GIVEN under my hand and the seal of the Court, this day of 19 .
Judge.

[Note—If a stay of execution has been ordered, intimation should be given of the fact on this notice.]

No. 7.

NOTICE TO A PARTY TO A SUIT NOT MADE A PARTY TO THE APPEAL BUT JOINED BY THE COURT AS A RESPONDENT. (O. 41, r. 20.)

(Title.)

WHEREAS you were a party in suit No. of 19 , in the Court of , and whereas the has preferred an appeal to this Court from the decree passed against him in the said suit and it appears to this Court that you are interested in the result of the said appeal :

This is to give you notice that this Court has directed you to be made a respondent in the said appeal and has adjourned the hearing thereof till the day of 19 , at A M. If no appearance is made on your behalf on the said day and at the said hour, the appeal will be heard and decided in your absence.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No 8

MEMORANDUM OF CROSS OBJECTION. (O 41, r. 22)

(Title)

WHEREAS the _____ has preferred an appeal to the _____ Court at _____ from the decree of _____ in Suit No _____ of 19 _____, dated the _____ day of _____ 19 _____, and whereas notice of the day fixed for hearing the appeal was served on the _____ on the _____ day of _____ 19 _____, the _____ files the memorandum of cross objection under rule 22 of Order XLI of the Code of Civil Procedure, 1908, and sets forth the following grounds of objection to the decree appealed from, namely —

No 9

DECREE IN APPEAL (O 41, r. 35)

(Title)

Appeal No _____ of 19 _____ from the decree of the Court of _____ dated the _____ day of _____ 19 _____

Memorandum of Appeal.

Plaintiff
Defendant

The _____ above-named appeals to the _____ Court at _____ from the decree of _____ in the above suit, dated the _____ day of _____ 19 _____, for the following reasons, namely —

This appeal coming on for hearing on the _____ day of _____ 19 _____, before _____, in the presence of _____ for the appellant and of _____ for the respondent, it is ordered—

The costs of this appeal, as detailed below, amounting to Rs _____, are to be paid by _____ The costs of the original suit are to be paid by _____.

Given under my hand this _____ day of _____ 19 _____

*Judge**Costs of Appeal.*

Appellant	Amount			Respondent	Amount.		
	Rs	A	P		Rs	A	P.
1. Stamp for memorandum of appeal				Stamp for power			
2. Do for power				Do for petition			
3. Service of processes				Service of processes			
4. Pleader's fee on Rs.				Pleader's fee on Rs.			
Total				Total			

No 10.

APPLICATION TO APPEAL IN *forma pauperis*. (O. 44, r. 1.)

(Title)

I, _____ the _____ above-named, present the accompanying memorandum of appeal from the decree in the above suit and apply to be allowed to appeal as a pauper.

Annexed is a full and true schedule of all the moveable and immoveable property belonging to me with the estimated value thereof.

Dated the _____ day of _____ 19 .

(Signed.)

Note -- Where the application is by the plaintiff he should state whether he applied and was allowed to sue in the Court of first instance as a pauper.

No 11.

NOTICE OF APPEAL IN *forma pauperis* (O. 44, r. 1.)

(Title)

WHEREAS the above-named _____ has applied to be allowed to appeal as a pauper from the decree in the above suit dated the _____ day of _____ 19 and whereas the _____ day of _____ 19 has been fixed for hearing the application, notice is hereby given to you that if you desire to show cause why the applicant should not be allowed to appeal as a pauper an opportunity will be given to you of doing so on the afore-mentioned date.

Given under my hand and the seal of the Court, this _____ day of _____ 19 .

Judge.

No. 12.

NOTICE TO SHOW CAUSE WHY A CERTIFICATE OF APPEAL TO THE KING IN COUNCIL SHOULD NOT BE GRANTED. (O. 45, r. 3.)

Title.

To

TAKE notice that _____ has applied to this Court for a certificate that as regards amount or value and nature the above case fulfils the requirements of section 110 of the Code of Civil Procedure, 1908, or that it is otherwise a fit one for appeal to his Majesty in Council.

The _____ day of _____ 19 is fixed for you to show cause why the Court should not grant the certificate asked for.

Given under my hand and the seal of the Court, this _____ day of _____ 19 .

Registrar.

No. 13.

NOTICE TO RESPONDENT OF ADMISSION OF APPEAL TO THE KING IN
COUNCIL. (O. 45, r. 8.)

(Title)

To

WHEREAS

in the above case, has furnished the security and made the
 deposit required by Order XLV, rule 2 of the Code of Civil Procedure, 1908.

19 . . .

in
 of

Registrar.

No. 14

NOTICE TO SHOW CAUSE WHY A REVIEW SHOULD NOT BE
GRANTED (O. 47, r. 4)

Title.

To

TAKE notice that has applied to this Court for a review
 of its decree passed on the day of 19 in the
 above case. The day of
 19 is fixed for you to show cause why the Court should not grant a review
 of its decree in this case.

Given under my hand and the seal of the Court, this day of
 19 . . .

Judge

APPENDIX H.

MISCELLANEOUS.

No 1.

AGREEMENT OF PARTIES AS TO ISSUES TO BE TRIED. (O. 14, r 6)

(Title)

WHEREAS we, the parties in the above suit, are agreed as to the question of fact [or of law] to be decided between us and the point at issue between us is whether a claim founded on a bond, dated the _____ day of 19____ and filed as Exhibit in the said suit, is or is not beyond the statute of limitation (or state the point at issue whatever it may be). We therefore severally bind ourselves that, upon the finding of the Court in the negative [or affirmative] of such issue _____ will pay to the said _____ the sum of Rupees _____ (or such sum as the Court shall hold to be due thereon) a _____ of Rupees _____ satisfaction of my claim said _____ will do or abstain from doing, etc., etc.]

Plaintiff.

Defendant.

Witnesses,

1.
2.

Dated the _____ day of _____ 19____

No. 2.

NOTICE OF APPLICATION FOR THE TRANSFER OF A SUIT TO ANOTHER COURT FOR TRIAL. (SECTION 24.)

In the Court of the District Judge of

No. _____ of 19____

To _____ WHEREAS an application dated the _____ day of _____ 19____ has been made to this Court by _____ the _____ in suit No _____ of 19____ now pending in the Court of the _____ at _____ in which _____ is plaintiff and _____ is defendant, for the transfer of the suit for trial to the Court of the _____ at _____ :-

You are hereby informed that the _____ day of _____ 19____ has been fixed for the hearing of the application, when you will be heard if you desire to offer any objection to it.

Given under my hand and the seal of the Court, this _____ day of _____ 19____

Judge.

No. 6

NOTICE TO PARTIES OF THE DAY FIXED FOR EXAMINATION OF A WITNESS
ABOUT TO LEAVE THE JURISDICTION. (O 18, r. 16)

(Title)

To _____ plaintiff (or defendant)

WHEREAS in the above suit application has been made to the Court by _____, a witness required
that the examination of _____ in the said suit, may be taken
by the said _____ immediately; and it has been shown to the Court's satisfaction that the said
witness is about to leave the Court's jurisdiction (or any other good and sufficient
cause, to be stated)

Take notice that the examination of the said witness _____ will be
taken by the Court on the _____ day of _____ 19 _____.

Dated the _____ day
of _____ 19 _____.

Judge.

No. 7

COMMISSION TO EXAMINE ABSENT WITNESS (O. 26, rr. 4, 18)

(Title.)

To _____

WHEREAS the evidence _____ is required by the _____
in the above suit, and whereas _____; you are
requested to take the evidence on interrogatories [or *viva voce*] of such witness
and you are hereby appointed Commissioner for that purpose.
The evidence will be taken in the presence of the parties or their agents if in
attendance, who will be at liberty to question the witness on the points specified;
and you are further requested to make return of such evidence as soon as it may
be taken.

Process to compel the attendance of the witness will be issued by any Court
having jurisdiction on your application.

A sum of Rs _____, being your fee in the above, is herewith forwarded.

Given under my hand and the seal of the Court, this _____ day of _____ 19 _____.

Judge.

No. 8.

LETTER OF REQUEST. (O. 26, r. 5.)

(Title.)

(Heading :—To the President and Judges of, etc, etc, or as the case may
be)

WHEREAS a suit is now pending in the _____
in which A. B is plaintiff and C. D. is defendant; And in the said suit the
plaintiff claims _____

(abstract of claim);

And whereas it has been represented to the said Court that it is necessary
for the purposes of justice and for the due determination of the matters in dispute

between the parties, that the following persons should be examined as witnesses upon oath touching such matters, that is to say :

E. F., of
G. H., of
I. J., or

and

And it appearing that such witnesses are resident within the jurisdiction of your honorable Court ;

Now I , as the of the said Court, have the honour to request, and do hereby request, that for the reasons aforesaid and for the assistance of the said Court, some one or more of you other witnesses as the

request you in writing so to summon) to attend at such time and place as you shall appoint before some one or more of you or such other person as according to the procedure of your Court is competent to take the examination of witnesses, and that you will cause such witnesses to be examined upon the interrogatories which accompany this letter of request (or *voir dire*) touching the said matters in question in the presence of the agents of the plaintiff and defendant, or such of them as shall, on due notice given, attend such examination

And I further have the honour to request that you will be pleased to cause the answers of the said witnesses to be reduced into writing, and all books, letters, papers and documents produced upon such examination to be duly marked for identification, and that you will be further pleased to authenticate such examination by the seal of your tribunal, or in such other way as is in accordance with your procedure, and to return the same, together with such request in writing, if any, for the examination of other witnesses to the said Court

(Note.—If the Request is directed to a Foreign Court, the words "through His Majesty's Secretary of State for Foreign Affairs for transmission" should be inserted after the words "other witnesses" in the penultimate line of this form)

No 9

COMMISSION FOR LOCAL INVESTIGATION, OR TO EXAMINE ACCOUNTS (O 26, rr. 9, 11)

(Title)

To

WHEREAS it is deemed requisite, for the purposes of this suit, that a commission for should be issued ;
You are hereby appointed Commissioner for the purpose of

Process to compel the attendance before you of any witnesses or for the production of any documents, whom or which you may desire to examine or inspect, will be issued by any Court having jurisdiction on your application

A sum of Rs. , being your fee in the above, is herewith forwarded

Given under my hand and the seal of the Court this day of 19

Judge

No 10

COMMISSION TO MAKE A PARTITION (O 26, r. 13)

(Title)

To

WHEREAS it is deemed requisite for the purposes of this suit that a commission should be issued to make the partition or separation of the property specified in, and according to the rights as declared in, the decree of this Court, dated the day of 19 ; You are hereby appointed Commissioner for the said purpose and are directed to make such inquiry as may be necessary, to

divide the said property according to the best of your skill and judgment in the shares set out in the said decree, and to allow such shares to the several parties. You are hereby authorised to award sums to be paid to any party by any other party for the purpose of equalizing the value of the shares

Process to compel the attendance before you of any witness, or for the production of any documents whom or which you may desire to examine or inspect, will be issued by any Court having jurisdiction on your application.

A sum of Rs. _____, being your fee in the above, is herewith forwarded.
Given under my hand and the seal of the Court, this _____ day of 19 ____.

Judge.

No. 11.

NOTICE TO MINOR DEFENDANT AND GUARDIAN. (O. 32, r. 3)

(Title.)

To

Minor Defendant.
Natural Guardian

WHEREAS an application has been presented on the part of the plaintiff in the above suit for the appointment of a guardian for the suit to the minor defendant, you, the said minor, and you (1)

(1) Here insert the name of guardian, are hereby required to take

notice that unless within _____ days from the service upon you of this notice, an application is made to this Court for the appointment of you (1) or of some friend of you, the minor, to act as guardian for the suit, the Court will proceed to appoint some other person to act as a guardian to the minor for the purposes of the said suit.

Given under my hand and the seal of the Court, this _____ day of 19 ____.

Judge.

No. 12.

NOTICE TO OPPOSITE PARTY OF DAY FIXED FOR HEARING EVIDENCE OF PAUPERISM.

(O. 33 r. 6.)

(Title.)

To

WHEREAS _____ has applied to this Court for permission to institute a suit against _____ ^{as} *formal pauperis* under Order XXXIII of the Code of Civil Procedure, 1908; and whereas the Court sees no reason to reject the application; and whereas the _____ day of 19 ____ has been fixed for receiving such evidence as the applicant may adduce in proof of his pauperism and for hearing any evidence which may be adduced in disproof thereof;

Notice is hereby given to you under rule 6 of Order XXXIII that in case you may wish to offer any evidence to disprove the pauperism of the applicant, you may do so on appearing in this Court on the said _____ day of 19 ____.

Given under my hand and the seal of the Court, this _____ day of 19 ____.

No. 13.

NOTICE TO SURETY OF HIS LIABILITY UNDER A DECREE. (Section 145.)

(Title.)

To .

WHEREAS you did on became liable as surety for the performance of any decree which might be passed against the said defendant in the above suit ; and whereas a decree was passed on the day of 19 against the said defendant for the payment of , and whereas application has been made for execution of the said decree against you

Take notice that you are hereby required on or before the day of to show cause why the said decree should not be executed against you, and if no sufficient cause shall be, within the time specified, shown to the satisfaction of the Court, an order for its execution will be forthwith issued in the terms of the said application

Given under my hand and the seal of the Court, this . day of 19 .

Judge

THE SECOND SCHEDULE.

ARBITRATION.

Arbitration in Suits.

1. (1) Where in any suit all the parties interested agree that any matter in difference between them shall be referred to arbitration, they may, at any time before judgment is pronounced, apply to the Court for an order of reference.

(2) Every such application shall be in writing and shall state the matter sought to be referred.

Act XIV of 1882, sect 506

This paragraph applies to H. C. and Prov. S. C. C.

This paragraph and paragraph 16, *post* are enabling paragraphs, and are not intended to be restrictive or exclusive. Parties *sui juris* are competent before decree to make any agreement as to the settlement of the suit.¹ The second clause of this para is directory only.²

In difference in the suit—In cases under this schedule, a matter not in issue before the Court cannot properly become the subject of arbitration or award.³

All the parties—All the parties to the suit who are interested must concur in making the reference,⁴ and in the issue to be determined.⁵ "All the parties" refer to the succeeding words "any matter in difference between them in the suit." they do not include parties who never put in any appearance and between whom and any parties to the submission there was not any matter in difference.⁶

Not all parties—But though an award, which has not been made on a reference by all the parties, cannot be converted into final decree in the manner laid down in this schedule so as to prevent an appeal,⁷ unless the persons dissenting are not necessary parties,⁸ it is not null and void, but is evidence against the parties concerned.⁹

¹ Jogessur Banerjee v Kulyanee, (1875) 24 W. R., 41

² Shama Sundram v Abdul Latif, (1909) 27 Calo. 61, 4 Calo. W. N., 92; followed in Abdul v Bazz ud din, (1907) A. W. N., 273

³ Taranath v Mamek Chunder, (1870) 14 W. R., 469.

⁴ Bykuntath Chatterjee v Nuznooddeen, (1868) 10 W. R., 171, 1 B. L. R., S. N., vi

⁵ Sheonath v Ramnath, (1863) 10 Moo. I. A., 413, p. 427. 5 W. R., P. C., 21; Indur Subbaram v Kandida, Rajamuniar, (1903) 26 Mad., 47.

⁶ Pitam Mal v Sudh Ah, (1902) 24 All., 229; dist. in Kadhu v Balji, (1907) 29 All., 423, A. W. N., 147

⁷ Joy Prokash v Sheo Gola, (1883) 11 Calo., 37; approved in Bepin Behari v. Annoda, (1891) 18 Calo., 324

⁸ Bishoka v. Anunto, (1879) 4 C. L. R., 65.

⁹ Bejoy Chunder v. Bhyrub Chunder, (1871) 15 W. R., 427.

Party not submitting—A person not a party to the submission is not bound by the award.¹ It only binds the parties making the reference.² It has been held in England, that, by acting under an agreement to refer, plaintiff was precluded from setting it aside as fraudulent.³ Mere silence on the part of a person not a party to the order of reference and his omission to inform the arbitrators that he is not a party, does not make the award binding against him.⁴

Presumption—No presumption can be raised against a party to a suit from his refusal to submit to arbitration.⁵

Revocation—An agreement to refer to arbitration cannot be revoked unless for good cause; an arbitrary revocation is not permitted;⁶ and by good cause is meant one of the causes mentioned in para. 5 *post*.⁷ But where, as under this para. the reference to arbitration is made by an order of Court, neither party can annul or revoke it.⁸ If the proceedings of the arbitrator are regular in all respects, an award made by him is binding on the parties, notwithstanding that one of them withdraws and revokes his authority after giving notice to the arbitrator.⁹

Effect of reference—Where parties in a suit for possession agree to arbitrate the question of title, plaintiff relinquishing his prayer for possession, the agreement contains an implied undertaking that the defendant shall give up possession, if the decision be adverse to him¹⁰ and a general reference is binding in regard to every matter in dispute unless the award is set aside on the ground of fraud, mistake or misconduct.¹¹

Withdrawal of suit—After reference made the Court cannot allow the plaintiff to withdraw his suit on an *ex parte* application under O. XXIII, r. 1.¹² The Court has no jurisdiction to allow the plaintiff to withdraw under s. 373, former Code (O. XXIII, r. 1) after the award is made.¹³

Interpretation of reference.—See *Bhagoti v. Chandan*.¹⁴

Arbitration Act—This schedule applies to arbitrations in a suit, and not to proceedings under the Arbitration Act, 1899.¹⁵

Rent-suits—This schedule does not apply to rent-suits in Bengal under Act X of 1859.¹⁶ But it has been held in the North-West that, under the general

¹ *See* *Shankar v. Sankar*, (1880) 10 B.L.R. 20; *L. R.*, 11 I. A., 20; *Sheonath v. Moo.*, 1. A., 413; *Rash Beharee also*, *Beni Madhub v. Priyanath*, p. 816.

² *Ormes v. Bendel*, 6 Jur., N. S., 1103.

³ *Beni Madhub Mitter v. Priya Nath Mandal*, (1900) 5 Cal. W. N., 268; 23 Cal., 303.

⁴ *Mohabeer v. Dhujon Singh*, (1873) 20 W. R., 172.

⁵ *11 in Abdul dun*, (1871) 46; *Sultan m v. Sadiq*,

⁶ *Hammoud v. Shauker*, (1889) 10 Bom., 381; but see, *Coley v. Dacosta*, (1890) 17 Cal., 200.

⁷ *Nil Monee Boso v. Mohima Chunder*, (1872) 17 W. R., 516.

⁸ *Aitken Spence & Co. v. Fernando*, (1902) 7 Cal. W. N., celi.

⁹ *Raj Narain v. Modhoo Soodun*, (1873) 20 W. R., 19.

¹⁰ *Bhagoti v. Chandan*, (1895) 11 Cal., 390; *L. R.*, 12 I. A., 67.

¹¹ *Sheonambar v. Deodat*, (1887) 9 All., 168.

¹² *Dela Churn v. Bipro Prasad*, (1902) 7 Cal. W. N., 186.

¹³ *Bhagoti v. Chandan*, (1891) *L. R.*, 12 I. A., 67; 11 Cal., 386.

¹⁴ *Protap Chunder Dey v. Toolsey Dass Dey*, (1902) 22 Cal., 793.

¹⁵ *Garee v. Hameed*, (1871) 16 W. R., 160. But see, *Khemna Gowala v. Budoloo Khan*, (1891) 6 Cal., 231.

law, parties to suits may, before issue themselves and after joined by the leave of the Court refer matters in dispute in a rent case to arbitration,¹ and the rent law makes special provisions.²

Probate—*Semble*, an executor against whose application for probate a *care at* has been entered, cannot submit to arbitration the question whether the will propounded by him was duly executed by the deceased.³

Joint Hindu family—It is competent to the father of a joint Hindu family in his capacity of managing member of the family to refer to arbitration the partition of the joint family property, and the award made on such reference, if in other respects valid, will be binding on the sons.⁴ Disputes having arisen in a joint Hindu family, the parties submitted the question of partition to an arbitrator who passed an award thereon. Both parties objected to the award, and it was never carried into effect. On a suit for partition being filed, *held*, that such an award is equivalent to a final judgment and binding on the parties in the absence of positive evidence that both parties agreed that the former state of things should be restored, and that therefore the present suit for partition could not be maintained.⁵

Religious Endowments Act—Under s 16 of the Religious Endowment Act, a Court may refer any matter in difference in the suit for decision by an arbitrator, but not the whole suit.⁶

Appellate Court.—An Appellate Court can act under this paragraph,⁷ but not a Court to which certain issues have been referred for trial under O. XLI, r 26.⁸

Jurisdiction.—A case having gone up on appeal, the Judge referred it to the first Court to call upon the parties to the suit to refer some of the issues to arbitration, or failing their doing so, the Court itself was to appoint arbitrators. *Held*, that the order was not one made without jurisdiction, but was an irregular proceeding, which might be cured by the consent of the parties.⁹

2. The arbitrator shall be appointed in such manner

Appointment of as may be agreed upon between the
arbitrator parties.

Act XIV of 1882, sect. 507

This paragraph applies to H C and Prov. S C C

The parties must either name the arbitrators or consent to their nomination by the Court under Para 5, (a) *post*.¹⁰

Stamp—Letters written by parties authorizing arbitrators to arbitrate between them do not require to be stamped.¹¹

¹ *Girdharji v Durga Devi*, (1879) 2 All., 119

² *Fahmunnissa v Ajudha*, (1884) 6 All., 170

³ *Ghellaabhai v Nandubai*, (1897) 21 Bom., 335

⁴ *Jagan Nath v. Mannu Lall*, (1891) 16 All., 231

⁵ *Krishna Panda v Balaram Panda*, (1896) 19 Mad., 290

⁶ *Kareella v Vemavarapu*, (1903) 26 Mad., 361

⁷ *Chitrangi Lal v Jamma Das*, (1875) 7 All. H. C., 245; *Sangaralingam, petitioner*, (1878) 3 Mad., 78; *Bhugwan Dass v Nund Lall*, (1886) 12 Calc., 173; *Suresh Chunder v Ambica Churn*, (1891) 18 Calc., 507; *Russol Bibee v Jan Ali*, (1873) 12 B. L. R., 267, note; 17 W. R., 31, but see, *contra*, *Juggesur v. Kritarthomoyee*, (1873) 12 B. L. R., F. B., 266, 21 W. R., 210.

⁸ *Nand Ram v. Fakir Chand*, (1885) 7 All., 523

⁹ *Puna v Khoda Bukeb*, (1874) 22 W. R., 396.

¹⁰ *Sheonath v Ramnath*, (1863) 10 Moo. I. A., 413 at p. 425; 5 W. R., P. C., 21; and see, *Coley v Dacosta*, (1890) 17 Calc., 200.

¹¹ *Gangaram v. Narayan Baboji*, (1895) 19 Bom., 32.

3. (1) The Court shall, by order, refer to the arbitrator the matter in difference which he is required to determine, and shall fix such time as it thinks reasonable for the making of the award, and shall specify such time in the order.

Order of reference.

(2) Where a matter is referred to arbitration, the Court shall not, save in the manner and to the extent provided in this schedule, deal with such matter in the same suit.

Act XIV of 1882, sect. 508.

This paragraph applies to H. C. and Prov. S. C. C.

Fix such time.—If no time is fixed in the order of Court, the award falls to the ground in Calcutta;¹ and in Allahabad it is also fatal to the order.²

Time elapsed.—As award after the time allowed is now apparently invalid.³ Where a suit was referred to arbitrators, who were to make their award within six months, and nothing was done within that time; *held*, on an application by the plaintiff to have the suit restored to the file of the Court, that the suit was still pending, the arbitrators not having determined it while they had jurisdiction to do so, and it was ordered that it should be brought again before the Court.⁴ See "FURTHER TIME," para. 8, p. 1171, *infra*, "WITHIN THE PERIOD ALLOWED," Para. 15, p. 1178, *infra*. But it is apparently sufficient if the award is made within the time fixed; it need not reach the Court within it.⁵

Matter in difference.—Whatever matters parties to a suit may agree to refer to arbitration, they can refer them or any of them as are in difference between them in the suit.⁶ The order of reference should state all the points which are referred to arbitration. It is important that this should be done unless the doubtful if a

general reference is allowable.

Where a suit for dismissal of a *devastanam* committee and damages was referred under Act XX of 1863, s. 16, to arbitrators, who passed an award dismissing them as prayed and decreeing a portion of the damages claimed and interest; *held*, that the Court had power to refer the matter to arbitrators and award damages with interest, provided the amount exclusive of interest did not exceed the amount claimed in the plaint.⁷

Procedure of arbitrators.—The arbitrators should confine themselves to the matter referred to and only take such legal evidence as is necessary to decide that.⁸ Where an arbitrator imported into his proceeding a previous

¹ *Gunga Gobind v. Kalee Prosunno*, (1869) 10 W. R., 206; 1 B. L. R., S. N., xii; *Nusservanjee Pestonjee v. Mynooden*, (1849) 6 Moo. L. A., 134.

² *Lachman Das v. Abparkash*, (1908) 30 All., 169; *Har Narain v. Bhagwant*, (1890) L. R., 18 I. A., 55; 13 All., 300; See also *Sita Ram v. Bhawaní*, 26 All., 105. *Muthukutti v. Acha Nayakan*, (1895) 18 Mad., 22.

³ *Bhugwan Dass v. Nund Lall*, (1886) 12 Cal., 173.

⁴ *Gopi Nath v. Sath Chandra*, (1870) 6 B. L. R., App., 74.

⁵ *Asadullah v. Muhammad Nur*, (1903) A. W. N., 47.

⁶ *Taranath v. Manick Chunder*, (1870) 14 W. R., 469.

⁷ *Haradhun v. Radhanath*, (1868) 10 W. R., 398.

⁸ *Perimal Naik v. Sammatha Pillai*, (1896) 19 Mad., 498. See, however, *Protap Chandra v. Brojo Nath*, (1892) 19 Cal., 275, where it has been held that in order to make that Act applicable the endowment should be a public one.

⁹ *Krishna Kanta v. Bilya Sundari*, (1863) 2 B. L. R., App., 25.

enquiry alleged to have been made by him and relied upon admission made in former proceedings, his award was held bad.¹

The decision of arbitrators in a matter not in difference between the parties, and not referred to them, is null and void.² Where certain matters are referred to arbitrators by the Judge and other matters by the parties, care should be taken that they should be distinctly separated and not mixed up together.³ Arbitrators cannot delegate their power to other.⁴

Court shall not deal with it—When a dispute has been referred to arbitration, the Court cannot deal with the matters in difference between the parties, except as provided for in this schedule,⁵ it cannot go into the merits of the case;⁶ or dispose of it otherwise than under this schedule.⁷ Nor will the Court confirm an order passed by the arbitrators making payment of their fees a condition precedent to hearing the reference.⁸

If not decided—Where matters in dispute are referred to arbitration, and it is found that one question at issue is omitted from the reference, and that the award contains no decision thereon, the party interested should bring the omission to the notice of the Court; if he does not do so, the Court is not wrong in not passing any order at all on the point.⁹

Forms—See *infra*

4. Where the reference is to two or more arbitrators, provision shall be made in the order for a difference of opinion among the arbitrators—

Where reference is to two or more, order to provide for difference of opinion.

- (a) by the appointment of an umpire; or
- (b) by declaring that, if the majority of the arbitrators agree, the decision of the majority shall prevail; or
- (c) by empowering the arbitrators to appoint an umpire; or
- (d) otherwise as may be agreed between the parties or, if they cannot agree, as the Court may determine.

(2) Where an umpire is appointed, the Court shall fix such time as it thinks reasonable for the making of his award in case he is required to act.

Act XIV of 1882, s. 509

This para applies to H C and Prov S C C

¹ Kanhye Chaud v. Ram Chunder, (1875) 24 W. R., 81.

² Moshahel Singh v. Konomutti, (1871) 15 W. R., 172.

³ Boghoo Nundun v. Bunwaree, (1865) 3 W. R., 213.

⁴ Surinjeet v. Gource Per-had, (1867) 7 W. R., 269.

⁵ Halimbhai v. Shanker, (1886) 10 Bom., 381.

⁶ Salig Ram v. Jhanna, (1882) 4 All., 546.

⁷ Huradhu v. Radhanath, (1865) 10 W. R., 393; 2 B. L. R., S. N., xiv.

⁸ Steel v. Roberts, (1881) 6 Cal., 809.

⁹ Raj Narain v. Juggessur Mokerjee, (1870) 14 W. R., 7.

Difference of opinion.—When a suit is referred to arbitration, the order of reference should provide for the appointment of an umpire in case of any difference of opinion among the arbitrators, and should declare that the decision shall be with the majority,¹ if not, the award must be made and signed by all the arbitrators.² Partial disagreement of two arbitrators does not nullify their award as a whole.³ The mere absence of a clause in the order of reference to arbitration providing for a difference of opinion between the arbitrators cannot vitiate the award, where there is no such difference of opinion.⁴ And in special appeal, a submission will not be sent back to the arbitrators, with a provision for a difference of opinion, where the arbitrators having given in differing awards, the case was tried by the first Court, whose decision was confirmed on appeal.⁵ Where the order of reference did not provide that decision by the majority of arbitrators should be binding and two of five arbitrators withdrew, it was held that a decision by the majority was invalid.⁶

If the decision lies with the majority, then their award, in the absence of the minority, provided they have had due notice, is a legal award, unless their absence is due to one or other of the causes enumerated in para. 5, *infra*.⁷ So, if the majority of three arbitrators, the third having withdrawn, and finally refused to sign the award, the award is valid, the arbitrator, having sat with the majority, and given an opinion on the last day, the parties do not object to the order to be valid and binding on the arbitrators.¹⁰ An umpire

Power of Court to appoint arbitrator in certain cases **5. (1) In any of the following cases, namely:—**

- (a) where the parties cannot agree within a reasonable time with respect to the appointment of an arbitrator, or the person appointed refuses to accept the office of arbitrator, or
- (b) where an arbitrator or umpire—
 - (i) dies, or
 - (ii) refuses or neglects to act or becomes incapable of acting, or

¹ Haradhan v. Radhanath, (1869) 10 W.R., 393 ; 2 B. L. R., S. N., xiv.

² Junglee Ram v. Ram Heet, (1873) 19 W. R., 47 ; Nem Roy v. Bharat, (1874) 22 W. R., 129.

³ Ponaoolah v. Tameerooddeen, (1865) 2 W. R., 32.

⁴ Gour Chunder v. Sodoy Chunder, (1872) 17 W. R., 130. But see, Futteh Singh v. Gango, (1865) 4 W. R., 4.

⁵ Thackoor Dass v. Ram Jeebun, (1870) 14 W. R., 150. See, however, Haradhan v. Radhanath, (1869) 2 B. L. R., S. N., xiv.

⁶ Gurupathappa v. Narasingappa, (1884) 7 Mad., 174.

⁷ Kedarnath v. Gunga Bae, S. D., N. W., 1861, p. 541.

⁸ Mithun Lal v. Ram Chund, S. D., N. W., 1861, 895 ; but see against this, Buxant Bai v. Girdharee Singh, (1868) 3 Agra, 93.

⁹ Gokul Bunsce and Jhaon, 3 Agra (1862), p. 448.

¹⁰ Kurubjeet v. Gourco Pershal, (1867) 7 W. R., 269.

¹¹ Smith v. Ludha (Sheela Damodar, (1893) 17 Bom., 129.

(iii) leaves British India in circumstances showing that he will probably not return at an early date, or

(c) where the arbitrators are empowered by the order of reference to appoint an umpire and fail to do so.

any party may serve the other party or the arbitrators, as the case may be, with a written notice to appoint an arbitrator or umpire.

(2) If, within seven clear days after such notice has been served or such further time as the Court may in each case allow, no arbitrator or no umpire is appointed, as the case may be, the Court may, on application by the party who gave the notice, and after giving the other party an opportunity of being heard, appoint an arbitrator or umpire or make an order superseding the arbitration, and in such case shall proceed with the suit.

Act XIV of 1882, sects 510, 511, 507, 2nd para

This paragraph applies to H C and Prov S C C.

The Court should not nominate any person until it has ascertained whether he will accept office¹. Where both parties could not agree in nominating an arbitrator, and the Judge nominated one under this section, and defendant six weeks afterwards objected that he did not nominate him, it was held that, looking at the evidence, the defendant must be considered to have desired that the Judge should nominate, and that the nomination was binding².

If the arbitrator refuses.—It has been held that this means, if the arbitrator accepts and afterwards refuses, and does not justify a Court in appointing new arbitrators against the wish of one of the parties, where the arbitrators first named refused from the first³.

It is not incumbent on the Judge to appoint new arbitrators when some of

named. The umpire first selected refused to act, and the Court appointed a new umpire, who was not one of the seven persons mentioned in the submission; *held*, that the umpire not being one of the seven, the award was invalid⁴. The Judge

¹ *Troyluckhonath Roy v Collector of Beerbhoom*, W. R. (1864) p. 338

² *Suroop Ram v Gobind Ram*, (1867) 7 W. R., 13, but see, *Coley v Dacosta*, (1890) 17 Cal., 200.

³ *Pugardin v Modinsz*, (1883) 6 Mad., 414. *Bepin Behari v Annols*, (1891) 18 Cal., 324

⁴ *Sada Fookh v Shiva Dyal*, (1866) 1 Agra. 109

⁵ *Shib Charan v Rati Ram*, (1885) 7 All., 20

⁶ *Nand Ram v Fakir Chand*, (1887) 7 All., 523. *Thammiraju v Bapiraju*, (1889) 12 Mad., 113

⁷ *Barracho v. Souza*, (1871) 7 Mad. H. C., 72. See, *Coley v Dacosta*, (1819) 17 Cal., 200.

has the sole power of appointing fresh arbitrators in the room of such as refuse to act,¹ and he may appoint one new arbitrator in place of several old arbitrators.²

May retract resignation.—An arbitrator has full power to retract his resignation before it has been accepted.³

Absence.—When a person goes away from the country and remains away, and there is no intention to return, he is incapable of acting as an umpire.⁴

Arbitration superseded.—When an arbitration has failed, and the record has been returned, the Court cannot dismiss the suit, but must fix a day for the hearing, and a reference to the parties to be made. After a suit was referred to arbitration by a third person, and the parties to let the matter in dispute be settled by the third person did not supersede the reference to arbitration, and that before the Court could hear the suit, an order superseding the arbitration was necessary.⁵

Consent.—Consent of all parties is not necessary to obtain an order under this paragraph.⁷

An arbitrator is not bound by technical rules of Court. He is appointed to give an equitable relief.⁶

6. Every arbitrator or umpire appointed under paragraph 4 or paragraph 5 shall have the like powers as if his name had been inserted in the order of reference.

Act XIV of 1882, s. 512.

This paragraph applies to H. C. and Prov. S. C. C.

Summoning witnesses and default. 7. (1) The Court shall issue the same processes to the parties and witness whom the arbitrator or umpire desires to examine, as the Court may issue in suits tried before it.

(2) Persons not attending in accordance with such process, or making any other default, or refusing to give their evidence, or guilty of any contempt to the arbitrator or umpire during the investigation of the matters referred, shall be subject to the like disadvantages, penalties and punishments, by order of the Court on the representation of the arbitrator or umpire, as they would incur for the like offences in suits tried before the Court.

Act XIV of 1882, s. 513

This paragraph applies to H. C. and Prov. S. C. C.

¹ *Troyluckonath Roy v. Collector of Beerboom*, W. R., (1864) p. 338.

² *Rampersad v. Juggernauth*, (1880) 6 C. L. R. 1.

³ *Joy Mungul Singh v. Mohun Ram*, (1871) 15 W. R. 38; 23 W. R. 429.

⁴ *Gadulhar v. Ganga Prasad*, (1869) 4 B. L. R., O. C., 89.

⁵ *Muddun Mohun v. Kanaye Das*, (1893) 23 W. R. 21.

⁶ *Janna Kunwar v. Nasibali*, (1902) 24 All. 312.

⁷ *Rampersad v. Juggernauth*, (1880) 6 C. L. R., 1.

⁸ *Reedoy v. Puddle Lochun*, (1861) 1 W. R., 12.

If the defendant does not appear, the arbitration may proceed *ex parte*.¹

The omission to give notice to a party who has notified to the arbitrators his withdrawal from the submission does not invalidate the award.²

8. Where the arbitrators or the umpire cannot complete the award within the period specified in the order, the Court may, if it thinks fit, either allow further time, and from time to time, either before or after the expiration of the period fixed for the making of the award, enlarge such period; or may make an order superseding the arbitration, and in such case shall proceed with the suit.

Act XIV of 1882, s. 514

This paragraph applies to H C, and Prov S C C

Complete the award — This does not include filing it.³

Further time — Under this paragraph the Court may at its discretion enlarge the period for the delivery of an award of arbitration without the consent of, and even if opposed by, the parties,⁴ even after the period has expired,⁵ unless the award has been delivered.⁶ The application for extension should be made in writing, and so should be the order on it.⁷

Where umpire may arbitrate in lieu of arbitrators

9. Where an umpire has been appointed, he may enter on the reference in the place of the arbitrators,—

(a) if they have allowed the appointed time to expire without making an award, or

(b) if they have delivered to the Court or to the umpire a notice in writing stating that they cannot agree

Act XIV of 1882 s. 515

This paragraph applies to H C Prov S C C

10. Where an award in a suit has been made, the persons who made it shall sign it and cause it to be filed in Court, together with any depositions and documents which have been taken and proved

¹ Gokul Chund v. Girdharee Lall, S D, N. W., 1866, p. 83.

² Subraya Prabhu v. Marjunath, (1906) 29 Mad., 44

³ Umersey v. Shamji, (1889) 13 Bom., 119

⁴ Gobind Chunder v. Ram Kishen, (1865) 2 W. R., 297

⁵ Har Narain v. Bhagwant, (1858) 10 All., 137. Suppu v. Govindacharyar, (1883) 11 Mad., 85

⁶ Har Narain v. Bhagwant, (1891) 13 All. 300, L. R. 15 J. A., 53; Lakshminarasimham v. Somasundaram, (1892) 15 Mad., 354; Ram Monohar v. Lal Behari, (1892) 14 All., 347

⁷ Monji Premji v. Mahiyakel, (1878) 3 Mad., 59 See "WITHIN THE PERIOD ALLOWED," para. 16, 7, *infra*.

before them; and notice of the filing shall be given to the parties.

Act XIV of 1882, s. 516.

This paragraph applies to H. C. and Prov. S. C. C.

Award.—The making of an award is a judicial act, and must be done by the arbitrators in the presence of one another and at the same time.¹ An award must be completed and signed by each in the presence of the whole of them,² but when the case has been regularly heard by the arbitrators sitting together, and an award has been drawn up and signed by them, the mere omission to sign the award at the same time and in each of the judicial portions of their duties is not a final conclusion, so that if all award, the validity of the draft award cannot be impeached, because they made out a fair copy. The draft is the award.⁴ Arbitrators cannot delegate their authority to others.⁵ An award under this para should be a single instrument complete in itself, and should not consist of two papers bearing different dates.⁶ If one arbitrator signs a blank paper and is absent from a part of the hearing, the award is bad.⁷

Documents.—The arbitrator should not allow documents entrusted to him by the Court to be removed from the record.⁸

Oath of party.—Plaintiff in a suit submitted to arbitration, agreed to be bound by the oath of the defendant, and the arbitrators decided accordingly; *held*, an award.⁹

Review.—After the award is made and filed, the functions of the arbitrators cease.¹⁰

Filed in Court.—The Court can extend the period within which the umpire is to give his award.¹¹

Delivery of award and documents.—The act of an arbitrator in handing an award to the proper officer of the Court to be filed is not an application within the meaning of the Limitation Act.¹²

The arbitrators may deliver their award to a third person to be filed,¹³ and if they deliver it to a party, they should not hand over with it the proceedings, depositions and exhibits in the suit. These they must deliver to the Court. The correct procedure is to return the award and record direct,¹⁴ if the arbitrators object to deliver the documents, the Court may compel them to do so.¹⁵

¹ *Joy Mungul Singh v. Mohun Ram*, (1869) 12 W. R., 397; 8 B. L. R., 319, *note*; (1875) 23 W. R., 429.

² *Joy Mungal, petitioner*, (1869) 3 B. L. R., A. C., 82; 11 W. R., 433.

³ *Bhabasundari Dasi v. Makhunlal*, (1871) 8 B. L. R., 128; *Mathukutti v. Acha Nayakan*, (1895) 18 Mad., 22.

⁴ *Kula Nagabuchanam v. Kula Seshachalam*, (1862) 1 Mad. H. C., 178.

⁵ *Surubjeet v. Gaurce Pershad*, (1867) 7 W. R., 269.

⁶ *Joy Mungul Singh v. Mohun Ram*, (1869) 12 W. R., 397; 8 B. L. R., 319, *note*.

⁷ *Benode Lal Pakrasy v. Pitan Chunder Pakrasy*, (1897) 2 Calc. W. N., cccxiv.

⁸ *Joy Mungul Singh v. Mohun Ram*, (1869) 12 W. R., 397; 8 B. L. R., 319, *note*.

⁹ *Bhagirath v. Ram Ghulam* (1882) 4 All., 237. But see, *Waliullah v. Ghulam Ali*, 1 All., 535; *Lekhray Singh v. Dulhama*, (1882) 4 All., 302.

¹⁰ *Dutto Singh v. Dorad*, (1883) 9 Calc., 575.

¹¹ *Kupa Rau v. Venkataramayyar*, (1882) 4 Mad., 311.

¹² *Roberts v. Harrison*, (1881) 9 C. L. R., 209; 7 Calc., 333.

¹³ *Jagat Sunder v. Sonatan*, (1870) 5 B. L. R., 377.

¹⁴ *Joy Mungul Singh v. Mohun Ram*, (1869) 12 W. R., 397; 8 B. L. R., 319, *note*.

¹⁵ *Narsing v. Nasser*, (1890) 17 Calc., 832.

Decree—If the award has not been filed, it is doubtful if a decree can be given.¹

Notice: revision—It is a material irregularity if the Court gives judgment without issuing notice, and the judgment will be set aside on revision.²

Limitation—See art 176, Sched II, Act XV of 1877, (Art 178, Sch I, Act IX of 1908) Limitation begins to run from the time the award arrives at the Registrar's office for the purpose of being filed.³

11. Upon any reference by an order of the Court, the arbitrator or umpire may, with the leave of the Court, state the award as to the whole or any part thereof in the form of a special case for the opinion of the Court, and the Court shall deliver its opinion thereon, and such opinion shall be added to and form part of the award.

Statement of special case by arbitrators or umpire.

Act XIV of 1882, s. 517.

This paragraph applies to H. C. and Prov. S. C. C.

The Court has no power to sanction a rule made by the arbitrators, making the payment of their fees a condition precedent to their hearing the reference.⁴

Power to modify or correct award.

12. The Court may by order, modify or correct an award,—

- (a) where it appears that a part of the award is upon a matter not referred to arbitration and such part can be separated from the other part and does not affect the decision on the matter referred; or
- (b) where the award is imperfect in form, or contains any obvious error which can be amended without affecting such decision; or
- (c) where the award contains a clerical mistake or an error arising from an accidental slip or omission.

Act XIV of 1882, s. 518

This paragraph applies to H. C. and Prov. S. C. C.

The arbitrators should confine their enquiry and the evidence to the matters referred,⁵ since an award on a matter not referred is null and void.⁶ An award that goes beyond the terms of reference is to that extent *ultra vires*.⁷ Where

¹ *Himatoollah v. Heeran*, (1870) 13 W. R., 62.

² *Rangasami v. Mattusami*, (1888) 11 Mad., 144; *Chatarbhuj Das v. Ganesh Ram*, (1898) 20 All., 474.

³ *Nobin Kally Dabee v. Ambica Churn Banerjee*, (1901) 5 Calc. W. N., 813.

⁴ *Roberts v. Steel*, (1881) 8 C. L. R., 439.

⁵ *Krishna Kanta v. Bidya Sundari*, (1868) 2 B. L. R., App., 25.

⁶ *Moshahel Singh v. Konomutty*, (1871) 15 W. R., 172; *Jafri Begum v. Syed Ali Raza*, (1900) L. R., 23 I. A., 111; 5 Calc. W. N., 585; 23 All., 383.

⁷ *Mumtaz Ali v. Sakkwat Ali*, (1900) 5 Calc. W. N., 681; 23 All., 294.

the Judge, and others by the parties themselves given, instead of mixing them all up and

Clause (c) is an innovation which speaks for itself.

13. The Court may also make such order as it thinks fit respecting the costs of the arbitration where any question arises respecting such costs and the award contains no sufficient provision concerning them.

Act XIV of 1882, s. 519

This paragraph applies to H. C. and Prov. S. C. C.

If the submission does not leave the question of costs to the arbitrators, they cannot enter into the question, and if they do, the Judge should refuse to file the award.² But when all matters in dispute between the parties are referred to an arbitrator, he has power to deal with the costs.³

It would seem as if the questions of costs was left wholly to the discretion of the Court. Where all matters in difference between the parties in the suit were referred to arbitration under an order of the Court: *held*, that the arbitrators had power to award interest after the date of the submission and to deal with the costs of the reference and award.⁴

Where award or matter referred to arbitration may be remitted.

14 The Court may remit the award or any matter referred to arbitration to the re-consideration of the same arbitrator or umpire, upon such terms as it thinks fit,—

- (a) where the award has left undetermined any of the matters referred to arbitration, or where it determines any matter not referred to arbitration, unless such matter can be separated without affecting the determination of the matters referred;
- (b) where the award is so indefinite as to be incapable of execution;
- (c) where an objection to the legality of the award is apparent upon the face of it.

Act XIV of 1882, s. 520

This paragraph applies to H. C. and Prov. S. C. C.

Award: binding.—Unless the Court had no power to refer, it cannot go behind the award,⁵ and give something not allowed by it.⁶ Where an award,

¹ *Bhogoo Nundun v. Bunwaree*, (1865) 3 W. R., 27.

² *Daglus v. Bhukan*, (1857) 9 Bom., 82.

³ *Muddoooodun v. Koylash Chunder*, 2 Ind. Jur., N. S., 12.

⁴ *Mohanal v. Nathuram*, (1868) 1 B. L. R., O. C. J., 144.

⁵ *Kalian Das v. Ganga*, (1843) 5 All., 500.

⁶ *Gopal Chunder v. Brojen Lal Gomar*, (1879) 5 C. L. R., 333.

which purported to be a considered award of the arbitrators, framed after consideration of the statements of the parties and the evidence of witnesses, was found in reality to be merely the adoption by the arbitrators of an agreement arrived at and signed by the parties to the reference, it was held that this would not prevent the award being a valid and binding award between the parties.¹

Construction—The Court must construe an award by the language of the award itself, and not by the oral evidence of the arbitrators.² An award drawn up by an unprofessional arbitrator in India is not to be construed according to the same principles as an award settled by counsel or a solicitor in England, but in accordance with what may reasonably be supposed to have been the intentions of the arbitrator.³

Remit—If, on a perusal of the award and the record, the Court finds that the arbitrators have fallen into such mistakes or omissions as cannot be amended under the last paragraph, of this Schedule it must return the award for reconsideration,⁴ the Court cannot decide such matters of its own motion.⁵ On the other hand, the Court should be careful not to remit a case unnecessarily.⁶

A suit having been referred to arbitration was dismissed by the arbitrators for default, whereupon the plaintiff objected to the award and charged the arbitrators with collusion. The Judge, finding that the charge was not made out, referred the matter back to the arbitrators for a proper award. *held*, that the plaintiff's revocation of his consent to the reference did not put an end to the arbitrator's power.⁷

Undetermined.—If, under a general reference, the arbitrators given costs but omit to give interest, the award should be remitted.⁸

Where the arbitrators have neglected to decide issues essential to the determination of the case, and refuse to do so when the case is remitted, the Court must try the case.⁹ But a separate finding on each issue is not necessary when the whole matter in issue between the parties is decided by the arbitrators.¹⁰ The condition that the award shall dispose of all matters referred to arbitration may be waived by the consent of the parties before the arbitrators.¹¹

Apparent illegality—An award cannot be remitted under this paragraph unless the illegality is apparent on the face of it,¹² but if illegal or defective on its face, it should be at once remitted.¹³

Where plaintiff and one of three defendants submitted their dispute to arbitration. *held*, the award was not void as between them, because the other defendants had not joined in submitting the case to arbitration.¹⁴

Oath of a party—Where the plaintiff in a referred case agreed to abide by the oath of the defendant (given on an idol) and an award was made accord-

¹ Gohardhan v. Jaiskisen, (1900) 22 All., 224.

² Guneshee v. Chotay Lal, (1880) 3 All. H. C., 117.

³ Abdul Majid v. Kadri Begam, (1898) 20 All., 245.

⁴ Mohun Kishen v. Bhoobun, (1867) 7 W. R., 406.

⁵ Luchmee Narain v. Pyle, (1879) 2 All. H. C., 150.

⁶ Taranath Chowdhry v. Mamek Chunder, 14 W. R., 469.

⁷ Ablakhee Koor v. Oolun, (1871) 15 W. R., 331.

⁸ Phuran v. Bahoran, (1883) 7 All. H. C., 367.

⁹ Jonardon v. Sambhunath, (1889) 16 Cal., 805.

¹⁰ George v. Vastian Soury, (1899) 22 Mad., 202.

¹¹ Makund Ram v. Saluq Ram, (1894) 21 Cal., 590, L. R., 21 I. A., 47.

¹² Nanak Chand v. Ram Narayan, (1879) 2 All., 181.

¹³ Luchmee Narain v. Pyle, (1879) 2 All. H. C., 150.

¹⁴ Bishoka v. Ananto Lal, (1879) 4 C. L. R., 65.

ingly; *held*, the award was good,¹ but all the parties must join in the agreement.²

Limitation.—See art. 158, Sched. II, Act XV of 1877.

15. (1) An award remitted under paragraph 14 becomes void on failure of the arbitrator or umpire to re-consider it. But no award shall be set aside except on one of the following grounds, namely:—

- (a) corruption or misconduct of the arbitrator or umpire;
- (b) either party having been guilty of fraudulent concealment of any matter which he ought to have disclosed, or of wilfully misleading or deceiving the arbitrator or umpire;
- (c) the award having been made after the issue of an order by the Court superseding the arbitration and proceeding with the suit or after the expiration of the period allowed by the Court, or being otherwise invalid.

(2) Where an award becomes void or is set aside under clause (1), the Court shall make an order superseding the arbitration and in such case shall proceed with the suit.

Act XIV of 1882, S. 521.

This paragraph applies to H. C. and Prov. S. C. C.

An award remitted becomes void if the arbitrators or umpire refuse or refuses to reconsider it, without any proof of corruption or misconduct.³

An award has no effect so long as there is a judicial order setting it aside.⁴

Corruption or misconduct.—Corruption or misconduct of the arbitrator or umpire
 look carefully at the award
 the ground of
 rendered their
 Court should
 nt partiality on
 that they had
 accepted;⁵ or

¹ Bhagirath v. Ram Ghulam, (1882) 4 All., 283, but see, Wallinullah v. Ghulam Ali, (1876) 1 All., 535.

² Lekhraj Singh v. Dulhans, (1882) 4 All., 302.

³ Mohun Kishen v. Bhooban, (1867) 7 W. R., 406; Deb Narain v. Rajmonee, (1865) 3 W. R., 108.

⁴ Fitzpatrick v. Macnaghten, (1874) 21 W. R., 261.

⁵ Puresh Nath v. Nolan Chunder, (1869) 12 W. R., 93. See, Sham v. Misri (1867) 29 All., 426; 15 B. L. R., App., 77, note, (doubted in Bykunt Nath v. Prionath, (1862) 22 W. R., 447.

⁶ Senuk Kachree v. Oree, (1870) 2 All. H. C., 241.

⁷ Bykunt Nath v. Prionath, (1874) 22 W. R., 447; Nainsukh v. Umadai, (1885) 7 All., 273, (but see case at 12 W. R., 97).

⁸ Jay Mungul Singh v. Mohan Ram, (1875) 23 W. R., 429; Har Narain v. Bhagwant, (1888) 10 All., 137, (but see L. R., 18 I. A., 55, 13 All., 300).

that, though they had awarded damages to plaintiff, they made him pay costs,¹ or that their award is erroneous,² or that they decided the case against the written statement of the defendant,³ or that they received and decided the case on what was not legal evidence,⁴ or the mere circumstance that the arbitrators had some interest in the subject-matter of the suit,⁵ or that one of the parties, through the fault of his agent, had no knowledge of the proceedings,⁶ or that the parties did not concur⁷ is insufficient to set aside an award.

But an award will be set aside for anything known as misconduct in English law.⁸ The Code implies the arbitrators shall all be present at such meetings [as are essential to the validity of the award,⁹ and when two out of three arbitrators examined witnesses in the absence of the third, the award was set aside.¹⁰ So, where one of the arbitrators who never attended or took any interest in the proceedings signed the award,¹¹ when three out of five arbitrators were not present and did not sign the award, though it purported to be signed by all of them,¹² where the arbitrators improperly added another to their number,¹³ or refused to hear witnesses produced by either party,¹⁴ or took evidence and received documents without giving the other side an opportunity of meeting and answering such evidence or seeing the documents and meeting the inferences deducible from them,¹⁵ or held meetings in the absence of one of the parties, and did not give them a fair and reasonable opportunity of being heard,¹⁶ the awards were set aside.

Absence—It is the duty of all the arbitrators to attend every meeting which takes place, and they ought all to act together in every stage of the proceeding.¹⁷ So, where four out of five arbitrators after having made their award, granted an application for rehearing, but before the matter was reheard one of the four died, and an order striking off the application was made by two of the surviving arbitrators, *held*, that the award was not valid.¹⁸

But where two of the five arbitrators, who were pleaders on either side, ceased with the consent of the parties and argued the matter before the other arbitrators, the award was held valid, inasmuch as the order of reference provided that in the event of the absence of two arbitrators, the arbitration should be continued by the other three.¹⁹

¹ *Mohendronath Bose v Nussee*, 1 Ind. Jur., N. S., 224.

² *Naser Ali v Tinoo Dossia*, (1866) 6 W. R., 95.

³ *Gooroo Churn v Ram Dhur*, (1867) 7 W. R., 28.

⁴ *Howard v. Wilson*, (1879) 4 Cal., 231, *Suppu v Gobindaacharyar*, (1888) 11 Mad., 85.

⁵ *Senuk Kachee v Oree*, (1870) 2 All. H. C., 241.

⁶ *Mackenzie v Hume*, 1 Tay. and Bell, 41.

⁷ *Lil Mohun v Surya*, (1907) 11 Cal. W. N., 1152.

⁸ *Ganga Sahai v. Lekhray Singh*, (1887) 9 All., 253.

⁹ *Nand Ram v Fakir Chand*, (1885) 7 All., 523.

¹⁰ *Thammuraju v Bapiraju*, (1889) 12 Mad., 113.

¹¹ *Ram Guttee v Thikoor Doss*, (1874) 22 W. R., 418, *Sreenath Ghose v. Raj Chunder*, (1867) 8 W. R., 171.

¹² *Ram Narain Roy v Bij Nath Mall*, (1902) 29 Cal., 36.

¹³ *Phiran v Bahoran*, (1875) 7 All. H. C., 367.

¹⁴ *Rughoobur Dyal v Maina Koer*, (1882) 12 C. L. R., 561.

¹⁵ *Cursetji Jehangir v Crowder*, (1894) 18 Bom., 299.

¹⁶ *Toolsimony Dass v. Sadevi Dass*, (1899) 3 Cal. W. N., 361.

¹⁷ *Sreenath v. Rajchunder*, (1862) 8 W. R., 171; but see, *Nadhar v. Gobind* (1905) 2 Cal. L. J., 61.

¹⁸ *Boonjad Mathoor v. Nathoo Shahoo*, (1878) 3 Cal., 375; 1 C. L. R., 455.

¹⁹ *Debendra Nath v. Abhoy Charan*, (1893) 9 Cal., 905; 12 C. L. R., 525.

An arbitrator may delegate to a third party the performance of acts of a ministerial character, so long as he exercises his own judgment on the matters referred.¹

The fact that the arbitrators had failed to account for delay in making an award does not justify the presumption of fraud.² The term "misconduct" does not necessarily imply "corruption".³

Within the period allowed.—An award after the time allowed is invalid,⁴ but the Court may complete it.⁵ *ante*.

Limitation.—For limitation of applications to set aside an award, see art. 138, Sched II, Act XV of 1877.

Appeal.—An order refusing to set aside an award is a judgment and an appeal lies under s. 15 of the Letters Patent.⁶ An appeal lies from the finding of a first Court on the question of misconduct by arbitrators.

Revision.—An order setting aside an award on the ground of misconduct of one of the arbitrators is not subject to revision.⁷ An error of law does not vitiate an award, and the High Court cannot interfere in revision on this ground.⁸ This paragraph does not deal with question of jurisdiction but specific grounds on which awards may be set aside if a subordinate Court in setting aside an award, takes an erroneous view of what amounts to misconduct, the High Court cannot interfere under s. 100.⁹

16 (1) Where the Court sees no cause to remit the award or any of the matters referred to arbitration for re-consideration in manner aforesaid, and no application has been made to set aside

¹ *Batta v. Municipal Committee of Lahore*, (1901) 14 I. R., 29 I. A., 168; 20 Calc., 834, (1902) 7 Calc. W. N., 82.

² *Sylappa v. Detchand*, (1902) 26 Bom., 132.

³ *Kali Charan Sirdar v. Sarat Chunder Chowdhury*, (1902) 7 Calc. W. N., 515; 30 Calc., 397. See, as to misconduct, *Adams v. Great North Scotland Ry.*, App. Cas. (1891), p. 41.

⁴ *Har Narain v. Bhagwant*, (1890) 14 I. R., 18 I. A., 55; 13 All., 300; *Ram Manohar v. Lal Bichari*, (1892) 14 All., 313; *Lakshminarasimham v. Somasundaram*, (1892) 15 Mad., 394; *Gauri Shankar v. Babban*, (1892) 14 All., 347; *Bhagwan Dass v. Nuni Lal*, (1886) 12 Calc., 173. *Simson v. Venkatagopalam*, (1886) 3 Mad., 475.

⁵ *Gauri Shankar v. Baldev Lal*, (1892) 14 All., 347.

⁶ *Lakshminarasimham v. Somasundaram*, (1892) 15 Mad., 394; *Badrī Narain v. Sheo Koer*, (1890) 17 Calc., 512; 14 I. R., 17 I. A., 1; *Bhagwan Das v. Abu Ahmed*, (1892) 16 Bom., 263.

⁷ *Asadullah v. Mahammad Nur*, (1905) 27 All., 459, and see, *Har Narain v. Shamu*, (1889) 13 Bom., 119; *Har Narain v. Shamu*, 14 I. R., 18 I. A., 55; *Arumugam v. Ram v. Bhawan Din Ram*, (1901) 26 All., page 1171, *ante*.

⁸ *Sudevi Devi v. Tudeenmoney Dasse*, (1898) 3 Calc. W. N., 317; 26 Calc., 361.

⁹ *Chatter Singh v. Gangai*, (1883) 5 All., 293.

¹⁰ *Ghulam Khan v. Muhammad Hassan*, (1902) 29 Calc., 167; 14 I. R., 29 I. A., 51; 6 Calc. W. N., 226.

¹¹ *Kali Charan Sirdar v. Sarat Chunder Chowdhury*, (1902) 7 Calc. W. N., 515; 30 Calc., 397.

the award, or the Court has refused such application, the Court shall, after the time for making such application has expired, proceed to pronounce judgment according to the award.

(2) Upon the judgment so pronounced a decree shall follow, and no appeal shall lie from such decree except in so far as the decree is in excess of, or not in accordance with, the award.

Act XIV of 1882 S. 522 This para applies to H. C. and Prov. S. C. C.

Sees no cause—See *Atty. Genl v. Emerson*¹

Award.—The word “award” as used in the last sentence, means the award given by the arbitrators². But the Court in passing judgment must confine itself to the plaintiff’s claim and give a decision thereon³. When referees are in effect valuers rather than arbitrators, no judgment can be given in terms of their award⁴.

Limitation.—The period of limitation for an application under this paragraph is ten days,⁵ and judgment should not be delivered until the ten days have expired⁶. A suit based upon an award is not barred by art. 91 of the Limitation Act, merely because it impugns part of it as invalid and *ultra vires*.⁷

Impugning award.—A party unpugning an award and seeking to set it aside is not bound to contest the proceedings, step by step, and appeal against every interlocutory order. He may advance all his objections when the award is delivered⁸. But he should be careful to bring to the notice of the Court within the ten days any objection he may have to urge or any defect he may perceive,⁹

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or
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though the judgment does not embody a suggestion of the majority of the arbitrators which was mere surplusage,¹⁰ and the matter cannot be remanded to the arbitrators¹¹. But where a party did not object in the first Court that the award was invalid having been made after the time allowed, it was held that

¹ 10 Q. B. D., 191, p. 209, *Sir John Moore Gold Co., Ltd.*, 12 Ch. D., 325.

² *Jawahar Singh v. Mul Raj*, (1886) 8 All., 449.

³ *Tara Nath v. Manick Chunder*, (1870) 14 W. R., 469.

⁴ *Chorney Money v. Ram Kinkar Dutt*, (1901) 28 Cal., 155, 5 Cal. W. N., 242.

⁵ Act XV of 1887, *Schd. II*, art. 158.

⁶ *Ganga Narain v. Ram Chand*, (1873) 20 W. R., 311.

⁷ *Jafri Begum v. Syed Ali Raza*, (1900) L. R., 23 I. A., 111, 5 Cal. W. N., 585; 23 All., 383.

⁸ *Sheenath v. Rammath*, (1863) 10 Moo. I. A., 413, 5 W. R., P. C., 21.

⁹ *Biney Madhub v. Harry Mohun*, 2 Ind. Jm., N. S., 16.

¹⁰ *Sashit Charan v. Tusk Chaudhry*, (1871) 8 B. L. R., 316, 15 W. R., F. B., 9.

¹¹ *Protab Chunder v. Huro Monee* (1875) 21 W. R., 183; and see *Joy Mungul Singh v. Mohun Ram*, (1874) 23 W. R., 429.

¹² *Ramanoogra Chobey v. Pntmoorti*, (1867) 7 W. R., 205; *Sreenath v. Raj-chunder*, (1867) 8 W. R., 171.

¹³ *Ishu Bux, in the matter of*, (1870) 5 B. L. R., App., 75.

¹⁴ *Surboreo Kant v. Asmita Kant*, (1873) 20 W. R., 226; 12 B. L. R., App., 10.

¹⁵ *Pohlar Pershal v. Panzum*, (1870) 2 All. H. C., 235.

the first Court, he could urge in the
 1 on the other hand, it has been held
 es, instead of ten days, were only
 which a decree was given and the
 proper remedy was by review.²

within ten days can
 15 of this Schedule.³
 rence does either, and
 ly ratifies the action of
 cannot be questioned.⁴
 efits arising therefrom,
 the award cannot be impeached.⁵ Once an award has been passed and a decree
 made on it, neither it nor the decree can be modified.⁶ In a suit under the
 Specific Relief Act to have an award declared null and void and for an injunction
 against the defendants to restrain them from suing the plaintiff on the award,
held, that the plaintiffs were not entitled to a decree, as they had not shown that
 the award, if left outstanding, would cause them serious injury, nor had their
 conduct been such as to call for an exercise of the Court's discretion under
 s 39.⁷

Appeal—Finality follows the award.⁸ So, there must be a valid award;⁹
 made within the period allowed by the Court,¹⁰ though not submitted to the
 Court within that time;¹¹ and though a trifling addition may not affect the
 the award
 pealable.¹²
 is made an
 a decree
 ere might
 ch alleged
 ecre and
 render the

¹ *Chuhra Mal v. Hari Ram*, (1896) 8 All., 548.

² *Monji v. Malijakel*, (1878) 3 Mad., 59.

³ *Muhammad Abid v. Muhammad*, (1896) 8 All., 61; and *Ram Narain Roy v. Baij Nath Malla*, (1902) 29 Cal., 36.

⁴ *Saturjit Pertap v. Dullna Gulah Koer*, (1897) 24 Cal., 469.

⁵ *Brijmohan v. Shiam Singh*, (1902) 24 All., 161.

⁶ *Ahmed v. Essa*, (1893) 17 Bom., 657; 18 Bom., 405.

⁷ *Vulley Mahomed v. Dittubhoj*, (1401) 23 Bom., 10.

⁸ *Shamra Sundaram v. Alamel Jathif* (1900) 27 Cal., 61; 4 Cal. W. N., 92; 1 Cal., 167; 6 Cal. W. N., 226, cited to in *Janokey Nath Roy v. Debendra Nath v. Sarbamangola*.

⁹ *Joy Prokash v. Sheo Golam*, (1885) 11 Cal., 37; *Debendranath v. Aubhoy*, (1883) 9 Cal., 905; *Komlu Achen v. Pangl Achen*, (1898) 21 Mad., 405; *Indur Subbarani v. Kamaladai Rajamannar*, (1904) 26 Mad., 47; *Ramesh v. Karunamoorthy*, (1906) 33 Cal., 498.

¹⁰ *Chuha Mal v. Hari Ram*, (1896) 8 All., 548.

¹¹ *Debendra Nath v. Sarbamangala*, (1882) 8 Cal. W. N., 916.

¹² *Harn Soonduree Debes v. Sreedhur Bhattacharjee*, (1872) 17 W. R., 352.

¹³ *Jawahar Singh v. Mul Raj*, (1886) 8 All., 449.

¹⁴ *Gourchunder v. Sahay*, (1872) 17 W. R., 30; *Madhusudan v. Ooldito Chunder*, (1867) 1 W. R., 85; 8 R. L. R., 316, *note*; *Ramireddy v. Mummureddy*, (1879) 5 Mad. H. C., 404; *Komlu Achen v. Pangl Achen*, (1898) 21 Mad., 405.

¹⁵ *Nizamuddin v. Tammanna*, (1907) 26 Mad., 76.

award no award in law;¹ nor to impugn the validity of an award.² But an appeal will lie if the decree is in excess of the award, or not in accordance with it, or there is no valid award, or the Court has no jurisdiction to hear the suit.³ So that if some of the parties have not joined in the reference,⁴ or the matter is not in issue,⁵ or there is no final award,⁶ or an award with a suggestion, and the decree does not follow the award exclusive of the surplusage suggestion;⁷ or if it give an interest which the arbitrators have not awarded,⁸ an appeal will lie. And where the Munsiff before the expiration of ten days discussed the evidence and delivered a judgment on the merits which coincided with the award: *held* that the award was not set aside, and that an appeal lay.⁹ And void *ab initio*,¹⁰ or *e. g.*, when the arbitrator was assured of this fact was made before the arbitrator was appointed;¹¹ or the debtor of one of the parties and this fact was not disclosed.¹² When a decree has been made upon a judgment given upon an award, and is not in excess of, and is in accordance with the award an appeal from such decree will lie on the ground that the so-called award upon which the judgment and decree are based is from one cause or another no award in law. Where an application to set aside an award on the ground of the misconduct of an arbitrator has been made under paragraph 15, and such application has been refused after judicial determination and a decree made under para. 16, which is in accordance with and not in excess of the award, no appeal based on any similar ground will lie from the decree so made. But an appeal will lie in the case

pointed in a suit under the N W P. Rent Act (1881).¹⁴

First Court—It has been held that the finality allowed to a decree passed under Act VIII only refers to the decree of the first Court, and where a Judge improperly admits an appeal from an order refusing to uphold, or a decree up-

¹ Ramdhan Singh v Karan Singh, (1890) 18 All., 414.

² Krishnan Chetti v Muthu Palandi, (1909) 22 Mad., 172.

³ Bindessuri v Jankee, (1889) 16 Calc., 482, and not otherwise, see, Bahadur Singh v Negi Raman, (1908) 30 All., 151.

⁴ Joy Prokash v. Sheo Golam, (1885) 11 Calc., 37.

⁵ Ram Bhunjun v Sreekishen, (1869) 11 W. R., 149.

⁶ Sashti Ch --- v --- (1871) 13 W. R. 300 L. R., 315;
Boonji v --- 15 v Brijpal,
(1884) 1885) 11 Mad.,
85 (con).

⁷ Surboree Kant v Anadya Kant, (1893) 20 W. R., 226, 12 B. L. R., App 10.

⁸ Mohun Lall v. Joy Narain, (1875) 23 W. R., 105.

⁹ Gunga Narain v. Ram Chand, (1873) 20 W. R., 311, 12 B. L. R., 48 see for an explanation of this case, Wazir Mahton v. Lalt Singh, 7 Calc., 166.

¹⁰ Saturjit Pertap v Dulhin Gulab Koer, (1897) 24 Calc., 469; Bidyadhar Panda v Nalu Behara, (1899) 4 Calc. W. N., xlvii; foll. in Walji v Ebn, (1903) 29 Bom., 285. Nandram Daluram v. Nemchand Jadarchand, (1893) 17 Bom., 357.

¹¹ Kali Prasanna Ghose v Rajani Kant Chatterji, (1893) 25 Calc., 141.

¹² Mahomed Wahidudin v. Hakimian, (1893) 25 Calc., 757.

¹³ Ibrahim Ali v Mohsin Ali, (1890) 18 All., 422, foll. in Najimuddin v. Puech, (1907) 29 All., 584.

¹⁴ Fahimunnissa v. Ajudhata Prasad, (1884) 6 All., 170.

as it did not appear he knew of the defect in the first Court, he could urge in the Court of appeal that there was no award;¹ on the other hand, it has been held that an appeal does not lie where the parties, instead of ten days, were only allowed a few hours to object to an award on which a decree was given and the proper remedy was by review.²

As to whether a person who does not impugn an award within ten days can object to it, the law is not settled. If an objection mentioned in para 15 of this Schedule³ is made, or consent to a reference does either, and the proceedings tacitly ratifies the action of void *ab initio* and cannot be questioned.⁴ If, on the other hand, the party accepting the benefits arising therefrom, and an award has been passed and a decree made on it, neither it nor the decree can be modified.⁵ In a suit under the Code of Civil Procedure, 1908, and void and for an injunction against the plaintiff on the award, as they had not shown that they had suffered any serious injury, nor had their interests been affected, the Court's discretion under

s 39⁷

Appeal—Finality follows the award.⁸ So, there must be a valid award;⁹ made within the period allowed by the Court,¹⁰ though not submitted to the Court within that time;¹¹ and though a trifling addition may not affect the decree,¹² the general rule is that a decree which does not strictly follow the award is appealable;¹³ and a decree strictly following an award is not appealable.¹⁴ If a decree is made on a decree which is not final, there might be an appeal from the decree which passed the decree and the award, if the award is of such a nature as to render the

¹ *Chuha Mal v. Hari Ram*, (1896) 8 All., 548.

² *Monyi v. Mahiyakel*, (1878) 3 Mad., 59.

³ *Muhammad Ali v. Muhammad*, (1896) 8 All., 64; and *Ram Narain Roy v. Haj Nath Malla*, (1902) 29 Calc., 36.

⁴ *Saturjit Persip v. Dulhan Gulah Koer*, (1897) 24 Calc., 469.

⁵ *Brijmohan v. Shiam Singh*, (1902) 24 All., 161.

⁶ *Ahmed v. Essi*, (1893) 17 Bom., 637; 18 Bom., 495.

⁷ *Valley Mahomed v. Dittabhog*, (1891) 25 Bom., 10.

⁸ *Shama Sundaram v. Abdul Latif*, (1900) 27 Calc., 61; 4 Calc. W. N., 92; 1901, 1 Calc. W. N., 226.

⁹ *Nath Roy v. Sarbamangala*, (1882) 8 Calc. W. N., 226.

¹⁰ *Ju v. ...*, (1897) 24 Calc., 469; *Bhadra Nath v. Aulhoy*, (1897) 24 Calc., 469; *Indur v. Karuna*, (1897) 24 Calc., 469.

¹¹ *Chuha Mal v. Hari Ram*, (1896) 8 All., 548.

¹² *Delendra Nath v. Sarbamangala*, (1882) 8 Calc. W. N., 916.

¹³ *Hari Sundar Datta v. Sreedhar Bhattacharjee*, (1872) 17 W. R., 352.

¹⁴ *Jawhar Singh v. Mal Raj*, (1886) 8 All., 419.

¹⁵ *Gourchunder v. Soley*, (1872) 17 W. R., 30; *Madhusudan v. Okloito Chunder*, (1879) 17 W. R., 85; 8 B. L. R., 316, note; *Ramreddy v. Mummareddy*, (1879) 5 Ind. H. C., 401; *Komba Achen v. Pangi Achen*, (1899) 21 Mad., 403.

¹⁶ *Nelsmarild v. Tiammana*, (1903) 26 Mad., 70.

award no award in law ;¹ nor to impugn the validity of an award.² But an appeal will lie if the decree is in excess of the award, or not in accordance with it, or there is no valid award, or the Court has no jurisdiction to hear the suit.³ So that if some of the parties have not joined in the reference ;⁴ or the matter is not in issue,⁵ or there is no final award,⁶ or an award with a suggestion, and the decree does not follow the award exclusive of the surplusage suggestion ;⁷ or if it give an interest which the arbitrators have not awarded,⁸ an appeal will lie. And where the Munsiff before the expiration of ten days discussed the evidence decided with the award : held that an appeal lay,⁹ and void *ab initio*,¹⁰ or *a. g.*, when the arbitrator was aware of this fact was made before the arbitrator was appointed ;¹¹ or the debtor of one of the parties and this fact was not disclosed.¹² When a decree has been made upon a judgment given upon an award, and is not in excess of, and is in accordance with the award an appeal from such decree will lie on the ground that the so-called award upon which the judgment and decree are based is from one cause or another no award in law. Where an application to set aside an award on the ground of the misconduct of an arbitrator has been made under paragraph 15, and such application has been refused after judicial determination and a decree made under para 16, which is in accordance with and not in excess of the award, no appeal based on any similar ground will lie from the decree so made. But an appeal will lie in the case

sion passed in accordance with the award of the majority of the arbitrators appointed in a suit under the N. W. P. Rent Act (1881).¹⁴

First Court—It has been held that the finality allowed to a decree passed under Act VIII only refers to the decree of the first Court, and where a Judge improperly admits an appeal from an order refusing to uphold, or a decree up-

¹ Ramdhan Singh v. Karan Singh, (1890) 16 All., 414.

² Krishnan Chetti v. Muthu Palani, (1899) 22 Mad., 172.

³ Bindeesuri v. Jankee, (1889) 16 Cal., 432, and not otherwise, see, Bahadur Singh v. Negi Raman, (1908) 30 All., 151.

⁴ Joy Prokash v. Sheo Golam, (1885) 11 Cal., 37.

⁵ Ram Bhunjun v. Sreekishan, (1869) 11 W. R., 140.

⁶ Sa. ————— L. R., 315 ;
 v. Brijpal,
 (1888) 11 Mad.,

⁷ Surboreo Kant v. Anadya Kant, (1893) 20 W. R., 226, 12 B. L. R., App. 10.

⁸ Mohun Lall v. Joy Narain, (1875) 23 W. R., 103.

⁹ Gunga Narain v. Ram Chand, (1873) 20 W. R., 311 ; 12 B. L. R., 48 see for an explanation of this case, Wazir Mahton v. Lall Singh, 7 Cal., 166.

¹⁰ Satrajit Pertap v. Dulhu Gulab Koer, (1897) 24 Cal., 469, Bidyadhar Panda v. Nalu Behara, (1899) 4 Cal. W. N., xlvii ; foll. in Walji v. Ebji, (1905) 29 Bom., 285. Nandram Daluram v. Nemchand Jadavchand, (1893) 17 Bom., 357.

¹¹ Kah Prosanna Ghose v. Rajani Kant Chatterji, (1899) 25 Cal., 141.

¹² Mahomed Wahidudin v. Hakiman, (1898) 25 Cal., 757.

¹³ Ibrahim Ali v. Mohsin Ali, (1890) 18 All., 422, foll. in Najimuddin v. Puch, (1907) 29 All., 534.

¹⁴ Fahimunnissa v. Ajudhain Prasad, (1884) 6 All., 170.

holding, an award, a special appeal lies to the High Court;¹ and though no appeal will lie from a judgment passed according to the award, an appeal will lie from orders passed in execution under s. 47.²

Second appeal.—Where there is no appeal, no second appeal lies.³ A second appeal lies from a decree of the lower appellate Court made in accordance with the award by an arbitrator, whose award the first Court had set aside.⁴

Revision.—If the Court has not jurisdiction to hear the case in which an award has been given,⁵ or has appointed arbitrators without jurisdiction, the decree on the award is subject to revision.⁶ When an order setting aside an award for the arbitrator's misconduct is made, the order is not subject to revision. It is an interlocutory order and may be made a ground of appeal against the decree.⁷

Res judicata.—A judgment and decree passed in terms of an award under this paragraph constitute a *res-judicata*.⁸

Private alienation.—A decree given in accordance with this paragraph is not a private alienation.⁹

Order of reference or agreements to refer.

17. (1) Where any persons agree in writing that any difference between them shall be referred to arbitration, the parties to the agreement, or any of them, may apply to any Court having jurisdiction in the matter to which the agreement relates, that the agreement be filed in Court.

(2) The application shall be in writing and shall be numbered and registered as a suit between one or more of the parties interested or claiming to be interested as plaintiff or plaintiffs, and the others or other of them as defendants or defendant, if the application has been presented by all the parties, or, if the application has been presented by plaintiff and the other otherwise, between the applicant as plaintiff and the other parties as defendants.

¹ Pureshnath v. Nabin Chander, (1893) 12 W. R., 93; 5 B. L. R., App., 77, note; foll. in Ganga Prasad v. a, 12 W. R., 409; Debandronath v. Obhoy Churn, (1869) 12 C. 1; Maina Koer, (1869) 1 Singh v. Sadulpal, (1888) 22 Mad., 172.

² Huntooslah v. Heerun, (1870) 13 W. R., 62.

³ Ganga Charan Roy v. Sasti Mandal, (1901) 6 Cal. N., 614.

⁴ Gnyama Charan v. Prohadi Durwan, (1903) 8 Cal. W., 390.

⁵ Vjdimatha v. Subramanya, (1885) 8 Mad., 235.

⁶ Pagarin v. Moilins, (1883) 6 Mad., 411.

⁷ Pagarin v. Moilins, (1883) 6 Mad., 411.

⁸ Pagarin v. Moilins, (1883) 6 Mad., 411.

⁹ Pagarin v. Moilins, (1883) 6 Mad., 411.

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¹⁰ Pagarin v. Moilins, (1883) 6 Mad., 411.

(3) On such application being made, the Court shall direct notice thereof to be given to all the parties to the agreement, other than the applicants, requiring such parties to show cause, within the time specified in the notice, why the agreement should not be filed.

(4) Where no sufficient cause is shown, the Court shall order the agreement to be filed, and shall make an order of reference to the arbitrator appointed in accordance with the provisions of the agreement or, if there is no such provision and the parties cannot agree, the Court may appoint an arbitrator.

Act XIV of 1882, s. 523 This paragraph applies to H. C. and Prov. S. C. C.

Persons agree—An agreement to refer an existing dispute to arbitration is binding and capable of enforcement like any other lawful agreement by the parties to it and by and against them only.¹

Where in a reference made, the arbitrators were empowered to make a partition but a power to sell was omitted *held*, on the award being made a rule of Court, that the Court had no power to order the sale of certain property which the arbitrators could not divide and recommended to the sold.² When both parties to a suit referred the matters in dispute to the Court, and agreed to abide by its decision, and the Court passed a decree awarding a certain sum to the plaintiff, *held*, that no appeal lay from the decree, the decision of the Court being in the nature of an arbitrator's award.³ Where an agreement to refer to arbitration is not in writing this provision does not apply, nor does it apply to an agreement to refer to arbitration in a pending suit.⁴

Revocation—It is almost a universal rule that a submission to arbitration is revocable before the award is made,⁵ but submission once made is not revocable without just cause.⁶ Telegrams sent by both parties to the arbitrators requesting them to stay further proceedings do not amount to revocation of their authority.⁷ A reference to arbitration may be revoked if it transpires that the arbitrator has been acting as *am-mukhtar* of one of the parties without remuneration or the arbitrator is indebted to one of the parties at the time of or after the reference and does not disclose the fact.⁸ Where matters in difference have been submitted to arbitration the submission is not revocable without just and sufficient cause. Where the submission has been made a rule of Court and has become the subject of a suit, it can only be revoked by leave of the Court upon good cause being shown.⁹

¹ Hira Singh v. Ganga Sahai, (1884) 6 All., 322

² Chumumony Dossie v. Nistarineo, (1878) 3 C. L. R., 337.

³ Zain v. Kalabai, (1899) 23 Bom., 752

⁴ Tincowri Dey v. Fakir Chand Dey, (1903) 30 Calc., 218

⁵ Surubjeet v. Gourree Pershad, (1867) 7 W. R., 269

⁶ Nagaswamy v. Rungasamy, (1885) 8 Mad., H. C., 46, Pestonjee Nusserwanjee v. Maneckjee, (1866) 3 Mad. H. C., 183; 12 Moo. I. A., 112, 10 W. R., P. C., 51, Santanya v. Ramaraya, (1871) 7 Mad. H. C., 257, Ramacoomar v. Katchand, (1874) 21 W. R., 395.

⁷ Kellie v. Fraser, (1877) 2 Calc., 445. As to "good cause," see the case of Coley v. Diocesi, (1890) 17 Calc., 200

⁸ Mahomed Wahiduddin v. Hakimian, (1902) 29 Calc., 278, 6 Calc. W. N., 235.

⁹ Petumalla v. Perumalli, (1904) 27 Mad., 112.

Agreement to refer—An agreement to refer is equally binding whether it is filed in Court or not.¹ An agreement entered into between the manager of a Tramway Company and one of its conductor's providing that the certificate of the manager in respect of the amount to be retained by the company as security shall be conclusive evidence between the parties is an agreement to refer to arbitration.² An agreement to refer the matters in dispute in a suit to arbitration whether filed under this paragraph or not, ousts the jurisdiction of the Court to proceed with the suit.³

When Court will not order agreements to be filed.—Where parties had executed a deed agreeing to refer all matters in dispute to the arbitration of three persons and one of the arbitrators refused to continue to act, and the other two consequently refused to proceed with the reference, the Court refused to order the agreement to be filed in Court;⁴ and when parties to a suit as well as those not engaged in the litigation agree to refer all their disputes to arbitration, the award should be filed, although the litigation is pending.⁵

As to an agreement to refer future disputes to an arbitrator, see the under-noted case.⁶ A general agreement to refer future differences to arbitration comes within this para, and may be filed in Court. The para is not confined to cases in which a dispute actually existing at date of agreement is agreed to be referred to arbitration. But the agreement must name the arbitrators. An agreement which provides for the future appointment of arbitrators does not fall within the paragraph. The effect of the last clause is to give the parties power to nominate the arbitrator even when they have agreed that he shall be appointed by the Court. In such cases, the Court must appoint their nominee;⁷ the wording is altered from that of the old Code.

As to an agreement to refer to a foreign tribunal see the under-noted case.⁸

May also nominate—Where the arbitrators are named, but there is no provisions for appointing an umpire, the Court cannot nominate one.⁹

Declining to act—If an arbitrator declines to act, the parties should be heard in regard to the appointment of his successor by the Court.¹⁰

Remand—A Court to which a matter has been referred for trial under O. XXI, r. 5, cannot act under this paragraph.¹¹

Appeal—A order disallowing the agreement to be filed is not open to appeal;¹² but if the Court has no jurisdiction and files the award, the procedure is subject to revision.¹³ A decision passed under this paragraph is a decree and an appeal lies;¹⁴ which is based on the ground that a proceeding under this section is not a suit.

¹ *Shro Dutt v. Shro Shankar Singh*, (1905) 27 All. 53; but see the distinction between the reference and an agreement to refer, see, *Adhikari v. Gursandas*, (1887) 11 Bom., 199, pp. 210, 212, 214; *Tahsil v. Richesher*, (1886) 8 All., 57.

² *Aghara Nath v. Calcutta Tramways Co.*, (1883) 11 Cal., 232.

³ *Shro Dutt v. Shro Shankar*, (1905) 27 All., 53.

⁴ *Brooke v. Surdjal*, (1873) 12 B. L. R., App., 13.

⁵ *Harivabhas v. Utanchand*, (1880) 4 Bom., 1.

⁶ *Wilcox and Storkey*, L. R., 1 C. P., 671.

⁷ *Fazulbhey Mehrali v. Bonlay & Fernia Navigation Coy.*, (1896) 20 Bom., 232.

⁸ *Law v. Garrett*, 8 C. D., 20.

⁹ *Muhammad Abid v. Muhammad*, (1886) 8 All., 61.

¹⁰ *Coley v. Dacosta*, (1895) 17 Cal.

¹¹ *Nand Ram v. Fakir Chand*, 70

¹² *Bhugwan v. Parmeshree*, (1885) (1881) 6 All., 186; *Peston*, H. C., 183; *Daya Nand v.*

C., 179; *Bhola* v. M., 5 All.,

Gobind Dyal, (1878) 3 Mad.

¹³ *Bonlay v. Jarjee*, (1837) 16

¹⁴ *Gowda B* from which

Arbitration Act—Paras 17, 19, 20, 21, are now superseded by the Arbitration Act, 1892, in places where that Act prevails.¹

Legal representative—The right of a legal representative to enforce a contract to refer depends on whether the right dealt with in the reference is of a personal character or one which survives to the legal representative. When it is one that survives, the proceedings before the arbitrator do not abate on the death of a party.²

18 Where any party to an agreement to refer to arbitration, or any person claiming under him, institutes any suit against any other party to the agreement, or any person claiming under him, in respect of any matter agreed to be referred, any party to such suit may, at the earliest possible opportunity and in all cases before issues are settled, apply to the Court to stay the suit, and the Court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the agreement to refer to arbitration, and that the applicant was, at the time when the suit was instituted and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the suit.

This is a new provision, and applies to H. C. and Prov. S. C. C. see sect 21 *post*.

19 The foregoing provisions, so far as they are consistent with any agreement filed under paragraph 17, shall be applicable to all proceedings under the order of reference made by the Court under that paragraph, and to the award add to the decree following thereon.

Provisions applicable to proceedings under paragraph 17

Act XIV of 1882, s. 524

This paragraph applies to H. C. and Prov. S. C. C.

So far as they may be consistent with any agreement—These words do not prevent a Court setting aside an award for misconduct of the arbitrators, though there is a clause in the submission, that the award should be accepted as final.³ They do not mean that the agreement must contain in every case an express provision as to what ought to be done if any arbitrator is unwilling to act, in order that a Judge may act in conformity to it, and that para. 5 has otherwise no application. The reasonable construction is that the action of the Judge under para. 5 should not be inconsistent with the agreement, if it contains any special provision on the subject.⁴

¹ Protap Chunder Dey v. Toolsey Dass Dey, (1902) 29 Cal., 793.

² Perumalla v. Perumalla, (1908) 27 Mad., 112.

³ Burla Ranga v. Kalipalli, (1853) 6 Mad., 368.

⁴ Balu Pattabhirama v. Seetharama, (1884) 17 Mad., 498.

Arbitration without the intervention of a Court.

20. (1) Where any matter has been referred to arbitration without the intervention of a Court and an award has been made thereon, any person interested in the award may apply to any Court having jurisdiction over the subject-matter of the award that the award be filed in Court.

(2) The application shall be in writing and shall be numbered and registered as a suit between the applicant as plaintiff and the other parties as defendants.

(3) The Court shall direct notice to be given to the parties to the arbitration, other than the applicant, requiring them to show cause, within a time specified, why the award should not be filed.

Act VIII of 1899. Sec. 20. Arbitration without intervention of a Court.

Any Court—These words are substituted for the *lowest Court*.

A valid award is operative although neither party has sought to enforce it by suit or by application under this paragraph.³

Referred—The natural guardian of a Hindu minor can refer.⁴ But not in a pending suit without the leave of the Court.⁵

May apply—In order to set the reference to arbitration and an award made by a party to the award, but any person interested in the award may apply from the date of the award—art. 176, written in it but the date it was handed over to the Court, verified, and issue notice calling on the parties to the arbitration to show cause why the award should not be filed.⁶

The arbitration award should be filed with the application;⁷ otherwise the Court cannot act;⁸ but secondary evidence of its contents is admissible if the

³ Gangadhar v. Mahula, (1881) 8 Bom., 20.

⁴ Narasingh Das v. Ajaykya Prasad, (1901) 31 Cal., 203.

⁵ Bhajahari v. Ikary, (1906) 33 Cal., 881.

⁶ Ramon Kissen v. Hurroddi, (1902) 19 Cal., 231.

⁷ Lakshmana Chettir v. Chennathambi, (1901) 21 Mad., 325.

⁸ Sashit Charn v. Tarack Chunder, (1871) 13 W. R. (F. B.), 9.

⁹ Bhayrub Jha v. Hanuman Dutt, (1866) 5 W. R., 123.

¹⁰ Seenuath Chatterjee v. Kalyash Chunder, (1874) 21 W. R., 218; Datto Singh v. Dossal, (1887) 9 Cal., 475.

¹¹ Jones v. Ledger, (1886) 4 All., 319.

¹² Himmattulla v. Heerun, (1870) 13 W. R., 62.

¹³ Anja v. Mahanandi, (1889) 12 Mad., 331.

award has been lost.¹ If the agreement to arbitrate provides that the award may be delivered bit by bit, each portion divided may be dealt with as a separate award under this para;² the application may be made without any valuation of suit.³ A civil Court can file an award to which agriculturist debtors are parties without adjusting the accounts under the Dekhan Agriculturists Relief Act, (Bombay Act XVII of 1879).⁴

Objections to factum or validity of submission and award—The Bombay High Court has held that where objections which, in the opinion of the Court, are not merely frivolous or colourable, are raised to the factum or validity of the submission and award, the Court has no jurisdiction to deal with them and must refer the parties to a regular suit;⁵ This opinion is, however, opposed to that of all the other High Courts in India.⁶ It has been held in this last case that the jurisdiction of the Court to order the award to be filed and to allow proceedings to be taken under it is not taken away by a mere denial of the reference to arbitration on an objection to the validity of that reference.⁷

Jurisdiction—The Court in which the application is made must have jurisdiction over the whole matter of the award, and if the value of the subject-matter is greater than the money limit of the Court's jurisdiction,⁸ or is from its nature not a matter of which the Court can take cognizance, the application should be returned.⁹

A and B entered into partnership for the purpose of carrying on a tea garden at Darjeeling. The partnership-deed was executed in Calcutta, but both parties resided out of jurisdiction. The deed contained provisions for reference to arbitration in case of dispute in matters relating to the partnership. Disputes having arisen, arbitrators were appointed in accordance with the terms of the deed, and they subsequently made their award in Calcutta to the following effect: that B's share in the partnership property should stand charged with the payment of a certain sum found to be due by him to the plaintiff A, that B should execute a mortgage to him as security for payment and that the tea garden should be sold in Calcutta. In an application under s. 327, Act VIII of 1859, to file the award, *held*, that the High Court at Calcutta had jurisdiction; that the award might be filed in any Court in which a suit in respect of the subject-matter of the award might be instituted, and as by reason of the execution of the deed of partnership, part of the cause of action arose in Calcutta such a suit could be instituted with the leave of the Court.¹⁰ Matters in dispute between certain parties were submitted to arbitration within the jurisdiction of the High Court and an award was made in due course. The matter to which the award related was the partition of property, part of which was situated outside the jurisdiction of the High Court. Application was then made that the award might be filed and a decree passed in its terms, when it was objected that the Court had no jurisdiction to entertain the application. *Held*, that the Court had jurisdiction inasmuch as the right to have the award filed had originated within the jurisdiction.¹¹

¹ Gopi Reddi v. Mahanandi, (1892) 15 Mad., 99.

² Shoshemukhi v. Nobin Chunder, (1879) 4 C. L. R., 92.

³ Khoda Buksh v. Mowla, (1870) 14 W. R., 235.

⁴ Mohan v. Tukaram, (1897) 21 Bom., 63.

⁵ Tejpur v. Mahaomed Jamal, (1896) 20 Bom., 595; Samad Nath v. Jai Shankar, (1887) 9 Bom., 254.

⁶ Amrit Ram v. Dastur Ram, 17 All., 21, referred to in Ganesh Singh v. Kashi Singh (1906) 28 All., 621; Chinta Malayya v. Thadi Gangireddi, (1897) 20 Mad., 89.

⁷ Mohamed Walidud-din v. Hakimian, (1898) 23 Cal., 757; 2 Cal. W. N., 520.

⁸ Gangappa v. Kapmappa, (1882) 5 Mad. H. C., 128, Balkrishna Bhashkar, *ex parte*, 2 Bom. H. C., 91.

⁹ Altaf Hossein v. Grish Chunder, (1871) 15 W. R., 556.

¹⁰ Kelie v. Fraser, (1877) 2 Cal., 445.

¹¹ Seshayya v. Chengayya, (1901) 24 Mad., 31.

Parties may submit matters pending in a suit, with other matters, for arbitration and determination under this paragraph,¹ and it is not necessary that the agreement to refer should be reduced to writing before it can be binding.²

Small Cause Court.—When a matter is referred to arbitration without the intervention of any Court, a Small Cause Court in the mofussil has jurisdiction to entertain an application under this paragraph if the matter referred relates to a debt not exceeding the value of the property of the defendant resides within its jurisdiction of a Court of Small Causes can file an award.⁴

Withdrawal—An application under this para can be withdrawn under s 373, old Code, prior to the delivery of judgment and preparation of the decree.⁵

Appeal—An appeal lies from an award under s 373, old Code.

Award—A document merely recommending a solution of the matters in dispute is not an award.⁶ If there was no matter in difference between the parties which could be referred to arbitration, the valuation made by three persons appointed by the plaintiff was not an award within the meaning of this paragraph.⁷

Functions of arbitrators—After an award has been made and handed in the parties, the functions of the arbitrators cease.¹⁰ Before effect can be given to an award by execution proceedings, there must be a judgment according to the award and a decree following thereon.¹¹

Suit—This paragraph is not imperative upon a person who seeks to enforce his award. He may do so in a regular suit,¹² or he may sue in the alternative on the original state of facts.¹³ Disputes between members of a Hindu family were referred to arbitrators, who made an award as to how the whole of the property should be divided. In pursuance of the award part of the moveable property was divided. Subsequently one of the members of the family died. The plaintiff, another member of the family, sued to enforce the award or in the alternative for partition. —*held*, (1) that the alternative claim for partition was barred by the award and (2) that s 525 old Code, did not preclude the plaintiff from suing to enforce the award.¹⁴ Where an award cannot be filed and a decree obtained

¹ *Thakurdoos Roy v. Hurraydoos Roy*, W. R., 1861, Muz., 21; *Horivalabdas v. Utamchand*, (1889) 4 Bom., 1.

² *Mulhoo Mamee v. Nilmonee*, (1872) 18 W. R., 373. See also, *Bahal Singh v. Shukar Ram*, W. R., (1864), 76.

³ *Elum Paramasick v. Solaithullah*, 1 B. L. R., A. C., 43; 19 W. R., 85; *Bridge v. Edulji*, (1877) 10 Bom. H. C., 54.

⁴ *Balkrishna v. Lakshman*, (1879) 3 Bom., 219. See also, *Simson v. McMaster*, (1890) 13 Mad., 344.

⁵ *Gauri Shankar v. Mauls Koer*, (1891) 31 Cal., 516.

⁶ *Mahomed Wahiduddin v. Hakiman*, (1888) 25 Cal., 757; 2 Cal. W. N., 529; (but see *Haranund v. Doyal*, (1896) 2 Cal. L. J., 142, and *Bihari v. Chunnai*, (1897) A. W. N., 118).

⁷ *Janki v. Gagan*, (1890) 3 All., 427; *Ponnusami v. Maudli Sundara*, (1904) 27 Mad., 255; *fol.*, in *Thiravengadath v. Vashistha*, (1906) 29 Mad., 201. See *note*, 104.

⁸ *Nandaboll Mookarjee v. Chunder Kant*, (1885) 11 Cal., 336.

⁹ *Mahabhoob v. Rameshwar Singh*, (1897) 20 Cal., 871.

¹⁰ *Datto Singh v. Dood*, (1887) 9 Cal., 575.

¹¹ *Edwardes v. Dewshi*, (1887) 7 Bom., 316; *Sahib Ram v. Kasee Nath*, (1874) 21 W. R., 205.

¹² *Nandappa Chetti v. Rayappa*, (1868) 4 Mad. H. C., 119.

¹³ *Parasanna v. Ramabhadra*, (1892) 15 Mad., 474. See also, *Jafri Begam v. Syed Ali Beg*, (1899) 5 Cal. W. N., 385; 23 All., 287.

¹⁴ *Satharaya v. Sathara*, (1897) 20 Mad., 491. But see, *Krishna Pandu v. Balaram*, (1896) 19 Mad., 291.

upon it under this paragraph, a party is not precluded from suing upon it. Secondary evidence of the contents of the award is admissible on proof of its being lost.¹

Show cause—The Court must proceed on affidavit or verified petition,² and confine its inquiry within the limits of ss. 14 and 15.³

In *Sreeram Chowdhry v. Denobundhoo*,⁴ Pontifex, J., intimated an opinion "that it was not intended that an award should be filed under this section, (s. 525, old Code) if either of the parties to the reference showed cause against it by affidavit or verified petition, within the provisions of ss. 520 and 521, old Code (paras. 14 or 15). In such cases, I think, it would be the duty of the Court, without inquiring into the validity of the cause so shewn, to refuse the application to file the award, and to leave the applicant to his remedy by suit, having regard to the fact that the Court has no power to deal with the award under 12 or to take action by remitting the award under s. 520, (old Code). The High Court of Bombay has refused to follow this expression of opinion.⁵ This decision of the Bombay High Court has been followed in the under-noted case,⁶ and by Divisional Benches of the Calcutta High Court;⁷ and of the Allahabad High Court.⁸ It is the duty of the Court to enquire into the validity of the objections raised and to determine whether the award should be filed or not.⁹

The existence of a difficult or doubtful question might be sufficient cause.¹⁰ To show cause does not mean to object, but to allege and prove sufficient cause.¹¹ An application for filing an award being registered as a suit, the defendant raised objections and the following issues were raised—(1) Whether a certain arbitrator was nominated or accepted by the defendant (2) Whether there was any and what illegality apparent in the award, and (3) Whether the proceedings were illegal. *Held*, that the defendant's objections embodied in these issues precluded the Court from filing the award.¹²

Amendment.—The Court has no power to amend an award under this para.¹³

Practice—An affidavit used on the original side of the High Court to oppose or show cause against a motion is, under the rules, filed in time if filed on or before the sitting of the Court on the day on which cause is in fact shown.¹⁴

¹ *Gopi Reddi v. Mahanandi Reddi*, (1892) 15 Mad., 99.

² *Ichamoyee v. Prosunno*, (1883) 9 Cal., 557.

³ *Bijadhur v. Monohari*, (1884) 10 Cal., 11, *Hurronath v. Nistarini*, (1884) 10 Cal., 74.

⁴ *Sreeram Chowdhry v. Deno Bundhoo*, (1881) 9 C. L. R., 147, 7 Cal., 419; and see, *Ichamoyee v. Prosunno* (1883) 9 Cal., 557, *Hussain v. Mohsin Khan*, (1876) 1 All., 156.

⁵ *Dandekar v. Dandekars*, (1882) 6 Bom., 663, and *Ishwardas v. Dosibai*, (1883) 7 Bom., 316.

⁶ *Dhanjibhai v. Mathurbhai*, (1904) 23 Bom., 287.

⁷ *Dutta Singh v. Dosad*, (1883) 9 Cal., 375, *Rang Lal v. Hem Narain*, (1885) 11 Cal., 166, but see, *Bindessuri v. Jankee*, (1899) 16 Cal., 482.

⁸ *Jones v. Ledgard*, (1886) 8 All., 349; *Jagan Nath v. Mannu*, (1894) 16 All., 231.

⁹ *Suryan Root v. Bhikari Raot*, (1894) 21 Cal., 213.

¹⁰ *Muhammed Esuf v. George*, (1882) 4 Mad., 387, see also *Sheard, ex parte*, 16 C. D., 107.

¹¹ *Rajmal Motiram v. Krishnavahad Mahapatra*, (1896) 20 Bom., 208; *Dandekar v. Dandekars*, (1882) 6 Bom., 663.

¹² *Venkatesh Khimol v. Chanapagada*, (1893) 17 Bom., 674.

¹³ *Alluakhu v. Jehangir*, (1873) 10 Bom. II C., 391. See, *Ghulam Khan v. Mahommed*, (1901) 29 Cal., 167.

¹⁴ *Hirva k Chund Golichu, in re*, (1880) 5 Cal., 603.

Consent—If good cause is shewn, the application should be dismissed, leaving the losing party to bring a regular suit,¹ but if both parties consent to have the enforcement of the award tried on application like a regular suit, neither of them can afterwards object to the jurisdiction on the Court.²

Court-fee.—The Court-fee required is not that on a suit but on an application.³

21. (1) Where the Court is satisfied that the matter has been referred to arbitration and that an award has been made thereon and where no ground such as is mentioned or referred to in paragraph 14 or paragraph 15 is proved, the Court shall order the award to be filed and shall proceed to pronounce judgment according to the award.

(2) Upon the judgment so pronounced a decree shall follow, and no appeal shall lie from such decree except in so far as the decree is in excess of or not in accordance with the award.

Act XIV of 1882, s. 526.

This paragraph applies to H. C. and Prov. S. C. C.

Where the Court is satisfied—This first sentence is an innovation in the text but the decisions under the former Code were to the same effect.⁴

The Court has no power to remit an award to private arbitrators over whose proceedings it has no control, but must ordinarily file the award, unless it acts on one or other of the grounds referred to in paras. 14 and 15.⁵

The plaintiff applied to file an award and for a decree in terms thereof, to

attachment
bound to
illegality

appearing on the face of it.⁶

A person cannot revoke a submission to arbitration without just and sufficient cause.⁷ Mere revocation does not bar the filing of an award;⁸ but if the agree-

¹ Palat Bhagut v. Monohur, (1882) 13 C. L. R., 171; Muhammad Nawaz v. Alam Khan, (1891) 18 Cal., 411; L. R., 18 L. A., 73.

² Hurrenath v. Nistarini, (1884) 10 Cal., 74.

³ Palat Bhagut v. Monohur, (1882) 13 C. L. R., 171; Khoda Bakhsh v. Mowla, (1870) 11 W. R., 255; Bishnur v. Monohur, (1884) 10 Cal., 11.

⁴ Jones v. Ledger, (1886) 9 All., 319; Hurrenath v. Nistarini, (1884) 10 Cal., 74; Butcher, Hindson v. Jankee, (1889) 16 Cal., 482; Ferozi v. Mahomed, (1905) 7 Bom. L. R., 708.

⁵ Daptoia v. Bhukan, (1885) 9 Bom., 82; Allarakhia v. Jehringir, (1890) 10 Bom. L. C., 391.

⁶ Dingarai v. Ujaisi, (1908) 22 Bom., 727.

⁷ Nagasamy v. Rungasamy, (1874) 9 Mad. H. C., 46.

⁸ Ramesh v. (1871) 7 Mad. H. C., 257.

ment to submit does not define the powers of the arbitrators,¹ or the whole award is not tendered;² or the arbitrators have been guilty of misconduct;³ or have gone beyond the deed of submission;⁴ or when the award leaves undetermined one of the principal subjects of dispute,⁵ the award should not be filed. If the award is filed, the Court should then proceed to pass judgment according to the award and draw up a decree,⁶ if the award be rejected it is not null and void and the applicant can sue to enforce it in a regular suit.⁷

Shown—The word "shown" is not equivalent to "alleged" but it is necessary that one of the grounds mentioned in para 14 or para 15, be proved to the satisfaction of the Court, before the Court is justified in refusing to file the award.⁸

Representation—Proceedings under this paragraph are of the nature of a suit, and a minor must be perfectly represented.⁹

Succession Certificate Act—See the under-noted case.¹⁰

Limitation—An application to pass judgment in terms of the award is not an application within the Limitation Act.¹¹ But a suit to enforce an award not being a suit to enforce a contract is governed by art. 144 of the Limitation Act.¹²

Appeal—See section 104 *ante* which states definitely the order in respect of awards which are now appealable.

Revision—If an objection raised is not of the kind referred to in paras 14 and 15, the Court should reject the application to file the award and leave the parties to a regular suit¹³ and so, if he refuses to file an award, his order is subject to revision.¹⁴

Effect of not filing the award—An award made by private submission may be valid and binding, though no proceedings under this paragraph have been taken to enforce it.¹⁵ It may be set up as a ground of defence in a suit relating to the subject-matter dealt with by it and will bar the suit.¹⁶

22 The last thirty-seven words of section 21 of the Specific Relief Act, 1877, shall not apply

Exclusion of certain words in the Specific Relief Act, 1877.

to any agreement to refer to arbitration, or to any award, to which the provisions of this schedule apply.

¹ Bindessuri v Jankee, (1889) 16 Cal , 482

² Raj Chunder v Brojendro Coomar, (1874) 21 W R , 182, Gopi v Mahanandi, 12 Mad , 331.

³ Nader Ali v Majoo, (1874) 21 W R , 377

⁴ Daglusa v Bhukan, (1885) 9 Bom , 82, Jaul Singh v Narain Das, (1880) 3 All., 541.

⁵ Dandekar v Dandekars, (1882) 6 Bom , 663

⁶ Himutollah v Heeran, (1870) 13 W R , 62

⁷ Kota Seetamma v Kolhpuria, (1893) 8 Mad H C , 81, Nursingh Gariwan v. Puttoo, (1873) 20 W. R. , 420, Baswantapa v Rama, (1885) 9 Bom , 86.

⁸ Jagan Nath v Maun Lal, (1894) 16 All , 241

⁹ Vasudev v Narayan, (1871) 9 Bom H C., 289

¹⁰ Ramchandrar v Sapa (1892) 16 Bom , 240.

¹¹ Ishwardas v Dostbar, (1883) 7 Bom , 316

¹² Sornavalli Ammal v Mathayya, (1900) 23 Mad , 393, see also, Sheo Narain v. Beni Madho, (1901) 23 All , 285

¹³ Bijadhar v. Monohur, (1884) 10 Cal , 11, Samal v. Jaishankar, 9 Bom., 254

¹⁴ Mana Vikrama v. Mahachery (1878) 3 Mad. 68. Daglusa v Bhukan, 9 Bom , 82, Bindessuri v Jankee, (1889) 16 Cal , 482

¹⁵ Surohject v Gourao Peshad, (1867) 7 W R , 269; See also, Ramyad Sahoo v. Doolar Sahoo, 9 W R , 441; Mohesh Chunder v Buloram, 6 W R , 194

¹⁶ Mohammed Newaz Khan v Alim Khan, (1891) 18 Cal , 414; L. R. , 18, 1 A.,

The last thirty seven words are :—

“but if any person who has made such a contract and has refused to perform it, sues in respect of any subject, which he contracted to refer, the existence of such contract shall bar his suit ; cf Arbitration Act, IX of 1899, paras. 3 and *sects 13, ante*.

23. The forms set forth in the Appendix, with such variations as the circumstances of each case require, shall be used for the respective purposes therein mentioned.

Forms.

APPENDIX.

No 1

APPLICATION FOR AN ORDER OF REFERENCE

(Title of suit)

- 1 This suit is instituted for *(state nature of claim)*
- 2 The matter in difference between the parties is *(state matter of difference)*
- 3 The applicants being all the parties interested have agreed that the matter in difference between them shall be referred to arbitration
- 4 The applicants therefore apply for an order of reference

A. B.

C D

Dated the day of 19

NOTE. If the parties are agreed as to the arbitrators it should be so stated.

No 3

ORDER OF REFERENCE

(Title of surt)

Upon reading the application presented on the _____ day of _____ 19____
it is ordered that the following matter in difference arising in this suit
namely —————

be referred for determination to X and Y, or in case of their not agreeing then to the determination of Z, who is hereby appointed to be umpire, and such arbitrators are to make their award in writing on or before the day of 19 , and in case of the said arbitrators not agreeing in an award the said umpire is to make his award in writing within months after the time during which it is within the power of the arbitrators to make an award shall have ceased

Liberty to apply

Given under my hand and the seal of the Court, this day of 19 .

Judge

No 3

ORDER FOR APPOINTMENT OF NEW ARBITRATOR

(Title of suit)

Whereas by an order, dated the _____ day of _____ 19____
[state order of reference and death, refusal, etc., of arbitrator], it is by consent
ordered that Z be appointed in the place of X (deceased, or as the case may be) to
act as arbitrator with Y, the surviving arbitrator, under the said order; and it is
ordered that the award of the said arbitrators be made on or before the
_____ day of _____ 19____.

Given under my hand and the seal of the Court this day of 19

Judge.

No 4

SPECIAL CASE.

(Title of suit)

In the matter of an arbitration between A. B. of and C. D. of ,
the following special case is stated for the opinion of the Court :—

[Here state the facts concisely in numbered paragraphs.]

The questions of law for the opinion of the Court are .—

First, whether _____

Secondly, whether _____

X.
Y.

Dated the day of 19 .

No 5

AWARD.

(Title of suit.)

In the matter of an arbitration between A. B. of and C. D. of :—

WHEREAS in pursuance of an order of reference made by the Court of
and dated the day of 19 the
following matter in difference between A. B. and C. D., namely, _____

_____ has been referred to us for determination ;

Now we, having duly considered the matter referred to us, do hereby make
our award as follows :—

We award—

(1) that _____

(2) that _____

Dated the day of 19 .

X.
Y.

THE THIRD SCHEDULE

EXECUTION OF DECREES BY COLLECTORS.

1 Where the execution of a decree has been transferred to the Collector under section 68, he may—

Powers of Collector

- (a) proceed as the Court would proceed when the sale of immoveable property is postponed in order to enable the judgment-debtor to raise the amount of the decree; or
- (b) raise the amount of the decree by letting in perpetuity, or for a term, on payment of a premium, or by mortgaging, the whole or any part of the property ordered to be sold; or
- (c) sell the property ordered to be sold or so much thereof as may be necessary.

Act XIV of 1882, s. 321

In Bombay it was held that a Judge, could recall a case sent to the Collector,¹ not so, in Allahabad.² He is limited to one of the three courses specified in this paragraph. He cannot allow payment by instalments.³

Procedure—When a decree is transferred in the North-West, the Collector's proceedings are not governed by the Code, but by the rules made by Government and s. 47 does not apply as such.⁴

Sale set aside—An application to set aside for a material irregularity should be made to the Collector,⁵ but an application under O. XXI, r. 91, by the purchaser on the ground that the judgment-debtor had no saleable interest in the property sold should be made to Court.⁶

2 Where the execution of a decree, not being a decree ordering the sale of immoveable property in pursuance of a contract specifically affecting the same, but being a decree for the payment of money in satisfaction of which the Court

Procedure of Collector in special cases.

¹ Mahadji v. Hari, (1883) 7 Bom., 332.

² Madho Prasad v. Hansa, (1883) 5 All., 314; doubtful—Hargovan v. Hira, (1884) 8 Bom., 301. See also Sander Das v. Manca Ram, (1879) 2 All., 407.

³ Mahadji v. Hari, (1883) 7 Bom., 312.

⁴ Madho Prasad v. Hansa, (1883) 5 All., 314; Keshabdeo v. Radhe Prasad, (1889) 11 All., 94.

⁵ Madho Prasad v. Hansa, (1883) 5 All., 314.

⁶ Nathu Mal v. Lohmi Narain, (1887) 9 All., 43; Keshabdeo v. Radhe Prasad, (1889) 11 All., 94; and see Takaddus v. Baldeo Das, (1890) 12 All., 604.

has ordered the sale of immoveable property, has been so transferred, the Collector, if, after such inquiry as he thinks necessary, he has reason to believe that all the liabilities of the judgment-debtor can be discharged without a sale of the whole of his available immoveable property, may proceed as hereinafter provided.

Act XIV of 1882, s 322.

- 3 (1) In any such case as is referred to in paragraph 2, the Collector shall publish a notice, allowing a period of sixty days from the date of its publication for compliance and calling upon—

Notice to be given to decree-holders and to persons having claims on property.

- (a) every person holding a decree for the payment of money against the judgment-debtor capable of execution by sale of his immoveable property and which such decree-holder desires to have so executed, and every holder of a decree for the payment of money in execution of which proceedings for the sale of such property are pending, to produce before the Collector a copy of the decree, and a certificate from the Court which passed or is executing the same, declaring the amount recoverable thereunder ;
- (b) every person having any claim on the said property to submit to the Collector a statement of such claim, and to produce the documents (if any) by which it is evidenced.

(2) Such notice shall be published by being affixed on a conspicuous part of the court-house of the Court which made the original order for sale, and in such other places (if any) as the Collector thinks fit ; and where the address of any such decree holder or claimant is known, a copy of the notice shall be sent to him by post or otherwise.

Act XIV of 1882, s 322 A.

4. (1) Upon the expiration of the said period, the Collector shall appoint a day for hearing any representations which the judgment-debtor and the decree-holders or claimants (if any) may desire to make, and for holding such inquiry as he may deem necessary for informing himself as to the nature and extent

Amount, of decrees for payment of money to be ascertained, and immoveable property available for their satisfaction

of such decrees and claims and of the judgment debtor's immoveable property, and may, from time to time, adjourn such hearing and inquiry

(2) Where there is no dispute as to the fact or extent of the liability of the judgment-debtor to any of the decrees or claims of which the Collector is informed, or as to the relative priorities of such decree or claims, or as to the liability of any such property for the satisfaction of such decrees or claims, the Collector shall draw up a statement, specifying the amount to be recovered for the discharge of such decrees, the order in which such decrees and claims are to be satisfied, and the immoveable property available for that purpose

(3) Where any such dispute arises, the Collector shall refer the same, with a statement thereof and his own opinion thereon, to the Court which made the original order for sale, and shall, pending the reference, stay proceedings relating to the subject thereof. The Court shall dispose of the dispute if the matter thereof is within its jurisdiction, or transmit the case to a competent Court for disposal, and the final decision shall be communicated to the Collector, who shall then draw up a statement as above provided in accordance with such decision.

Act XIV of 1882, s. 322 B.

This applies to H. C.

The assignees of a decree for money obtained against a person whose property has been taken over by the Collector under s. 325, Act X of 1877, whilst such property was under the management of the Collector, are not entitled to be placed on the list of creditors prepared by the Collector under this para. An application to be placed on the said list of creditors should be made to the Collector and not to the District Judge.¹

Practice.—An appeal from a decision under this paragraph by which a disputed claim is settled is in Madras treated as a miscellaneous appeal *i.e.*, an appeal from a decree not passed in a regular suit,² otherwise, in the North-West Province.³

5 The Collector may, instead of himself issuing the notices and holding the inquiry required by paragraphs 3 and 4, draw up a statement specifying the circumstances of the judgment-debtor and of his immoveable property so far as

Where District Court may issue notices and hold inquiry

¹ *Murari Das v. Collector of Ghazipur*, (1896) 18 All., 313.

² *Srinivasa v. Perin*, (1882) 4 Mad., 429; followed in *Narayan v. Elangudi*, (1886) 10 Bom., 278.

³ *Alomud Khan v. Madho*, (1883) 7 All., 565.

they are known to the Collector or appear in the records of his office, and forward such statement to the District Court; and such Court shall thereupon issue the notices, hold the inquiry and draw up the statement required by paragraphs 3 and 4 and transmit such statement to the Collector.

Act XIV of 1882, s. 312 C.

Under the Bengal, North West Provinces and Assam Civil Courts Act, 1887, the High Court has power to authorise Subordinate Judges and Munsiffs to take cognizance of references by Collectors under this paragraph; Act XII of 1887 s. 23 (2) (c).

6 The decision by the Court of any dispute arising under paragraph 4 or paragraph 5 shall, as between the parties thereto, have the force of and be appealable as a decree.

Act XIV of 1882, s. 322. D.

An appeal under this paragraph is a miscellaneous appeal and is not from a decree passed in a regular suit.¹

7. (1) Where the amount to be recovered and the property available have been determined as provided in paragraph 4 or paragraph 5, the Collector may,—

Scheme for liquidation of decrees for payment of money.

- (a) if it appears that the amount cannot be recovered without the sale of the whole of the property available, proceed to sell such property; or,
- (b) if it appears that the amount with interest (if any) in accordance with the decree, and, when not decreed, with interest (if any) at such rate as he thinks reasonable, may be recovered without such sale, raise such amount and interest (notwithstanding the original order for sale)—
 - (i) by letting in perpetuity or for a term, on payment of a premium, the whole or any part of the said property; or
 - (ii) by mortgaging the whole or any part of such property or
 - (iii) by selling part of such property; or
 - (iv) by letting on farm, or managing by himself or another, the whole or any part of such property for any form not exceeding twenty years from the date of the order of sale; or

¹ *Srinivasa v. Pania*, (1882) 4 Mad., 420. See also, *Narayan v. Bhingayant*, (1886) 10 Bom., 238. As to the Court fee duty, see the Court Fees Act Sched. 11 and *Ahmad Khan v. Madho Das*, (1885) 7 All., 563.

(v) partly by one of such modes and partly by another or others of such modes.

(2) For the purpose of managing the whole or any part of such property, the Collector may exercise all the powers of its owner

(3) For the purpose of improving the saleable value of the property available or any part thereof, or rendering it more suitable for letting or managing, or for preserving the property from sale in satisfaction of an incumbrance, the Collector may discharge the claim of any incumbrancer which has become payable or compound the claim of any incumbrancer whether it has become payable or not, and, for the purpose of providing funds to effect such discharge or composition, may mortgage, let or sell any portion of the property which he deems sufficient. If any dispute arises as to the amount due on any incumbrance with which the Collector proposes to deal under this clause, he may institute a suit in the proper Court, either in his own name or the name of the judgment-debtor, to have an account taken, or he may agree to refer such dispute to the decision of two arbitrators, one to be chosen by each party, or of an umpire to be named by such arbitrators.

(4) In proceeding under this paragraph the Collector shall be subject to such rules consistent with this Act as may, from time to time, be made in this behalf by the Local Government.

Act XIV of 1882, s. 323

8 Where, on the expiration of the letting or management under paragraph 7, the amount to be recovered has not been realized, the Collector shall notify the fact in writing to the judgment-debtor or his representative in interest, stating at the same time that, if the balance necessary to make up the said amount is not paid to the Collector within six weeks from the date of such notice, he will proceed to sell the whole or a sufficient part of the said property; and, if on the expiration of the said six weeks the said balance is not so paid, the Collector, shall sell such property or part accordingly.

Act XIV of 1882, s. 324

9 (1) The Collector shall, from time to time, render to the Court which made the original order for sale an account of all monies

Recovery of balance
(if any) after letting or
management.
Collector to render
amounts to Court

which come to his hands and of all charges incurred by him in the exercise and performance of the powers and duties conferred and imposed on him under the provisions of this Schedule, and shall hold the balance at the disposal of the Court.

(2) Such charges shall include all debts and liabilities from time to time due to the Government in respect of the property or any part thereof, the rent (if any) from time to time due to a superior holder in respect of such property or part, and, if the Collector so directs, the expenses of any witnesses summoned by him.

(3) The balance shall be applied by the Court—

(a) in providing for the maintenance of such members of the judgment-debtor's family (if any) as are entitled to be maintained out of the income of the property, to such amount in the case of each member as the Court thinks fit; and

(b) where the Collector has proceeded under paragraph 1, in satisfaction of the original decree if execution of which the Court ordered the sale of immoveable property, or otherwise as the Court may under section 73 direct; or

(c) where the Collector has proceeded under paragraph 2,—

(i) in keeping down the interest on incumbrances on the property;

(ii) where the judgment-debtor has no other sufficient means of subsistence, in providing for his subsistence to such amount as the Court thinks fit; and

(iii) in discharging rateably the claims of the original decree-holders and any other decree-holders who have complied with the said notice, and whose claims were included in the amount ordered to be recovered.

(4) No other holder of a decree for the payment of money shall be entitled to be paid out of such property or balance until the decree-holders who have obtained such order have been satisfied, and the residue (if any) shall be paid to the judgment-debtor or such other person as the Court directs.

10. Where the Collector sells any property under this Schedule, he shall put it up to public auction in one or more lots, as he thinks fit, and may—

- (a) fix a reasonable reserved price for each lot ;
- (b) adjourn the sale for a reasonable time whenever, for reasons to be recorded, he deems the adjournment necessary for the purpose of obtaining a fair price for the property ;
- (c) buy in the property offered for sale, and re-sell the same by public auction or private contract, as he thinks fit.

Act XIV of 1882, S 325

11. (1) So long as the Collector can exercise or perform in respect of the judgment-debtor's immoveable property or any part thereof, any of the powers or duties conferred or imposed on him by paragraphs 1 to 10, the judgment-debtor or his representative in interest shall be incompetent to mortgage, charge, lease or alienate such property or part except with the written permission of the Collector, nor shall any Civil Court issue any process against such property or part in execution of a decree for the payment of money.

(2) During the same period no Civil Court shall issue any process of execution either against the judgment-debtor or his property in respect of any decree for the satisfaction whereof provision has been made by the Collector under paragraph 7.

(3) The same period shall be excluded in calculating the period of limitation applicable to the execution of any decree affected by the provisions of this paragraph in respect of any remedy of which the decree-holder has been temporarily deprived.

Act XIV of 1882 S 325A.

See *Keshavlal Bechar v Pitamberdas & Tribhuvandas*, 19 Bom., 261, and *Ganga Prasad v. Ganga Baksh Singh*, (1907) 29 All., 415.

12. Where the property of which the sale has been ordered is situate in more districts than one, the powers and duties conferred and imposed on the Collector by paragraphs

Provision where property is in several districts

1 to 10 shall be exercised and performed by such one of the Collectors of the said districts as the Local Government may by general rule or special order direct.

Act XIV of 1882, s. 325 B.

13. In exercising the powers conferred on him by paragraphs 1 to 10 the Collector shall have the powers of a Civil Court to compel the attendance of parties and witnesses and the production of documents.

Act XIV of 1882, s. 325 C.

THE FOURTH SCHEDULE.

(See section 155)

ENACTMENTS AMENDED

1	2	3	4
Year	No.	Short title	Amendment.
1870	VII	The Court fees Act, 1870	<p>In article 1 of Schedule I, after the word "plaint" the words "written statement pleading a set-off or counter-claim" and after the word "Act" the words "or of cross-objection" shall be inserted</p> <p>From article 11 of Schedule II the word "from an order rejecting a plaint or" shall be omitted.</p> <p>For the entry in the first column of Schedule II relating to article 10 the following entry shall be substituted, namely:—</p> <p>"Agreement in writing stating a question for the opinion of the Court under the Code of Civil Procedure, 1908 "</p>

THE FIFTH SCHEDULE.

(See section 156)

ENACTMENTS REPEALED.

1	2	3	4
Year.	No.	Subject or short title	Extent of repeal
<i>Acts of Governor General in Council.</i>			
1870	VII	The Court-fees Act, 1870	Section 16, and article 15 of Schedule II.
1882	IV	The Transfer of Property Act, 1882	Sections 85 to 90 inclusive, 92 to 94 inclusive, 96, 97, 99 and in section 100 the words "and all the provisions hereinbefore contained as to a mortgagee instituting a suit for the sale of the mortgaged property."
"	XIV	The Code of Civil Procedure	The whole Act.
"	XV	The Presidency Small Cause Courts Act, 1882	The last paragraph of section 3.
1888	VI	The Debtors Act, 1888	Sections 2 to 8
"	VII	The Civil Procedure Code Amendment Act, 1888	So much as is unrepealed, except section 1, section 65 and section 66, sub sections (2), (3) and (4).
"	X	The Presidency Small Cause Courts Law Amendment Act, 1888	So much as is unrepealed.
1890	VIII	The Guardian and Wards Act, 1890.	Section 53
1891	XI	The Repealing and Amending Act, 1891.	So much as relates to Act XIV of 1882 and Act VII of 1888
1892	VI	The Indian Limitation Act and Civil Procedure Code Amendment Act, 1892	In the title and preamble the words "and the Code of Civil Procedure" and sections 2, 3 and 4.
1894	V	The Civil Procedure Code Amendment Act, 1894	The whole Act.
1895	VII	The Punjab Laws Act Amendment Act, 1895	Sections 1 and 2.
"	XII	The Civil Procedure Code Amendment Act, 1895	The whole Act.
1900	VI	The Lower Burma Courts Act, 1900	So much of the schedules as relate to Act XIV of 1882.

APPENDIX.

AN ACT FOR ESTABLISHING HIGH COURTS
OF JUDICATURE IN INDIA ⁽¹⁾

(24 & 25 Vict., C 104): [6th August, 1861.]

BE it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same as follows

1 It shall be lawful for Her Majesty, by Letters Patent under the great Seal of the United Kingdom, to erect and establish a High Court of Judicature at *Fort William* in *Bengal* for the *Bengal* Division of the Presidency of *Fort William* aforesaid, and by like Letters Patent to erect and establish like High Courts at *Madras* and *Bombay* for those several Presidencies, respectively. Such High Courts to be established in the said several Presidencies at such time or respective times as to Her Majesty may seem fit, and the High Court to be established under any such Letters Patent in any of the said Presidencies shall be deemed to be established from and after the publication of such Letters Patent in the same Presidency, or such other time as in such Letters Patent may be appointed in this behalf

2. The High Court of Judicature at *Fort William in Bengal*, and at the Presidencies of *Madras and Bombay*, respectively, shall consist of a Chief Justice and as many Judges, not exceeding fifteen, as Her Majesty may, from time to time, think fit and appoint, who shall be selected from—

1st. Barristers of not less than five years' standing ; or

2nd. Members of the Covenanted Civil Service of not less than ten years' standing, and who shall have served as Zillah Judges or shall have exercised the like powers as those of a Zillah Judge for at least three years of that period; or

3rd. Persons who have held Judicial Office not inferior to that of Principal Sudder Ameen or Judge of a Small Cause Court for a period of not less than five years; or

4th. Persons who have been Pleaders of a Sudder Court or a High Court for a period of not less than ten years, if such Pleaders of a Sudder Court shall have been admitted as Pleaders of a High Court :

Provided that not less than one-third of the Judges of such High Courts respectively, including the Chief Justice, shall be Barristers, and not less than one-third shall be Members of the Covenanted Civil Service.

(1) By the terms of this Act the exercise of jurisdiction in any part of Her Majesty's Indian Territories by the general Council, whereby any place or territory is brought under the jurisdiction of the High Courts, is one expressly contemplated by the Statute, and by the Letters Patent issued under it—*Empress v. Burah*, (1879) 4 Cal., 172; L. R., 5 L. A., 178.

3. Provided always, that the persons who at the time of the establishment of such High Court in any of the said Presidencies, are Certain existing Judges herein named to be the first Judges of the High Court. Judges of the Supreme Court of Judicature and permanent Judges of the Court of Sudder Dewan Adawlut or Sudd becor shall be and further ap- Court shall pointment for that purpose; a become the Chief Justice of such High Court.

4. All the Judges of the High Courts established under this Act shall hold their offices during Her Majesty's pleasure; provided Tenure of office of High Courts that it shall be lawful for any Judge of a High Court to resign such office of Judge to the Governor-General of India in Council or Governor in Council of the Presidency in which such High Court is established

5. The Chief Justice of any such High Court shall have rank and precedence before the other Judges of the same Court, and such of the other Judges of such Court as on its establishment shall have been transferred thereto from the Supreme Court shall have rank and precedence before the Judges of the High Court not transferred from the Supreme Court, and except as aforesaid, all the Judges of each High Court shall have rank and precedence according to the seniority of their appointments unless otherwise provided in their Patents

6 Any Chief Justice or Judge, transferred to any High Court from the Salaries, & of Judges of the High Courts Supreme Court, shall receive the like salary, and be entitled to the like retiring pension and advantage as he would have been entitled to for and in respect of service in the Supreme Court, if such Court had been continued, his service in the High Court being reckoned as service in the Supreme Court; and, except as aforesaid, it shall be lawful for the Secretary of State in Council of India to fix the salaries, allowances, furloughs, retiring pensions, and (where necessary) expenses for equipment and voyage of the Chief Justices and Judges of the several High Courts under this Act, and from time to time to alter the same Provided always such alteration shall not affect the salary of any Judge appointed prior to the date thereof.

7. Upon the happening of a vacancy in the office of Chief Justice and during any absence of a Chief Justice, the Governor-General Provision for vacancy of the office of Chief Justice or other Judge. in Council or Governor in Council, as the case may be shall appoint one of the Judges of the same High Court to perform the duties of Chief Justice of the said Court until some person has been appointed by Her Majesty to the office of Chief Justice of the same Court, and has entered on the discharge of the duties of such office, or until the Chief Justice has returned from such absence; and upon the happening of a vacancy in the office of any other Judge of any such High Court, and during any absence of any such Judge, or on the appointment of any such Judge to act as Chief Justice, shall be lawful for the Governor-General in Council, or Governor in Council, as aforesaid, to appoint any Judge of the said High Court to act as such Judge.

until the absent Judge has returned from such absence, or until the Governor-General in Council, or Governor in Council, as aforesaid, shall see cause to cancel the appointment of such acting Judge.

The words "Governor-General in Council" shall be construed as follows:

after the happening of a vacancy. It cannot be held that the power conferred by the above mentioned section can be held in suspense for several years and then be legally exercised. Where a person held in fact for a period of more than a year been exercising all the functions of a Judge of the High Court in virtue of an appointment purporting to be made by the Lieutenant Governor of the North Western Provinces and Chief Commissioner of Oudh under sanction of Her Majesty's Secretary of State for India it was held that though, so far as the validity of appointment depended upon the provisions of ss. 7 and 16 of the Statute, 24 and 25 Vic. cap. 104, the appointment was apparently *ultra vires*, it must nevertheless be presumed, in the absence of fuller information, that the appointment was legally made in the exercise of some power unknown to the Court vested in the Secretary of State for India.¹ Held, in reference to High Courts Act, 1861, in which no time is mentioned for the appointment of an acting Judge on the occurrence of a vacancy that such an appointment cannot be questioned on the ground of its not having been made until after a period alleged to be unreasonable.²

8 Upon the establishment of such High Court as aforesaid in the Presidency of Fort William in Bengal, the Supreme Court and the Court of Sudder Dewanny Adawlut and Sudder Nizamat Adawlut at Calcutta, in the same Presidency shall be abolished

And upon the establishment of such High Court in the Presidency of Madras the Supreme Court and the Court of Sudder Adawlut and Fowjdarry Adawlut in the same Presidency shall be abolished

And upon the establishment of such High Court in the Presidency of Bombay, the Supreme Court and the Court of Sudder Dewanny Adawlut and Sudder Fowjdarry Adawlut in the same Presidency shall be abolished.

And the records and documents of the several Courts so abolished in each Presidency shall become, and be, records and documents of the High Court established in the same Presidency.

9 Each of the High Court to be established under this Act shall have and exercise all such Civil Criminal, Admiralty and Vice-Admiralty, Testamentary, Intestate, and Matrimonial Jurisdiction, original and appellate, and all such powers and authority for, and in relation to, the administration of justice in the Presidency for which it is established, as Her Majesty may, by such Letters Patent as aforesaid, grant and direct, subject, however, to such directions and limitations as to the exercise of original, civil and criminal jurisdiction beyond the limits of the Presidency Towns as may be prescribed thereby: and save as by such Letters Patent and subject and without prejudice to the powers and authority whatsoever of the Governor established in each Presidency shall be abolished in the same Presidency.

The High Court ordered, under this section, the real plaintiffs, though strangers, to the record, to pay costs.³

10. Until the Crown shall otherwise provide under the powers of this Act, all jurisdiction now exercised by the Supreme Courts of Calcutta, Madras, and Bombay, respectively, over inhabitants of such parts of India as may not be comprised in the Letters Patent to be issued to the High Courts of Calcutta, Madras and Bombay

Repealed by 28 Vict. c. 15, s. 2. *post*.

¹ Queen-Empress v Ganga Ram, (1894) 16 All. 1, 136

² Balwant Singh v. Ram Kishori, (1895) 20 All. 4 267; L. R., 23; 2 Calc. W. N., 374.

³ Bama Sundari Deyee v. Anant Lal Bore, Bourke 45, 96; but see, Ram Coomar Coondoo v. Chunder Canto Mukerjee, (1877) L. R., 4 I. A., 49.

11. Upon the establishment of the said High Courts in the said Presidencies respectively, all provisions then in force in *India* of Acts of Parliament, or of any Orders of Her Majesty in Council, or Charters, or of any Act of the Legislature of *India*, which at the time or respective times of the es-

Existing provisions applicable to Supreme Courts to apply to High Courts

to the Supreme Courts a
ively, or to the Judges of
High Courts and the Judges thereof respectively, so far as may be consistent with the provisions of this Act, and the Letters Patent to be issued in pursuance thereof, and subject to the legislative powers in relation to the matters aforesaid of the Governor-General of *India* in Council

12 From and after the abolition of the Courts abolished as aforesaid in any of the said Presidencies, the High Court of the same
Presidency shall have jurisdiction over all proceedings pending in such abolished Courts at the time of the abolition thereof, and such proceedings and all previous proceedings in the said last-mentioned Courts shall be dealt with as if the same had been had in the said High Court, save that any such proceedings may be continued, as nearly as circumstances permit, under and according to the practice of the abolished Courts respectively.

13 Subject to any laws or regulation which may be made by the Governor-General in Council, the High Court established in any Presidency under this Act may, by its own rules provide for the exercise, by one or more Judges or by Division Courts constituted by two or more Judges of the said High Court, of the original and appellate jurisdiction vested in such Court, in such manner as may appear to such Court to be convenient for the due administration of justice.

A Judge of the High Court sitting alone to hear cases in which the value of the subject matter in dispute does not exceed Rs 50 cannot make a reference to a Full Bench.

High Court the trial of the accused had commenced and been gone into when his Lordship retired Procedure Code and the case was adjourned The Chief Justice purporting to act under cl. 14

was discharged.*

Chief Justice to determine what Judges shall sit alone or in the Division Courts.

14 The Chief Justice of each High Court shall, from time to time, determine what Judge in each case shall sit alone, and what Judges of the Court, whether with or without the Chief Justice, shall constitute the the several Division Courts as aforesaid.

By virtue of the power conferred by this section the Chief Justice by constituting a Division Court consisting of himself and any other Judge can deal with applications against an order made by the Presidency Small Cause Court.*

The Chief Justice having once appointed a Bench under this section to hear any particular case has no power to interfere, when the case has been disposed of by that Bench.*

* Nohu Mondol v Cholim Mullik, (1898) 25 Cal. 836 ; 2 Cal. W. N., 403.

* Empress v Khagendra Nath Banerjee (1890) 2 Cal. W. N., 491.

* Halalhar Matti v Choytanna Matti, (1903) 30 Cal., 583 ; 7 Cal. W. N., 517.

* Abdool Sobhan in the matter of, (1852) 8 Cal., 63

15. Each of the High Courts established under this Act shall have superintendence over all Courts which may be subject to its

High Court to superintendence and to frame rules of practice for Subordinate Courts.

appellate jurisdiction, and shall have power to call for returns, and to direct the transfer of any suit or appeal from any such Court to any other Court of equal or superior jurisdiction, and shall have power to make and issue

general rules for regulating the practice and proceedings of such Courts, and also to prescribe forms for every proceeding in the said Courts for which it shall think necessary that a form be provided, and also for keeping all books, entries, and accounts to be kept by the officers, and also to settle tables of fees to be allowed to the Sheriff, Attorneys, and all clerks and officers of Courts, and from time to time alter any such rule or form or table; and the rules so made, and the forms so framed, and the tables so settled, shall be used and observed in the said Courts; provided that such general rules and forms and tables be not inconsistent with the provisions of any law in force, and shall, before they are issued, have received the sanction, in the Presidency of *Fort William*, of the Governor-General in Council, and in *Madras* or *Bombay*, of the Governor in Council, of the respective Presidencies.

The intention of this section is not to confer any rights upon litigant parties; its whole object being to give the High Court some control over the Courts subject to its appellate jurisdiction.¹

Under this section the High Court may direct the exercise of a power of jurisdiction disclaimed by a Court,² or may interfere and set aside an order which the Court has no authority to make,³ but it cannot interfere on the ground that the judgment passed by a Court having jurisdiction is erroneous.⁴ Whether a decree for rent under Act X of 1859 made in one district can be transferred to another for execution is a question which the High Court can decide in the exercise of its powers under this section.⁵ It can, therefore, exercise its powers of superintendence over Revenue Courts.

Interference by the High Court.—Where the applicant has a remedy by regular suit, the High Court will not interfere;⁶ nor when there is great and unexplained delay on the part of the applicant;⁷ nor where the interference would be substantially to give a right of special appeal, which is not given by the Code,⁸ unless the

¹ *Dusse v Sreenibash*, (1869) 12 W. R., 74.

² *Munohar Paul v. Wise*, (1871) 15 W. R., 246; *Nassir Jan, in the matter of*, *Cochrane*, (1873) 20 W. R., 16; (1) 14 W. R., 9; *Collector of Bogra v. 01*; 11 W. R. 191; *Hardayal v. R.*, 31.

³ *Ni* L R., 9 L. A., 174, follow. L R., (F. B.), 714; see also *J. R.*, 54; 2 B. L R., A. C., 33; *Roeknes Roy v. Amrit Lall*, (1870) 14 W. R., 254.

⁴ *Tej Ram v. Kant Bux* Lukhy
Ram Bux howay
(1878) 3 C. Allah,

⁵ *Nilmoni v. Taranath Mukerji*, (1883) 9 Cal., 295; L. R., 9 L. A., 174.

⁶ *Madhub Chunder v. Sham Chand*, (1878) 3 Cal., 243; *Bishuon Chunder v. Shoshoo Mohun* (1874) 22 W. R., 277; *Hareeshur v. Nobin Chunder*, (1873) 170; *Sudoy C. 74*
A. C.

⁷ *R.* 174. *Butty v. Morey*, 18 W. R., 87;

⁸ *D* *ant Bose, in re*, 4 Bom. H. C.

Judge has exercised a jurisdiction which he has not, or has refused to exercise a jurisdiction which he has.¹ The High Court cannot therefore interfere if the Lower Court has jurisdiction and the law declares its order to be final.²

for review —
th an application
t will do so on the
Lower Court has
Collector's Court
tled to any relief

under this section *

The High Court has no power to interfere under this section or s. 115, or s. 25 of the Provincial Small Cause Courts Act with an order passed by a Small Cause Court Judge under s. 157 of Act II, B. C., of 1888.³

The Courts established under the Land Acquisition Act (X of 1870) are subject to the appellate jurisdiction of the High Court, which has consequently the power of superintendence over those Courts under this section.*

In the case of an order passed under s. 26 of Act XVII of 1870 (the Legal Practitioners Act) the High Court has no power to interfere with the decision of the Judge of the Court, that the decision of the Court is final.⁴

Ram, in re, 21 All, 181
Practitioners Act without having any legal evidence before him, held, that the High Court may interfere under the wide powers given it by Charter Act.¹⁰

no power
that
in it
and complete the case according to law.¹²

The Court of the Resident at Aden is subject to the superintendence of the Bombay High Court which can remove a suit from the Court of the Resident at Aden to try and determine the same.¹³

Judge of the
Court is not
all not inter-
jurisdiction,
isted¹⁴ The

High Court has powers of revision in respect of an order of discharge passed by a Presidency Magistrate;¹⁵ or in respect of an order revising a complaint after discharge;¹⁶ or of an order refusing sanction to prosecute a Magistrate under s. 197

¹ Doorga Soonduree v. Kashee Kant, (1870) 14 W. R., 212.

² Showlaminee v. Manik Ram, (1868) 9 W. R., 396.

³ Ram Lall Singh v. Janki Mahaboon, (1879) 4 C. L. R., 14.

⁴ Ajonnissee v. Surja Kant, (1868) 2 B. L. R., A. C., 181; 11 W. R., 56;
Asrafuunnissa v. Inaet Hossein, (1870) 5 B. L. R., 316; 13 W. R., 439.

⁵ Umassundari, in the matter of, (1870) 5 B. L. R., App. 29.

⁶ Mathra Pershad, in the matter of, (1876) 1 All. 296.

⁷ Drobo Moyee v. Bipin Mundul, (1863) 10 W. R., 6.

⁸ Corporation of Calcutta v. Bhupati Roy Chowdhry, (1899) 26 Calc., 74.

⁹ Abdul Ali, in the matter of, (1875) 15 B. L. R., 197.

¹⁰ Suddeshwar Boral, in re, (1899) 4 Calc. W. N., 36. See also Thomson, in the matter of, (1870) 6 B. L. R., 180; 14 W. R., 257.

¹¹ Abdulillah v. Salaro, (1896) 18 All., 4.

¹² Abdul Karim v. Municipal Officer, Aden, (1903) 27 Bom., 575.

¹³ Ameer Khan, in the matter of, (1871) 15 W. R. Cr. 60.

¹⁴ Empress v. Rajcoomar, (1878) 3 Calc., 573.

¹⁵ Charanbali v. Barendra Nath, (1900) 27 Calc. 126; (1898) 3 Calc. W. N., 601;
but see, Panna Charan, in the matter of, (1881) 7 Calc., 447.

¹⁶ Opoorba Kumar v. Probod Kumari, (1896) 1 Calc. W. N., 49.

of the Criminal Procedure Code,¹ or when orders under s 435 cl. (3) are challenged as made without jurisdiction;² or when the Magistrate abuses his power³

16 It shall be lawful for Her Majesty, if at any time hereafter Her Majesty see fit so to do, by Letters Patent under the Great Seal of the United Kingdom, to erect and establish a High Court of Judicature in and for any portion of the territories within Her Majesty's dominions in India, not included within the limits of the local jurisdiction of another High Court, to consist of a Chief Justice and of such number of other Judges, with such qualifications as are required in persons to be appointed to the High Courts established at the Presidencies hereinbefore mentioned, as Her Majesty from time to time may think fit and appoint, and it shall be lawful for Her Majesty by such Letters Patent to confer on such Court any such jurisdiction, powers, and authority as under this Act is authorized to be conferred on or

Governor General or Governor of the Presidency in which such High Court is established, shall, as far as circumstances may permit, be applicable to the High Court established in the said territories, and to the Chief Justice and other Judges thereof, and to the person administering the Government of the said territories

17 It shall be lawful for Her Majesty, if Her Majesty shall so think fit, at any time within three years after the establishment of any High Court under this Act by Her Letters Patent, to revoke all or such parts or provisions as Her Majesty may think fit of the Letters Patent by which such Court was established, and to grant and make such other powers and provisions as Her Majesty may think fit and as might have been granted or made by such first Letters Patent, or, without any such revocation as aforesaid, by like Letters Patent to grant and make any additional or supplementary powers and provisions which might have been granted or made in the first instance.

The period within which fresh letters might be granted was extended to the 1st, January, 1868, by s 1 of the 29 Vict, c 15,

18 It shall be lawful for Her Majesty, from time to time, by Her Order in Council, to transfer any territory or place from the jurisdiction of one to the jurisdiction of any other of the High Courts established under this Act, and generally to alter and determine the territorial limits of the jurisdiction of the said several Courts as to Her Majesty, with the advice of Her Privy Council, may seem meet

Repealed by 23 Vict, c 15, s 2, post

19 The word "Barrister" of English Advocates General administering the Government

¹ Nando Lal v. Mitter, (1899) 26 Cal. 832; (1931) 3 Cal. W. N., 539.

² Hurballab v. Luchmeswar, (1899) 26 Cal., 188; (1898) 3 Cal. W. N., 40.

³ Lalhari v. Sukhdeo Narain, (1900) 27 Cal., 892; (1899) 4 Cal. W. N., 613.

SIR CHARLES WOOD'S DESPATCH ACCOMPANYING FIRST
LETTERS PATENT OR CHARTER.

Judicial, No. 24

INDIA OFFICE,
London, 14th May, 1862.

To

HIS EXCELLENCY THE RIGHT HONORABLE
THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.

MY LORD,

I HEREWITH transmit to you the Letters Patent or Charter,¹ under the Royal Sign Manual, for the High Court of Judicature to be established in Bengal, in accordance with the provisions of the Act 24 and 25 Victoria, Chapter 104 for establishing High Courts of Judicature in India and request that you will take immediate measures for instituting the Court, the first Judges of which, including those appointed under the 3rd section of the Act, are designated in the second clause of the Charter. Those appointed by the Crown will be severally informed by me of their appointments to the Court.

2. This Charter will accomplish the great object which has so long been contemplated, of substituting for the Supreme and Sudder Courts abolished by the Act one High Court of Judicature, possessing the combined powers and authorities of the abolished Courts, and exercising jurisdiction, both over the Provinces under the Sudder Court and over the Presidency Town which forms the local jurisdiction of the Supreme Court.

3 Before I review the provisions in detail, it is necessary that I should direct your attention to the general scope and main provisions of the Act in question.

4 It abolishes, in the first place (as soon as the Charter shall issue), the Supreme Court and the Court of Sudder Dewany Adawlut. It vests in the High Court (by the last provision of section 9) the powers and authorities of those Courts respectively, except so far as the Crown may by such Charter otherwise direct. And (by the first part of the same section) it invests the High Court with such Civil, Criminal, Admiralty, Vice-Admiralty, Testamentary, Intestate, and Matrimonial Jurisdiction, and all such powers and authority in relation to the administration of justice in the Presidency, as the same Charter may confer. With respect therefore, to the fusion of the Supreme and Sudder Courts, it appears obvious that the Act itself speaks, and that to assume and effice the same purpose by affirmative declaration in the Charter would be superfluous. It has been, consequently, deemed unnecessary that the Charter should exhibit on the face of it an explicit statement of the powers and jurisdiction to be possessed by the new Court in consequence of the fusion, as would have been the proper course if these powers and jurisdiction had been entirely new. Recourse has been had in some places in lieu of such explicit statement to reference to statutory provision, and, in others, to the Charter of the Supreme Court, when the object of clearness appeared to require it. But wherever the Charter does not otherwise specify, the High Court will use the powers and administer the jurisdiction appertaining to those Courts respectively to whose authority it now succeeds.

¹ The Letters Patent or Charter, dated the 14th May, 1862, forwarded with this despatch, were afterwards revoked by further Letters Patent, dated 28th, Decr. 1865, for which, see *post*.

5. But the Charter is intended positively to declare all such Civil, Criminal, and other jurisdictions above specified, as the Crown thinks proper by this Charter to confer on it, supplementary or additional to its main purpose, namely, the fusion of the aforesaid Courts

6. Moreover, the words giving authority to confer on the Court such jurisdiction and such powers and authorities for the administration of Justice as the Crown may direct, appear very large, and such as, in point of fact, invest the Crown with extensive legislative powers, so far as 'the administration of justice,' within the meaning of the section, may require. It has been, however, thought best to use this power very sparingly, and simply as ancillary to the real purpose of the Act, namely, the establishment of new Courts

7. Another reason for the form which the present Letters Patent assume, is to be found in the provisions of section 17 of the Act of last Session. By that section power is given to the Crown to recall the Letters Patent establishing the Court, at any time within three years after its establishment, and to grant other Letters Patent in their stead. This provision was inserted in the Act, mainly with the view of enabling Her Majesty's Government to avail themselves of the advice and assistance of the Judges of the Court in framing the more perfect Charter by which the jurisdiction and authority of the Court is to be permanently fixed. On this point, I request you will put yourselves in communication with the Judges of the Court, and, at any time previous to the expiration of two years from the date of establishment of the Court, furnish me with any suggestions they may make, or any amendments they may propose in the Letters Patent, now transmitted, and I shall be glad if, in proposing alterations, the Judges will put their recommendations as nearly as possible in the form in which they wish them to appear in the future Letters Patent

8. I proceed to notice, in order, such of the provisions of the Charter as appear to me to call for special remark.

9. By clause 6, power is given to the Chief Justice to appoint the officers of the Court, and to fix their salaries, subject, however, in both cases, to the approval and confirmation of the Governor General in Council. This provision does not refer to the settling of tables of fees, where fees are allowed, which, under section 15 of the Act, is required to be done by the Court

10. The Supreme Court exercises an authority entirely independent of the Government, however, has no power to interfere with the property or rights of any of the subjects of the Crown, and it will be expedient for you to take the question into your consideration, and, after communication with the Government, to report to the High Court of Justice, which must be uniformly

oppressive.

11. In regard to the admission of Advocates, Vakeels, and Attorneys, the recommendations of the Law Commissioners have been followed. Under the existing practice, the Advocate pleads, and the Attorney acts for the suitors of the Supreme Court, and the Vakeel both pleads and acts for the suitors of the Sudder Court, of which Court

Court as he did in the Sudder Court. Any person may apply to be admitted either as an Advocate, or Vakeel, or Attorney, under the rules which the Court

is authorized by the Charter to make, and there is nothing in the Charter to prevent the admission of Advocates and Attorneys to be also Vakeels of the High Court, should the Judges consider such a course to be expedient.

12 The provision in the Act, section 2, clause 4, which declares that Pleaders of the Sudder Court, 'who shall have been admitted as Pleaders of the High Court,' shall be eligible, under certain conditions, to the Bench of the Court, implies that a discretionary power may be exercised as to the admission of the present Pleader of the Sudder Court to the Bar of the High Court. This enactment will account to you for the omission from the Charter of any provision appointing all the present practitioners of the Supreme and Sudder Courts to the High Court. I conclude, however, that unless, in any special cases there are strong reasons to the contrary, the Court will admit the whole of the practitioners in the abolished Courts at the date of their abolition, to be the first Advocates, Vakeels and Attorneys of the High Court.

13 With reference to the concluding sentence of clause 10, it is to be observed that the Letters Patent contain no provision reserving to the Attorneys of the present Supreme Court the right of pleading after the issue of this Charter, in the Insolvent Court, as newly regulated by clause 17. No such provision, however, is necessary, as the Insolvent Court is a separate tribunal, not affected by the Act authorising the Letters Patent and will continue a separate Court, though, for the future, presided over by a Judge of the High Court. The Attorneys, therefore, will, as heretofore, practise in accordance with the rules of the Insolvent Court itself.

14 By the important provisions contained in the clauses of the Charter, 11 to 38 inclusive, effect is given to the 9th section of the Act, respecting the jurisdictions and powers to be exercised by the High Court.

15. The original civil jurisdiction now exercised by the Supreme Court within the limits of the Presidency Town will henceforth be exercised, under the Charter, by the High Court, including in that term (clause 36 of the Charter) a Judge or Division Court of the High Court, appointed or constituted under the provisions of the 13th section of the Act.

16. As it is very desirable that every suit should be instituted in the Court of the district in which the property forming the subject of dispute is situated, or in which the cause of action has its origin, or in which the defendant resides or carries on business, the jurisdiction hitherto exercised by the Supreme Court (on the ground of *res sita* or *actoris habitatio*) and property

its of the Pre- not been vested in the High Court, be confined to the local limits of the Presidency Town, with power, however, to the Court, under clause 13, to call for and try any suit instituted in any Court subject to its superintendence when, for reasons to be recorded, it shall think proper to do so.

17. The terms of clause 12, defining the original jurisdiction of the High Court as to suit, are nearly similar to those employed in section 5 of the Code of Civil Procedure (Act VIII of 1859) and are intended to include a wide range of cases.

1856, ruled against the exercise of the Ecclesiastical jurisdiction of the Supreme Court in matters matrimonial between others than Christians, and even expressed some hesitation as to whether that Court could administer a remedy in such cases on the Civil side. It is one object of the present Charter to do away with all such restrictions and limitations, as far as this can be done without trenching on the proper province

of legislation. It has, therefore, been sought to invest the High Court, in the exercise of its original civil jurisdiction, with as ample powers in receiving and determining cases of every description, and in applying a remedy to every wrong, as are exercised by the Courts not established by Royal Charter, and thus to place the Courts of first instance in the Presidency Towns and in the interior of the country, in this respect, as nearly as may be, on the same footing.

18 I shall be glad to be furnished with your opinion, after consultation with the Judges of the Court, as to the concluding portion of clause 12, excluding the jurisdiction of the Court in regard to cases falling within the jurisdiction of the Small Cause Court of Calcutta, in which the debt or damage or value of the property sued for does not exceed 100 Rupees. Hitherto, I believe, there has been no tendency to bring into the Supreme Court cases cognizable by the Small Cause Court; but should it appear that under the new system, the time of the High Court is unnecessarily taken up with trying cases which might be instituted in the Small Cause Court, it may become a question for consideration whether the sum, excluding the jurisdiction of the High Court, might not be raised to, say, 500 or 500 Rupees.

19 It has been suggested that the Small Cause Court should be placed on the same footing as a Zillah Court, in its subjection to the High Court as a Court of appeal and general superintendence. But I do not consider that it was the purpose of the Act of Parliament of last Session that the Crown, in framing a

20 As already observed, the effect of clause 12 will be to confine the ordinary original civil jurisdiction of the High Court within

Clause 13.

narrower limits than the civil jurisdiction exercised by the Supreme Court. By clause 13, however, the High Court is empowered to call for and to try, as a Court of first instance, any suit which the law requires to be instituted before some other tribunal. By the exercise of the power thus conferred on it, the High Court will be enabled to obviate all reasonable ground of complaint, when it shall deem that any hardship or injustice is likely to result from the compulsory institution in a Zillah Court of a suit which, but for the change in the system, might have been instituted in the Supreme Court.

21 The introduction of the words "whether within or without the Bengal Division of the presidency of Fort William" may appear to require explanation. The in section 2 of the Act, 24 and 25 Victoria, Division of the Presidency of Fort William in the Charter. By section 8, the Supreme

power and authority except when otherwise the Supreme Court has the Presidency of Fort Provinces under the appellate jurisdictions and also over the Province

of Assam and others, which are not properly parts of the Presidency. The result is, that the High Court "for the Bengal Division," succeeding to the powers of both the Supreme and Sudder Courts, has, in several respects, jurisdiction in territories not within the Bengal Division. As this is the result of the Act, it might not have been necessary to notice it in the Charter. But for the sake of clearness and in order to show distinctly that the Charter is meant to apply to this extra local jurisdictions, as well as to the strictly local jurisdiction within the Bengal Division, it has been deemed advisable to introduce these words.

22. Clauses 14 and 15 give effect to the recommendation of the Law Commissioners, that the High Court shall have all the appellate jurisdiction which is now exercised by the Sudder

Clauses 14 and 15.

Dewany Adawlut, and a new appellate jurisdiction in civil cases, from the Courts of original jurisdiction, constituted by one or more of its own Judges, except that in the case of a decision which has been passed by a majority of the full number of the Judges of the Court, the appeal shall lie to Her Majesty in Council.

23. It will appear, from a subsequent clause in the Letters Patent, that the proceedings in the High Court in civil cases are to be regulated by the Code of Civil Procedure enacted by the Legislature of India, of which Act XXIII of 1861 forms a part. By section 23 of the last mentioned Indian Act, provision has been made for a difference of opinion on the hearing of an appeal. A difficulty, however, may occur when two Judges constituting a Division Court for the trial of cases in the exercise of original jurisdiction, differ as to the judgment to be given. For such a case, the Code of Civil Procedure, which is adapted to Courts of first instance, presided over by single Judges only, contains no provision. To call in a third Judge, and to re-try the case, with a view to a judgment from which there may be an appeal to the High Court under clause 14 would be productive of unnecessary delay and expense to the parties; and I am of opinion that the Court should make provision for such a contingency, by a rule made under the 13th section of the Act of Parliament, providing either that the judgment shall be in accordance with the opinion of the senior of the Judges constituting the Division Court, or that the final judgment shall be entered *pro forma*, according to such opinion, such judgment being a judgment for the purpose of an appeal against the same, but not for any other purpose.

24. The substantive civil law to be administered by the High Court within Clauses 18, 19, and 20 the jurisdiction of the Supreme and Sudder Courts, respectively, will, until otherwise provided, continue as at present. This, as I have said, it was no part of the purpose of the Act of Parliament or Charter to effect. And the clauses on which I am now commenting are

however, that measures may be taken in this respect, by enacting for the purpose a body of substantive law, by which all classes shall be governed, and all transactions shall be regulated, except in cases to which our Judicatures are required to apply the personal laws of any classes of our Indian subjects.

25. Under clauses 21, 22, and 38, no change will be effected by the Charter Clauses 21, 22, and 38 in the administration of criminal justice in the Presidency Town or in respect of persons subject to its criminal jurisdiction, residing in the interior of the country. It appears, however, to Her Majesty's Government, that some modification of the existing practice, both at the capital and in the provinces, is necessary, and on these points, I shall address you in a separate despatch.

26. The Sudder Court exercises no original jurisdiction, but by clause 23, Clause 23. original criminal jurisdiction, throughout the territories subject to its authority, has been given to the High Court, the principal object being to enable the Judges to hold trials for offences committed out of the Presidency Town, at which from their importance or for other specific cause, it may be expedient that a Judge or Judges of the High Court should preside.

27. The remaining clauses of the Letters Patent, on the subject of the Clauses 24-25. criminal jurisdiction, of the High Court, do not call for any particular notice. They contain no special provisions respecting the transfer to that Court of the criminal jurisdiction exercised by the Supreme Court over inhabitants of such parts of India as are not comprised within the local limits of the Letters Patent, that having been fully provided for by section 10 of the Act under the authority of which the High Court is established.

28. As in the case of the Small Cause Court, you will consult the Judges in regard to the relation in which the High Court is to stand to the Magistrates of Calcutta

29 Clause 30 respecting the exercise of jurisdiction by the High Court elsewhere than at its ordinary place of sitting, is a very important provision, and one which I have no doubt, if judiciously carried into effect, will materially tend to the greater efficiency of all the judicatories subject to the superintendence and authority of the High Court. Circumstances may frequently arise when the deputation of a Judge or Judges of the High Court would be a measure of the highest expediency. For such cases the clause under consideration will enable the Government to provide by deputing one or more Judges from the High Court, who would avail themselves of the opportunity thus afforded them of making a searching inquiry into the manner in which the local Courts were performing their duties

30 With reference to this clause, it has been considered whether the precedent of section 14 of the Act of Parliament, should not be followed and the authority to make the necessary arrangements for exercise of the Court's jurisdiction out of the usual place of sitting vested in the Chief Justice. On the whole, it was thought that acts partaking so much of an administrative character might be more perfectly performed by the Governor-General in Council. But it is scarcely for me to add, that her Majesty's Government entertain full confidence that the Chief Justice will be the authority habitually consulted in the matter.

31. The Supreme Court exercises, at present, Admiralty Jurisdiction under its Charter. The Chief Justice has Vice-Admiralty Jurisdiction under the commission of the 19th July, 1822, and all or any of the Judges of the Supreme Court may be appointed Commissioners, under the provisions of 39 and 40, George, III, C 79, section 25, for the trial and adjudication of prize causes and other maritime questions arising in India. By the present Charter, the whole of these jurisdictions and power will be vested in the High Court, and as in the Act above cited the expression "other maritime questions" is general, mention is made of all the jurisdictions conferred as above-mentioned, in the clauses of the Charter providing both for the civil and criminal maritime jurisdiction of the High Court

Clauses 33 and 34. 32. The clauses respecting testamentary and intestate jurisdiction do not call for any remark

33 Her "

Clause 35,

general, as it effected by clause 35, High Court : the Supreme Court have the same

England, established in virtue of the 20 and 21 Vic., C. 65, and in regard to which further provisions were made by 22 and 23 Vic., C. 61, and 23 and 24 Vic., C. 144. The Act of Parliament for establishing the High Courts, however, does not purport to give to the Crown the power of importing into the Charter all the provisions of the Divorce Court Act, and some of them the Crown clearly could

f re-marriage to re-marry I I request introduce licition and should beorce Court

34 The object of the proviso at the end of clause 35 is to obviate any doubt that may possibly arise as to whether, by vesting the High Court with the powers of the Court for Divorce and Matrimonial Causes in England, it was intended to take away from the Courts within the division of the Presidency not established

by Royal Charter, any jurisdiction which they might have in matters Matrimonial, as, for instance, in a suit for alimony between Armenians or Native Christians. With any such jurisdiction it is not intended to interfere.

35 Clause 36 refers to the powers of single Judges and Divisions Courts, appointed or constituted under the provisions of the 13th section of the Act. By section 14 of the Act, the power of determining from time to time what Judge in each case shall sit alone, and what Judges shall constitute Division Courts, is placed in the hands of the Chief Justice. It will be observed that the law does not require that a Judge selected from the Bar shall necessarily form a part of every Division Court, and it will be for the Chief Justice to consider whether, in cases exclusively between Natives, it will not be desirable to follow, as far as possible, the course which has already been resolved upon in regard to the cases under appeal to the Sudder Court at the time of its abolition, and to constitute the Division Court of Judges trained in the country, whose knowledge of the Native language will obviate the expense and delay of translating the proceedings.

36 Clause 37 is a very important one, and, there is little doubt, will prove a very salutary provision. It has, therefore, been inserted, although the change introduced is somewhat greater and more substantial than is generally aimed at in this Charter. It extends to the High Court the Code of Civil Procedure enacted by the Legislature of India for the Courts not established by Royal Charter, and thus accomplishes the object so long contemplated of substituting one simple Code of Procedure for the various systems (corresponding to its common law, equity, and admiralty jurisdictions) which have been in operation in the Supreme Court since the date of its establishment.

37. In regard to the rules respecting appeals to the Privy Council, the object has been to avoid unnecessary innovation. The existing rules, if they are necessary inconvenience, is unavoidable. Appeals are, therefore, left in force, with the experience in the Court of the Judicial Committee has found advisable. For instance, clause 40 is introduced as it had been commonly introduced, of late years in the appeal rules of other dependencies of Great Britain, in order to remove all doubt as to the power of the High Court to allow an appeal to the Council from interlocutory judgments.

38 It will, however, be obvious to you that the rules, as now framed, will be liable to the reproach of confusion and perhaps of uncertainty. They will be compounded of those contained in the Charter and those already in force which will necessitate reference to several documents. You will agree with me that a simple and intelligible Code of Rules, to regulate appeals to the Privy Council from the new High Courts, or rather from the High Courts in general which may be constituted under the Act of Parliament, will be of great advantage to the suitors and the public. I should wish, therefore, that one of the first objects of the Judges, as soon as the amount of labour thrown on them by their new position may allow it might be, to prepare suggestions for such a Code of Rules, which might then be reduced into a complete shape by the authority of the Privy Council at Home.

39 In forwarding the Letters Patent to the Judges of the High Court, you are requested to furnish them with a copy of this despatch. I trust that the Letters Patent taken in connection with the Act for establishing the Court, will be found to contain everything requisite for enabling the Court to proceed at once. It is possible that omissions may be which may impede the proper action. I do not wish to say to you that such is the case, you at is wanting by such legislative for remedying the defects brought under your consideration.

40 I cannot conclude this despatch without expressing the deep interest felt by Her Majesty's Government in the success of this important measure. The Crown by its Letters Patent has sanctioned the establishment of a tribunal as the

Chief Court of Justice in India, which in the trained learning of the Judges selected from the Bar, and in the knowledge of the language, feelings and habits of the natives of that country possessed by the other members of the Court, combines the most material elements of success. And Her Majesty's Government look with confidence to the zealous exertions and cordial co-operation of the Judges to place the administration of Justice in India, under the controlling authority of the Court, in such a state of efficiency as will render it, in every respect, adequate to its ends, and satisfactory to the people and to the Government.

I have the honour to be,

My Lord,

Your Lordship's most obedient, humble Servant.

(Signed) C. WOOD.

the notification of such disallowance by her Majesty Provided always that all acts, proceedings, and judgments done, taken, or given by such High Courts, and not set aside by any competent authority before the promulgation or signification as aforesaid of such disallowance by Her Majesty, shall be deemed to be and to have been valid and effectual for all purposes whatever, such disallowance notwithstanding.

5 So much of this Act as relates to the jurisdiction of the High Court shall commence and come into operation as soon as the same shall have been published by the Governor-General in Council.

Time when Act shall come into operation.

Not to interfere with certain powers of Governor-General.

6 Nothing in this Act contained shall interfere with the powers of the Governor-General in Council, at meetings for the purpose of making Laws and Regulations

LETTERS PATENT.⁽¹⁾

*For the High Court of Judicature at Fort William in Bengal,
dated 28th December, 1865.*

VICTORIA, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the faith. To all to whom these presents shall come, greeting : Whereas by an Act of Parliament passed in the twenty-fourth and abolishing High Courts acted that it shall be it Seal of the United e at Fort William in ort William, aforesaid, and as many Judges not exceeding seven, as Her Majesty might, from time to time, think fit to alified as in the said Act is ie time of the establish- Court of Judicature and wlut or Sudder Adawlut of such High Court with- Justice of such Supreme Court, and that upon the reme Court and the Court of Sudder Dewany Adawlut and Sudder Nizamut Adawlut at Calcutta, in the said Presidency, should be abolished.

And that the High Court of Judicature so to be established should have and exercise all such Civil, Crim Intestate and Matrimonial

o the exercise the Presidency Patent might slative powers in relation to the matters aforesaid of the Governor-General of India in Council, the High Court so to be established should have and exercise all jurisdiction, and every power and authority whatsoever in any manner vested in any of the Courts in the same Presidency abolished under the said Act at the time of the abolition of such last mentioned Courts ;⁽²⁾

1. Now know ye that We, upon full consideration of the premises, and of Our special grace, certain knowledge, and mere motion, have thought fit to revoke, and do by these presents (from and after the date of the publication thereof as hereinafter provided, and subject to the provisions thereof) revoke Our said Letters Patent of the fourteenth of May, one thousand eight

Revocation of Letters Patent of 1862.

(1) The Letters Patent of the High Court at Fort William, Bengal, made to Sir Courtenay Ilbert's "Government of India," Chap. V, pp 351-385. They are not printed here, as there is no practical difference between them and the Letters Patent of the High Court at Fort William, Bengal.

(2) Certain paragraphs of the preamble, which follow here, have been omitted.

hundred and sixty-two, except so far as the Letters Patent of the fourteenth year of His Majesty King George the Third dated the twenty-sixth March, one thousand seven hundred and seventy-four, establishing a Supreme Court of Judicature at Fort William in Bengal, were revoked or determined thereby

2. And We do by these presents grant, direct, and ordain that notwithstanding the revocation of the said Letters Patent of the fourteenth of May, one thousand eight hundred and sixty-two the High Court of Judicature, called the High Court of Judicature at Fort William in Bengal, shall be and continue, as from the time of the original erection and establishment thereof, the High Court of Judicature at Fort William in Bengal, for the Bengal Division of the Presidency of Fort William aforesaid; and that the said Court shall be and continue a Court of Record, and that all proceedings commenced in the said High Court prior to the date of the publication of these Letters Patent, shall be continued and depend in the said High Court, as if they had commenced in the said High Court after the date of such publication, and that all rules and orders in force in the said High Court immediately before the date of the publication of these Letters Patent, shall continue in force, except so far as the same are altered hereby, until the same are altered by competent authority

The High Court as now existing was continued, not created, by the Letters Patent of 1863¹

3 And We do hereby appoint and ordain that the person and persons, who shall immediately before the date of the publication of these Letters Patent, be the Chief Justice or Judges, or ~~any one~~ Chief Justice or Judges, of the said High Court to be continued,

continue to be the Judges of the said High Court Our heirs and successors in that behalf, in accordance with the said recited Act for establishing High Courts of Judicature in India

4 And We do hereby appoint and ordain that every clerk and ministerial officer of the said High Court of Judicature at Fort William in Bengal, appointed by virtue of the said Letters Patent of the fourteenth of May, one thousand eight hundred and sixty-two, shall continue to hold and enjoy his office and employment, with the salary thereunto annexed, until he be removed from such office and employment; and he shall be subject to the like power of removal, regulations, and provisions as if he were appointed by virtue of these Letters Patent.

5 And We do hereby ordain that the Chief Justice and every Judge who shall be from time to time appointed to the said High Court of Judicature at Fort William in Bengal, previously to entering upon the execution of the duties of his office, shall make and subscribe the following declaration before such authority or person as the Governor-General in Council may commission to receive it:—

"I, A B, appointed Chief Justice [or a Judge] of the High Court of Judicature at Fort William in Bengal, do solemnly declare that I will faithfully perform the duties of my office to the best of my ability, knowledge, and judgment"

6. And We do hereby grant, ordain, and appoint that the said High Court of Judicature at Fort William in Bengal, shall have and use, as occasion may require a seal bearing a device and impression of Our Royal Arms, within an exergue or



Chief Justice, or during any absence of the Chief Justice, the same shall be

¹ Birdot v. Augusty, (1873) 10 Bom. H. C., 110.

delivered over and kept in the custody of the person appointed to act as Chief Justice under the provisions of section 7 of the recited Act; and We do further grant, ordain, and appoint that, whensoever it shall happen that the office of Chief Justice or of the Judge to whom the custody of the said Seal be committed shall be vacant, the said High Court shall be and is hereby authorized and empowered to demand, seize, and take the said Seal from any person or persons whomsoever, by what ways and means soever the same may have come to his, her, or their possession.

7. And We do hereby further grant, ordain, and appoint that all writs, summons, precepts, rules, orders, and other mandatory process to be used, issued, or awarded by the said High Court of Judicature at Fort William in Bengal, shall run and be in the name and style of Us, or of Our heirs and successors, and shall be sealed with the Seal of the said High Court.

8. And We do hereby authorize and empower the Chief Justice of the said High Court of Judicature at Fort William in Bengal, Appointment of officers from time to time, as occasion may require, and subject to any rules and restrictions which may be prescribed by the Governor-General in Council, to appoint so many and such clerks and other ministerial officers as shall be found necessary for the administration of justice and the due execution of all the powers and authorities granted and committed to the said High Court by these Our Letters Patent. And We do hereby ordain that every such appointment shall be forthwith submitted to the approval of the Governor-General in Council, and shall be either confirmed or disallowed by the Governor-General in Council. And it is Our further will and pleasure, and we do hereby, for Us, Our heirs and successors, give, grant, direct, and appoint that all and every the officers and clerks to be appointed as aforesaid shall have and receive respectively such reasonable salaries as the Chief Justice shall from time to time, appoint for each office and place, subject to the approval of the Governor-General in Council, that all and every resident within shall hold their judge the right of any officer or clerk to avail himself of leave of absence under any rules prescribed by the Governor-General in Council, and to absent himself from the said limits during the term of such leave, in accordance with the said rules.

Admission of Advocates, Vakeels, and Attorneys.

9. And We do hereby authorize and empower the said High Court of Judicature at Fort William in Bengal, to approve, admit, and enrol such and so many Advocates, Vakeels, and Attorneys as to the said High Court shall seem meet; such Advocates, Vakeels, and Attorneys shall be and are hereby authorized to appear for the suitors of the said High Court, and to plead or to act, or to plead and act, for the said suitors, according as the said High Court may by its rules and directions determine, and subject to such rules and directions.

10. And We do hereby ordain that the said High Court of Judicature at Fort William in Bengal shall have power to make rules for the qualification and admission of proper persons to be Advocates, Vakeels, and Attorneys-at-law of the said High Court, and shall be empowered to remove or to suspend from practice, on reasonable cause, the said Advocates, Vakeels, and Attorneys, and to make such rules on behalf of the said High Court, as may be allowed.

To a t — See *Moran v. Dewan Ah.*¹

¹ (1871) 9 B. L. R., 418.

Remove or to suspend from practice—See *Le Mesurier v. Wajid Hassan*.¹ It is professional misconduct to accept a share of property sued for as a fee,² or to supply funds for litigation with an assignment of the property by way of consideration.³

Reasonable cause—For contempt while defending his own conduct as an advocate and libelling the Judges in a newspaper.⁴

Board of Examiners—The Court has no jurisdiction to interfere with the discretion of the Board of Examiners in an attorneys' examination.⁵

Presentation of appeal—The presentation of an appeal by a person who was not an advocate, vakil, or attorney of the Court, nor a suitor, is not a valid presentation in law,⁶ but the presentation of an appeal in *forma pauperis* by the duly authorised agent of a *Paria* woman was held to be a valid presentation in law.⁷

Civil jurisdiction of the High Court.

11 And We hereby ordain that the said High Court of Judicature at Fort William in Bengal shall have and exercise ordinary original civil jurisdiction within such local limits as may from time to time, be declared and prescribed by any law made by competent legislative authority for India, and until some local limits shall be so declared and prescribed, within the limits declared and prescribed by the proclamation fixing the limits of Calcutta, issued by the Governor-General in Council, on the 10th day of September, in the year of Our Lord, one thousand seven hundred and ninety-four, and the ordinary original civil jurisdiction of the said High Court shall not extend beyond the limits for the time being declared and prescribed as the local limits of such jurisdiction.*

A Judge, in exercise of the or-
at Madras directed a warrant
appointed a special bailiff to exee
debtor, wherever he might be
made without jurisdiction.⁸ In an ordinary suit commenced in the High Court a writ of *fiats facias* cannot issue except within the local limits of the Court's original jurisdiction.⁹

12 And we do further ordain that the said High Court of Judicature at Fort

Original jurisdiction
as to suits

suits for land or other immoveable property, such land or property, shall be situated, or, in all other cases if the cause of action shall have arisen either wholly or in part, the land or property shall be a bona fide situated in part

* In the *Madras and Bombay Letters Patent* the words are "by any law made by the Governor in Council." In the *Madras Letters Patent*, for the words "within the limits declared and prescribed" &c., are substituted "within the limits of the local jurisdiction of the said High Court of *Bombay* *Madras* at the date of the publication of these presents."

¹ (1902) 29 Cal. 890.

² *In re, An Advocate*, (1906) 4 Cal. L. J., 239.

³ *Id.* p. 262.

⁴ *In re, Sarbhadicary* (1907) L. R., 34 I. A., 41.

⁵ *In re, Purna Chandra Datt*, (1903) 12 Cal. W. N., 875.

⁶ *Shiam Karim v. Raghubandon*, (1900) 22 All., 331.

⁷ *Wazir-un-nissa v. Ilahi Bakhsh*, (1902) 24 All. 172.

⁸ *Rajah of Ramnad v. Seetharam Chetty*, (1933) 20 Mad., 120.

⁹ *Monmotho Nath v. Greender Chunder*, (1875) 24 W. R., 366.

within the jurisdiction of the Small Cause Court at Calcutta in which the debt or damage, or value of the property sued for does not exceed one hundred rupees.

The interpretation of this clause has differed considerably in the three High Courts of Calcutta, Bombay and Madras but in one respect they are all agreed namely that it should be read as if it ran as follows.

"The said High Court in the exercise of its ordinary original civil jurisdiction shall be empowered to receive, try, and determine suits of every description if

(a) *in the case of suits for land*, or other immoveable property, such land or property shall be situated either wholly, or, in case the leave of the Court shall have been first obtained, in part within the local limits of the ordinary original jurisdiction of the said High Court, or if

(b) *in all other cases*, the cause of action shall have arisen either wholly, or, in case the leave of the Court shall have been first obtained, in part within the local limits of the ordinary original jurisdiction of the said High Court, or if the defendant at the time of the commencement of the suit shall dwell or carry on business or personally work for gain within such limits."

Suits for Land—In a Madras case² a learned Judge (Moore J.) stated that he would be prepared to hold that the phrase "suits for land or other immoveable property" in clause 12 of the Madras Letters Patent includes all suits mentioned in clauses (a) (b) (c) (d) (e) and (f) in section 16 of the Code. This dictum appears to have been unnecessary to the decision of the case before him and is diametrically opposed to the rulings of the Bombay High Court. The suit was for the sale of mortgaged lands and the case can only be regarded as an authority for the proposition that any suit in which a decree is asked for operating directly upon the land is not within clause 12. Even this ruling goes beyond the earlier authorities, several of which show that a suit may be maintainable in part even though some reliefs are prayed for which the Court has no jurisdiction to grant. See *infra*.

The Calcutta High Court has long regarded it as settled that suits for foreclosure³ or sale, suits for redemption,⁴ suits by a purchaser for specific suits for the purpose of control over land are suits

The Bombay High Court has interpreted the words in the light of the uncertainty in respect of similar suits,⁵ and has held that a suit for specific in Bombay relating to land outside the jurisdiction may be entertained and a mortgage-debt realised by sale of the land.⁷ A suit by one shareholder

¹ See *Candler v. J. de B.* (1893) 22 Bom., 992; following B. L. R., O. C., 85. Jagadamba, 696. Seshhari v. Ramarao, (1896) 0) 4 Bom., 482; see also, Srinath

² *Nelum v. Krishnaswami*, (1903) 27 Madras p. 160, 161. See pp. 129-132, *ante*. For another Madras case in which jurisdiction in an Administration suit was declined, see *Aklulkaram v. Badruddeen*, (1905) 29 Mad., 216.

³ See *Markby J.*, in *Jaggolomba v. Poddomon*, (1875) 15 B. L. R., p. 329.

⁴ *Dononath v. Hogg*, (1862) 1 Hyde, 141.

⁵ See cases cited by Strachey J., in *Sorahji v. Ruttonj*, (1894) 22 Bom., at p. 704.

⁶ *Paget v. Ede*, L. R. 18 Fq., 180.

⁷ *Holkar v. Dalabhai*, (1890) 14 Bom., 353; following *Yankoba v. Ramibhai*, (1871) 9 Bom. H. C., Rep. p. 12; and see *Honsraj v. Runchor Das*, (1905) 7 Bom. L. R., 319, which was a purchaser's suit.

to recover his share of rents received by another was also held to be maintainable although the title to the land was in dispute.¹ These decisions were followed in 1898 by Strachey J., who held that a suit for foreclosure of a mortgage made in Bombay on land outside the jurisdiction was not a suit for land within the meaning of this clause.² In a later case the plaintiffs sued for partition of property consisting of a house in Bombay and certain fields at Vavla outside the jurisdiction. The parties were all residents in Bombay. As no leave had been obtained, it was held that the Court had no jurisdiction as to the Vavla property but the suit proceeded as regards the property in Bombay.³

The principle underlying these decisions seems to be that the Charter has invested the High Court with the full powers of the Courts of Equity in England in respect of suits in *personam*. They have all been considered by Sir Lawrence Jenkins C. J., and Mr. Justice Bachelor in the case of *Vaghoji v. Camaji*,⁴ in

jurisdiction

In Calcutta this clause has been interpreted as curtailing the full powers to act in *personam* which is vested in the English Court of Chancery,⁵ and *Paget v. Ede*⁶ has not been followed, but the course of the decisions seems to show that it is not yet too late to put a stop to the cutting away of the jurisdiction of the Court which has been effected by the most recent judgments upon the point in question.

Calcutta—The old Supreme Court held that it had power to declare a trust in respect of land in the *mofussil*,⁷ and the authority of this case still stands unshaken.⁸ It was also decided in an early case that a suit by a purchaser for specific performance of a contract to sell lands outside Calcutta was maintainable where the parties were under and within the jurisdiction.⁹

Again a Receiver was appointed to take charge of immoveable property outside the jurisdiction in a case where the right to a Sebatship under a trust-deed was disputed. In this case it was said that the parties had no *beneficial* interest in the land and that no decree bearing *directly* upon any interest in the land was given.¹⁰

Another case which involved the settlement of a boundary line was held not to be maintainable although it was urged that the plaintiff did not seek any adjudication of title to the land in question. In this case it was said that a plaintiff may shew jurisdiction but the written-statement may turn the suit into a "suit for land."¹¹

¹ *Chintaman v. Madhavarav*, (1869) 6 Bom. H. C., 20.

² *Sorabji v. Ruttonji*, (1898) 22 Bom., 701.

³ *Balaram v. Ramchandra*, (1898) 22 Bom., 922.

⁴ *Vaghoji v. Camaji*, (1905) 29 Bom., 249.

⁵ *Penn v. Lord Baltimore*, 1 Ves., (Sen), 411.

⁶ L. R., 18 Eq., 118.

⁷ *Bagram v. Moses*, 1 Hyde, 234.

⁸ *Kennedy, J.*, in *Kelke v. Fraser*, (1877) 2 Cal., 445. *Nistaring Dass v. Nundo Lal Bose*, (1899) 26 Cal., 891.

⁹ *Ramdhoni Shaw v. Nobumoney Dassee, Bourke*, 218; *contra*, where defendants not residents, *Sreenath Roy v. Cally Dass Ghose*, (1879) 5 Cal., 82.

¹⁰ *Jaggodumba v. Paddomoney*, (1875) 15 B. L. R., 318; see, p. 329. See also, *Crisp v. Watson*, (1893) 20 Cal., 689.

¹¹ *East India Ry. Co. v. Bengal Coal Co.* (1876) 1 Cal., 95, but with this, contrast, *Sale J's judgment in Kishory Mohan Roy v. Kali Churn Ghose*, (1897) 24 Cal., 190; 1 Cal. W. N., 156, *infra*.

A still stronger cue in favour of a more liberal construction of the Charter is that of *Juggernath Dass v. Brynith*¹ in which Garth C. J. and Markby J. held that a suit to recover title deeds although it may involve a question of title is not a suit to obtain possession of land or to deal in any way with the land itself within the meaning of the Charter. In this case the defendant denied and contested the plaintiff's title to the property.² The next case³ on this point was *Hung Lal Lohia v. Furzon*, a suit for rent and for damages for use and occupation of land outside the jurisdiction. The defendants did not admit the plaintiff's title and the main issue was what was the nature of the tenancy. O'Kneels J. said, "where it becomes necessary to determine what the nature of the tenancy was I think that that fact does not make the suit a suit for land."

The next decision⁴ tended still further to extend the interpretation of the Rule laid down by Sir Richard Garth in *De v. and London Bank v. Hardie*, *supra*. This was an administration action in which the plaintiffs sought to set aside leases granted by the defendant executors of lands outside the jurisdiction. Mr. Justice (now Chief Justice Sir) John Stanley overruled the defendants' objections on the point of jurisdiction. "The Court assumes jurisdiction," he said (p. 921), "in regard to immoveable properties situate outside the jurisdiction in cases where it acts *in personam* either to compel the owner to give effect to legal obligations into which he has entered or to a trust imposed on him." This case seems to go even further than *Higram v. Moses*, *supra*. On appeal to the Privy Council⁵ this ruling on the point of jurisdiction has been expressly upheld, and their Lordships stated that the High Court has jurisdiction in certain cases, to set aside leases of land outside the jurisdiction. This decision came too late to place before the Court in *Hara Lal Bhanoo v. Anandehi* and *Abdul Karim v. Badruddeen Sahib*, note 7, *infra*. The under-noted case⁶ is also noteworthy in considering this question. Mr. Justice Sale held that the restrictive words in this clause should be strictly construed and apply to the case of a plaintiff only. They do not apply to a case in which the person seeking the exercise of the Court's jurisdiction is the defendant.

The next case⁷ is difficult to reconcile with all these decisions. The plaintiff brought his suit for the construction of a will and declaration of rights therein, and for the delivery of possession. It was argued for the plaintiff that the defendant was

must now be regarded as being not only wholly different from those of the Bombay High Court on this important point but also in conflict among themselves. A similar application of the words of Garth C. J. seems to have been adopted by Stephen J. in the recent case of *Toral v. Matter* as yet unreported and now under appeal, and it remains to be seen whether the Appellate Court's judgment will set at rest the doubts which cannot fail to arise upon a consideration of the Calcutta decisions on this question.

¹ Calo., 376.

² (1906) 33 Calo., 180; 9 Calo. W. N., 961; 2 Calo. L. J., 189; 7 Bom. L. R., 887.

³ *Kisori Mohun Roy v. Kall Churn Ghose* (1897) 24 Calo., 191; 1 Calo. W. N., 156.

⁴ *Hara Lal Bhanoo v. Nitalbani Dabee*, (1901) 29 Calo., 315. This case has been relied upon in Madras where the interpretation of the clause has always been very narrow; *Abdul Karim v. Badruddeen Sahib*, (1905) 28 Mad., 217.

In all other cases—It has been held by Harrington J.¹ that these words exclude suits for land and that the question whether the defendant dwells in the county is irrelevant in suits.

Dwelling or carrying on business. See pp 134-138, *ante*.

Cause of action.—The words "cause of action" in this section mean these things necessary to give a right of action, and in a suit for breach of contract, where leave has not been obtained to sue under this section, it must be established that the contract as well as the breach have taken place within the local limits of the Court.²

When part of a cause of action has arisen within the jurisdiction of the High Court, the jurisdiction of the Court is not ousted, because the defendant being the subject of a foreign state, had ceased to carry on business within the jurisdiction before the suit was filed.³ The High Court has jurisdiction to try a suit in which the cause of action is that the 2nd defendant was endeavouring to deprive the surviving partner in a partnership carried on beyond the jurisdiction to get into his hands a sum of money within the jurisdiction of the Court with a view to deprive the representatives of his deceased partner of it, leave to sue having been obtained under this clause.⁴ When a defendant is added who does not reside within the jurisdiction of the High Court and against whom the cause of action has not arisen wholly within that jurisdiction, leave must be obtained under clause 4, even if leave was obtained when the suit was originally filed.⁵

An undertaking to pay immediately . . . of the plaintiff by the . . . not personally works for § . . . of the High Court, in con . . . against him on the basis of . . . by the High Court Q. B. v. , England, and to be enforced in the same manner as a judgment does not constitute a cause of action within the meaning of section 6.

Where the defendants resided outside the jurisdiction and the plaintiff, exclusive of the cause title, contained no averment that the defendants entered into within the jurisdiction or entered into within the jurisdiction of the plaintiff was filed: *See* *W. H. H. v. W. H. H.*, 100 F.2d 100, 101 (1st Cir. 1937).

12 of its Charter having been obtained.⁸ In a suit brought by the plaintiff for the costs of preparation of a trust-deed, it was held that as the deed had

¹ *Hara Lal Banerjee v. Nitambani*, (1901) 29 Cal., at p. 322; *foli. Seshagiri v. Rama Rau*, (1926) 19 Mad., 417 and *Jairam v. Atmaram*, (1880) Bom., 482.

¹ Doya Narain v. Secretary of State, (1887) 14 Calc., 256; Seshagiri v. Askur Jun (1901) 27 Mad., 494.

¹ Ram Ravi v. Pralhadbhai, (1896) 20 Bom., 137; Giridhar v. Kassar, (1897) 17 Bom., 662.

* Rivett Carnac v. Goenidas, (1896) 20 Bom., 15

* Nampratala i. Foolrahi, (1896) 20 Bom., 767.

* Deep Narain v. Dietert, (1903) 8 Cal. W. N., 207; 31 Cal., 281.

³ Fink & Bullock-Dass, (1894) 3 Calc. W. N., 524; 26 Calc., 715.

* Nistamney Dasi v. Nundolall Bosc. (1898) 3 Cal. W. N., 670.

been signed by the plaintiff's agent in Bombay, and the payment to be made by the plaintiff's was to be made in Bombay, as leave had been obtained under this cause, the High Court of Bombay had jurisdiction to try the suit.¹ When the plaintiff's brought a suit for their share of family property consisting of lands situated outside the jurisdiction of the High Court and for moveables situated within, leave having been granted by the Registrar, *held* (1) that the High Court had no jurisdiction as to the lands, and that the suit must be dismissed as to them; (2) that leave to sue had been wrongly granted by the Registrar.²

Partly within local limits—When the cause of action arises only partly within the local limits, the leave of the Court must be obtained before the institution of the suit,³ and leave to sue under this section cannot be implied from the fact that leave to sue as a proper has been granted to plaintiff. Leave for the former purpose must be distinctly sought and obtained.⁴ Moreover, the cause of action must be the—
not cover an amended plaint.⁵
and the witnesses reside at
may be obtained can be satisfied
appeal lies from the order.⁷
on the 30th of June, 1874. The unsuccessful party did not appeal, but made the same application to another judge on the 15th December and the leave was granted. *Held*, on appeal, that the order should not have been made and should be discharged.⁸

A *hundi* drawn at Benares on the drawer's firm at Bombay in favour of a firm at Mirzapore and Calcutta was endorsed at Calcutta by the payee to a firm at Calcutta and dishonoured by the drawer's firm at Bombay. *Held*, that the endorsement having taken place in Calcutta part of the cause of an action arose in Calcutta so as to give the High Court there jurisdiction.⁹

It is not necessary to obtain the leave of the High Court under cl. 12 of the Letters Patent, to sue to set aside a decree of that Court made upon a compromise to which the plaintiff has been induced by the misrepresentations of the defendant to agree, even when it appears from the plaint that the defendants are outside the jurisdiction of the Court.¹⁰

A suit against persons outside the jurisdiction in respect of transactions carried on by them as Commission Agents for the plaintiffs where instructions were sent from and demand of payment was made in Bombay and accounts were to be rendered to the plaintiffs at Bombay was held to have been well brought in Bombay.¹¹

Order giving leave The granting of order under this clause amounts to a judicial act which cannot be delegated to the Registrar.¹²

¹ *Dobson v. Bengal Spinning and Weaving Co.*, (1897) 21 Bom., 126.

² *Seshagiri Rau v. Rama Rau*, (1896) 19 Mad., 418.

³ *Abdul Hamed v. Promothonath Bose*, 1 Ind. Jur. (N. S.), 218.

⁴ *Jairam Narayan v. Atmaram*, (1890) 4 Bom., 492.

⁵ *Rampurab v. Premsookh*, (1891) 15 Bom., 93.

⁶ *Radha Bibee v. Mucksoodun*, (1874) 21 W. R., 204; and where the defendant is an absent foreigner see *Seshgiri Row v. Askar Jung*, (1907) 30 Mad., 438; *Shaw Wallace v. Gordhaadhar*, (1906) 8 Bom. L. R., 56.

⁷ *De Souza v. Coles*, (1866) 3 Mad. H. C., 385.

⁸ *Mudelly v. Mudelly*, (1874) 8 Mad. H. C., 21.

⁹ *Roghoonath Misser v. Gobind Narain*, (1893) 22 Calc., 451.

¹⁰ *Soloman v. Abdul Aziz*, (1879) 4 C. L. R., 366.

¹¹ *Motilal v. Serajmull*, (1906) 30 Bom., 167. See also, *Shaw Wallace Co. v. Gordhaadhar*, (1906) 30 Bom., 364.

¹² *Ishteswar v. Ramswar*, (1907) 31 Calc., 619; 5 Calc. L. J., 405; 11 Calc. W. N., 619. *Brinj Coomari v. Alma Chand*, (1907) 11 Calc. W. N., 662.

An appeal lies from an order dismissing a summons to show cause why leave under this clause should not be granted.¹

The legality of an order granting permission to institute a suit under cl. 12 of the Letters Patent may form an issue for trial in the suit so instituted.²

Residence. Residence in Bombay for a temporary purpose does not amount to "dwelling," nor having a *padhu* or place of business where devotees paid in presents, to carrying on business, nor accepting invitations to the houses of devotees and pupils where presents were offered, to personally working for gain within the meaning of cl. 12. The expression "carry on business" relates to business of a kind in which actionable debts may be contracted.³

The defendant who was a Political Agent at Kolhapur left Kolhapur on the 6th March 1900, *en route* for England on a year's furlough. He arrived at Bombay on the 7th March. While the defendant was in Bombay (*viz.*, on the 8th March) the plaintiff presented a plaint against him, in the wording of which the defendant was stated to be then residing at Malabar Hill in Bombay. *Held*, that the temporary residence of the defendant in Bombay, under the circumstances, gave the Court jurisdiction to admit the plaint.⁴

Leave to institute a fresh suit after withdrawal from the previous suit.—When leave to institute a suit was given under cl. 12 and a suit was instituted and afterwards withdrawn with liberty to bring a fresh suit, the Court when leave is again asked for, may grant or refuse it.⁵

Infant marriage.—The High Court has jurisdiction under cl. 12 to try a suit to declare an infant marriage amongst the Parsees to be null and void.⁶

Decree obtained by fraud. The original side of the High Court has jurisdiction to entertain a suit to set aside, on the ground of fraud, a decree passed by any other Court of concurrent jurisdiction, where the cause of action has arisen either wholly or in case the leave of the Court has been first obtained, in part, within the local limits of its original jurisdiction.⁷

Jurisdiction. In a partnership suit it was held by the Privy Council that the jurisdiction of the Bombay Court is not limited to the assets recovered in Bombay.⁸

Value.—See note to s. 15, "How DETERMINED," pp. 89, 90.

Appeal.—When leave to sue under cl. 12 has been obtained and a new plaintiff has been added, the defendant cannot appeal against the order,⁹ unless the amendment has altered the cause of action.¹⁰ An appeal lies from an order granting leave to institute a suit under this clause.¹¹

Practice.—When defendant objects to leave granted *ex parte*, the matter may be heard on summons before the case comes on for hearing.¹²

¹ *Nagamoney v. Janakiram*, (1857) 10 Mad., 142.

² *Vaghaji v. Camaji* (1905) 29 Bom., 249.

³ *Gridharaji v. Govardhanlalji*, (1891) 18 Bom., 294; L. R., 21 I. A., 13.

⁴ *Fernandez v. Wray*, (1901) 25 Bom., 170.

⁵ *Sibhapathi v. Lakshmi*, (1901) 24 Mad., 293.

⁶ *Peshetam Hormaji v. Meherbai*, (1889) 13 Bom., 302.

⁷ *Nanda Lal v. Nistarini*, (1902) 7 Cal. W. N., 354.

⁸ *Ishagwanias v. Rivet Carnar*, (1893) 3 Cal. W. N., 111.

⁹ *Foolbi v. Ramprotal*, (1893) 17 Bom., 466.

¹⁰ *Ramprotal v. Premankh*, (1891) 15 Bom., 93.

¹¹ *Muljee Ismail v. Hadjee Mahomed*, (1873) 13 B. L. R., 91; 21 W. R., 303.

See *Vaghaji v. Camaji*, (1905) 29 Bom., 249.

¹² *Keraji v. Luchmadis*, (1889) 13 Bom., 424.

Limitation—The limitation to set aside an *ex parte* order under this section is governed by art 178, Schedule 11 of the Limitation Act.¹

13 And We do further ordain that the said High Court of Judicature at Fort William in Bengal, shall have power to remove and to try and determine, as a Court of extraordinary original jurisdiction, any suit being or falling within the jurisdiction of any Court, whether within or without the Bengal Division of the Presidency of Fort William, subject to its superintendence, when the said High Court shall think proper to do so, either on the agreement of the parties to that effect, or for purposes of justice, the reasons for so doing being recorded on the proceedings of the said High Court

The application should be made to the Judge sitting on the Original Side.² It will be granted when it has been shown to the satisfaction of the Court,³ that the lower Court has dealt harshly, and without discretion, with the applicant, and the decision turns mainly on points of law,⁴ or that difficult points of law arise and where generally it appears to be a case that should not be tried in the Mofussil,⁵ provided the interest of the applicant will be prejudiced if the case be not transferred.⁶

The substantive law applicable to the case will be the law of the Court from which it has been transferred.

In the Durrpur Court, the defendant the clause, the grounds of the application in the suit, (2) that the defendant's impossible for her to go to Durrpur and take her witnesses there, (4) that an agreement upon which the suit was brought was executed in Calcutta, (5) that the plaintiff resided and carried on business in Calcutta, held, that the case was a proper one for transfer to the High Court.⁷

Resident at Aden—The Civil Court of the Resident at Aden, as constituted by Act 11 of 1861 is subject to the superintendence of the Bombay High Court, which has power to remove a suit from the Court of the Resident and to try and determine the same.⁸

ver apart from the Civil proceeding with a Small om the S. C. Court which

14 And We do further ordain that, where plaintiff has several causes of action against a defendant, such causes of action not being for land or other immoveable property, and the said High Court shall have original jurisdiction in respect of one of such causes of action, it shall be lawful for the said High Court to call on the defendant to show cause why the several causes of action should not

¹ Kessowji v. Luchmidas, (1889) 13 Bom., 404

² Doucett v. Wise, (1865) 4 W. R., 7.

³ Courjon v. Courjon, (1871) 9 B. L. R., App. 10.

⁴ Kopinanth Sahai v. Government, (1872) 10 B. L. R., 168.

⁵ Doucett v. Wise, 1 Ind. Jur., (N. S.), 94

⁶ Borradaile v. Gregory, Bourke, Part II, Ex. O. C. J., 1. See also Munsif of Debrooghur, in the matter of, (1871) 7 B. L. R., 303; Payn v. Administrator General, (1886) 6 C. L. R., 221.

⁷ Grose v. Amritamayi Dasi, (1869) 4 B. L. R., O. C. J., 1; 12 W. R., O. J., 13.

⁸ Harendro Lal Rai v. Sarvamangala Debi, (1897) 21 Calc., 183; 1 Calc. W. N., 109

⁹ Abdul Karim v. Municipal Officer, Aden, (1903) 27 Bom., 575. Municipal Officer Aden v. Ismail, (1906) 30 Bom., 246; 10 Calc. W. N., 183.

¹⁰ Rash Behary Dey v. Bhowani, (1907) 31 Calc., 97; Mangle v. Gopal, (1907) 34 Calc., 104.

¹¹ Meganlal v. Bombay Co., (1913) 7 Bom. L. R., 143. In re, Ralli, (1907) 31 Bom., 236.

be joined together in one suit, and to make such order for trial of the same as to the said High Court shall seem fit.

15. And We do further ordain that an appeal shall lie to the said High Court of Judicature at Fort William in Bengal from the judgment not being a sentence or order passed or made in any criminal trial of one Judge of the said High Court, or of one Judge of any Division Court, pursuant to section 13 of the said recited Act, and that an appeal shall also lie to the said High Court from the judgment (not being a sentence or order as aforesaid) of two or more Judges of the said High Court, or of such Division Court, whenever such Judges are equally divided in opinion, and do not amount in number to a majority of the whole of the Judges of the said High Court at the time being; but that the right of appeal from other judgments of Judges of the said High Court, or of such Division Court, shall be to Us, Our heirs or successors, in Our or Their Privy Council, as hereinafter provided.

Appeal: judgment.—This section is not affected by s. 93 of the Civil Procedure Code,¹ but it is by O. 17, r. 7,⁴ and by ss. 104 and O. 43, r. 1.²

Under this section sentence or order passes appellate jurisdiction, and did not amount in allowed from a decision from an order passed by decision passed under a Council Department, *from an order deciding the claim of relatives to be guardian of a minor*,¹¹ from an order refusing a commission to examine witnesses not compellable to attend;¹² from an order discharging a rule to set aside a sale;¹³ from an order on the original

order passed on a certificate given by a Commissioner appointed to take account;¹⁴ from an order reversing a decree of a Small Cause Court under s. 115;¹⁵ from an

¹ *Gridharji v. Purushottam*, (1831) 10 Calc., 814; 17 Calc., 3, p. 7; L. R., 16 L. A., 137.

² *Achaya v. Ratnavela*, (1886) 9 Mad., 253.

³ *Rajagopal, in re*, 9 Mad., 447; *Banno v. Mehdi Hussain*, (1869) 11 All., 375; *Sabhapathi v. Natayansami*, (1902) 25 Mad., 553.

⁴ *Srinivasa v. Queen Empress*, (1891) 17 Mad., 105.

⁵ *Shurno Moyce v. Luchmeeput Doogur*, (1869) 7 W. R., 52, 512; *Gridharji v. Romanlalji*, (1890) 17 Calc., 2, p. 11; 10 Calc., 814.

⁶ *Nundeeput Mahta v. Uruhart*, (1870) 13 W. R., 209; *Reasut Hossein v. Abdoollah*, L. R., 3 L. A., 221; 26 W. R., 50.

⁷ *Hurriah Chunder Mitter, petitioner*, (1872) 18 W. R., 209.

⁸ *Amcer Ali v. Kassim Ali*, (1870) 13 W. R., 403.

⁹ *Kali Sundari Debia*, (1891) *in re*, 6 Calc., 594; but see, *Iutif Ali v. Asgur Reza*, (1890) 17 Calc., 455.

¹⁰ "Champion" *in the matter of*, (1899) 17 Calc., 68.

¹¹ *Kristo Kisor v. Kailermoye*, (1877) 2 C. L. R., 593; *Narroudas, in the matter of*, (1899) 14 Bom., 555.

¹² *Macuthanatha v. Krishnamacharian*, (1907) 30 Mad., 143.

¹³ *Russik Lal Pal v. Romonath Sen*, (1896) 1 Calc. W. N., xxvi.

¹⁴ *Keshagiri v. Askar Jung*, (1903) 26 Mad., 502.

¹⁵ *Somanuldrain v. Administrator General*, (1876) 1 Mad., 148.

¹⁶ *Haji Jena v. Narran Mulji*, (1875) 12 Bom. H. C., 129.

¹⁷ *Vanangamudi v. Ramasami*, (1891) 14 Mad., 400.

order dismissing a claim preferred by the mortgagees of immoveable property attached in execution of a decree,¹ from an order dismissing an application by a judgment-creditor of an insolvent praying for payment of a certain sum of money to him by the official assignee,² from an order dismissing a petition praying the Court to receive a sum of money as security for costs of an appeal,³ from an order dismissing on its

Code there are only two ways by which a judgment and decree of a Division Bench can be set aside in India. The two methods are described in ss. 558 and 623, C. P. C."

An appeal lies under this clause from an order refusing an application to commit for contempt of Court,⁴ as well as from an order of committal for contempt.¹⁰ And from an order of a single Judge rejecting a petition for revision.¹¹ A Judge of the High Court sitting alone to hear cases in which the value of subject matter in dispute does not exceed Rs. 50, cannot make a reference to a Full Bench.¹² An order on and application under s. 96 of the Probate and Administration Act at the instance of a beneficiary, where there was no restriction on the power of the executor to sell, is without jurisdiction and is appealable under this section.¹³ A petition for revision preferred under the Provincial Small Cause Courts Act, s. 23, was heard and dismissed

the Bench was a herefrom.¹⁴ The ions made by the cannot interfere order of a single a judgment, and

¹ *Sibbapathi v. Narayanasami*, (1902) 25 Mad., 553.

² *Punithavelu v. Bhashyam*, (1902) 25 Mad., 406.

³ *Vidhyapurana v. Vidjardhi*, (1902) 25 Mad., 654.

⁴ *Commercial Bank of India v. Sabju Sahob*, (1901) 24 Mad., 253.

⁵ *Brij Coomaree v. Ramrick Dass*, (1900) 5 Calc. W. N., 781.

⁶ *Veerabadran Chetty v. Nataraja Deskar*, (1903) 28 Mad., 23.

⁷ *Rambhari Sahu v. Madan Mohan Mitter*, (1896) 23 Calc., 339.

⁸ *Fatimunnissa v. Deoki Persad*, (1897) 24 Calc., 350; 1 Calc. W. N., 21.

⁹ *Mobendro Lal Mitter v. Anand Kumar Mitter*, (1893) 25 Calc., 236.

¹⁰ *Navivahoo v. Narotam Das*, (1883) 7 Bom., 5.

¹¹ *Rama Aiyar v. Venkata Chella*, (1897) 30 Mad., 31.

¹² *Nabu Mandal v. Chohm Mullik*, (1893) 25 Calc. 896.

¹³ *Indra Chandra Singh, in the goods of*, (1896) 23 Calc., 580.

¹⁴ *Venkata Reddi v. Taylor*, (1894) 17 Mad., 100.

¹⁵ *Ramaasmy Chetty, in the matter of*, (1901) 27 Mad., 540.

¹⁶ *Narayanasami v. Osuru Reddi*, (1902) 25 Mad., 518.

¹⁷ *Corporation of Calcutta v. Cohen*, (1901) 6 Calc. W. N., 480.

¹⁸ *Pathukudi v. Parakkas*, (1904) 27 Mad., 340; *Chinnasami v. Aramagaa*, (1904) 27 Mad., 432.

16 And We do further ordain that the said High Court of Judicature at Fort William in Bengal shall be a Court of Appeal from the Civil Courts of the Bengal Division of the Presidency of Fort William, and from all other Courts subject to its superintendence, and shall exercise appellate jurisdiction in such cases as are subject to appeal to the said High Court by virtue of any laws or regulation now in force

17 And We do further ordain that the said High Court of Judicature at Fort William in Bengal, shall have the like power and authority with respect to the persons and estates of infants, idiots, and lunatics, within the Bengal Division of the Presidency of Fort William, as that which is now vested in the said Supreme Court at Calcutta.

In the case of *Sirish Chunder Singh*¹ the Calcutta High Court refused in a summary proceeding under this section to appoint a guardian of the person and property of a minor not a European British subject, living outside of the limits of its ordinary original civil jurisdiction.

18 And We do further ordain that the Court for Relief of Insolvent Debtors in Bengal shall have jurisdiction, and otherwise, as are constituted by the laws relating to insolvent-debtors in India.

This section narrows the jurisdiction of the Insolvent Court to the Bengal Division of the Presidency of Fort William,² and of the Court for relief of Insolvent Debtors in Bombay to the Presidency of Bombay. Its jurisdiction cannot be exercised outside that Presidency or outside any area within it to which it may by subsequent enactment be restricted.³

A European British born subject, residing in the Bombay Presidency, but outside the local limits of the jurisdiction of the High Court, is entitled to come to the Court for Relief of Insolvent Debtors and to the jurisdiction of the Supreme Court by clause 18 of the Letters

Law to be administered by the High Court of Judicature at Fort William in Bengal.

19 And We do further ordain that, with respect to the law or equity to be applied to each case coming before the said High Court of Judicature at Fort William in Bengal, in the exercise of its ordinary original civil jurisdiction, such law or equity shall be the law or equity which would have been applied by the said High Court to such case if these Letters Patent had not issued.

Law and Equity.—See *Maidhub Chunder Poramanick v. Rajcoomar Doss*, 14 B. L. R., 76; *Ghose v. Amrutamayi Dasi*, 4 B. L. R., 14

20 And We do further ordain that with respect to the law or equity and rule of good conscience to be applied to each case coming before the said High Court of Judicature at Fort William in Bengal, in the exercise of its extraordinary original civil jurisdiction, such law or equity and rule of good conscience shall (until otherwise provided) be the law or equity and rule of

¹ *Sirish Chunder Singh, in the matter of*, (1891) 21 Cal., 206.

² *Tietkins, in the matter of* (1868) 1 B. L. R., O C J., 81

³ *James Curtis, in re*, (1897) 21 Bom., 403.

⁴ *Blackwell, in re*, (1885) 9 Bom., H. C., 461

The Court can quash or confirm a conviction.¹ When the Judge at Sessions
 h simple
 Advocate
 to cases

The discretion given to a Judge presiding at a criminal trial whether or not he will reserve a point of law for the opinion of the High Court, cannot be reviewed by the High Court, sitting as a Court of Review under this section.⁴

27. And We do further ordain that the said High Court of Judicature at
 Appeals from Criminal Fort William
 Courts in the Provinces the Criminal C
 dency of Fort
 to its superintendence, and shall exercise appellate jurisdiction in such cases as are subject to appeal to the said High Court by virtue of any law now in force.

28. And We do further ordain that the said High Court of Judicature at
 Hearing of referred Fort William in Bengal, shall be a Court of reference and
 cases and revision of revision from the Criminal Courts subject to its appellate
 criminal trials jurisdiction, and shall have power to hear and determine
 all such cases referred to it by the Sessions Judges or
 by any other Officers now authorized to refer cases to the said High Court, and to revise all such cases tried by any Officer or Court possessing criminal jurisdiction, as are now subject to reference to, or revision by, the said High Court.

See Queen Empress v. Budara Janni.⁵ The High Court has power under this section to revise the proceedings of the criminal Courts subject to its appellate authority, and can therefore interfere with an improper order of discharge passed by a Presidency Magistrate.⁶

The jurisdiction which the High Court exercises in hearing a case submitted to it under s. 307 of the Criminal Procedure Code is not its original criminal jurisdiction, but it hears the case as a Court of reference in the exercise of the jurisdiction vested in it by cl. 28, which is co-extensive with its appellate jurisdiction.⁷

29. And We do further ordain that the said High Court shall have power
 High Court may direct to direct the transfer of any criminal case or appeal from
 the transfer of a case any Court to any other Court of equal or superior juris-
 from one Court to an diction, and also direct the preliminary investigation
 other, or trial of any criminal case by any Officer or Court
 otherwise competent to investigate or try it, though such
 case belongs, in ordinary course, to the jurisdiction of some other Officer or Court.

The High Court has power to transfer a criminal appeal⁸ or the investigation or trial of any criminal offence committed in Calcutta to a Mofussil Court, or to direct the High Court to try any offence committed in the Mofussil.⁹ A single Judge on the Original Side has power to entertain an application for the removal of a case from the Mofussil to the High Court.¹⁰

¹ Reg. v. Haribole Chandra Ghose, (1876) 25 W. R., Cr. 30; 1 Cal., 207. See also, Banka Behari Ghose, in the matter of, (1868) 2 B. L. R., A. C. R., 17.

² Reg. v. Yail Ali Khan, 1 Ind. Jur. N. S., 424.

³ Empress v. McGuire, (1899) 4 Cal. W. N., 433. See also Reg. v. Navroji, (1874) 9 Bom. H. C., 358.

⁴ Reg. v. Pestanji Dinsha, (1873) 10 Bom. H. C., 75.

⁵ (1891) 14 Mad., 121.

⁶ Colville v. Kristo Kishore, (1898) 3 Cal. W. N., 598; 26 Cal., 746.

⁷ Lyall, in the matter of, (1902) 29 Cal., 286.

⁸ Satapathi v. Queen, (1883) 6 Mad., 32.

⁹ Reg. v. Nabalwip Gossami, (1868) 1 B. L. R., Cr., 15.

¹⁰ Reg. v. Amer Khan, (1871) 7 B. L. R., 240, p. 256.

The High Court may under s. 15 of the Charter Act direct the transfer of a case under s. 145 of the Criminal Procedure Code which a Magistrate has taken cognizance of.¹

Criminal Law

30 And We do further ordain that all persons brought for trial before the said High Court of Judicature at Fort William in Bengal, either in the exercise of its original jurisdiction, or in the exercise of its jurisdiction as a Court of appeal, reference or revision, charged with any offence for which provision is made by Act No. XLV of 1860, called the "Indian Penal Code," or by any Act amending or excluding the said Act, which may have been passed prior to the publication of these presents, shall be liable to punishment under the said Act or Acts, and not otherwise

Exercise of Jurisdiction elsewhere than at the ordinary place of sitting of the High Court

31 And We do further ordain that whenever it shall appear to the Governor-General in Council convenient that the jurisdiction and power by these Our Letters Patent, or by the recited Act, vested in the said High Court of Judicature at Fort William in Bengal, should be exercised in any place within the jurisdiction of any Court now subject to the superintendence of the said High Court, other than the usual place of sitting of the said High Court, or at several such places by way of circuit, the proceedings in cases before the said High Court at such place or places shall be regulated by any law relating thereto which has been or may be made by competent legislative authority for India

Admiralty and Vice-Admiralty Jurisdiction.

32 And We do further ordain that the said High Court of Judicature at Fort William in Bengal, shall have and exercise all such civil and maritime jurisdiction as may now be exercised by the said High Court as a Court of Admiralty or of Vice-Admiralty, and also such jurisdiction for the trial and adjudication of prize causes, and other maritime questions arising in India, as may now be exercised by the said High Court

Regulations made in pursuance of 2 and 3 Will. IV, c. 51, nor any procedure for consolidation in the Civil Procedure Code) the practice of the Court of Admiralty in England ought to be followed so far as such practice can be applied to this country by analogy.²

33 And we do further ordain that the said High Court of Judicature at Fort William in Bengal, shall have and exercise criminal jurisdiction as may now be exercised by the said High Court as a Court of Admiralty or of Vice-Admiralty, or otherwise in connection with maritime matters or matters of prize

Testamentary and Intestate Jurisdiction.

34 And We do further ordain that the said High Court of Judicature at Fort William in Bengal, shall have the like power and authority as that which may now be lawfully exercised by the said High Courts, except within the limits of the

¹ Lohitmoian v. Surjikutta, (1901) 28 Calo., 709.

² Falls of Etnrick, in the matter of, (1895) 22 Calo., 511.

The Court can quash or confirm a conviction.¹ When the Judge at Sessions sentenced a prisoner to rigorous imprisonment for a crime punishable only with simple imprisonment, *held*, that this was an error which might be reviewed on the Advocate General's certificate under this section.² S. 167 of the Evidence Act applies to cases heard by the High Court when exercising its powers under this section.³

The discretion given to a Judge presiding at a criminal trial whether or not he will reserve a point of law for the opinion of the High Court, cannot be reviewed by the High Court, sitting as a Court of Review under this section.⁴

27. And We do further ordain that the said High Court of Judicature at Fort William in Bengal, shall be a Court of Appeal from the Criminal Courts of the Bengal Division of the Presidency of Fort William, and from all other Courts subject to its superintendence, and shall exercise appellate jurisdiction in such cases as are subject to appeal to the said High Court by virtue of any law now in force.

28. And We do further ordain that the said High Court of Judicature at Fort William in Bengal, shall be a Court of reference and revision from the Criminal Courts subject to its appellate jurisdiction, and shall have power to hear and determine all such cases referred to it by the Sessions Judges or by any other Officers now authorized to refer cases to the said High Court, and to revise all such cases tried by any Officer or Court possessing criminal jurisdiction, as are now subject to reference to, or revision by, the said High Court.

See Queen Empress v. Budara Janni.⁵ The High Court has power under this section to revise the proceedings of the criminal Courts subject to its appellate authority, and can therefore interfere with an improper order of discharge passed by a Presidency Magistrate.⁶

The jurisdiction which the High Court exercises in hearing a case submitted to it under s. 307 of the Criminal Procedure Code is not its original criminal jurisdiction, but it hears the case as a Court of reference in the exercise of the jurisdiction vested in it by el. 28, which is co-extensive with its appellate jurisdiction.⁷

29. And We do further ordain that the said High Court shall have power to direct the transfer of any criminal case or appeal from any Court to any other Court of equal or superior jurisdiction, and also direct the preliminary investigation or trial of any criminal case by any Officer or Court otherwise competent to investigate or try it, though such case belongs, in ordinary course, to the jurisdiction of some other Officer or Court.

The High Court has power to transfer a criminal appeal,⁸ or the investigation or trial of any criminal offence committed in Calcutta to a Mofussil Court, or to direct the High Court to try any offence committed in the Mofussil.⁹ A single Judge on the Original Side has power to entertain an application for the removal of a case from the Mofussil to the High Court.¹⁰

¹ Reg. v. Haribole Chamira Ghose, 1876) 25 W. R., Cr. 36; 1 Cal., 207. See also, Banka Dehari Ghose, in the matter of, (1869) 2 B. L. R., A. C. R., 17.

² Reg. v. Yal Ali Khan, 1 Ind. J. R. N. S., 421.

³ Empress v. Megurie, (1899) 4 Cal. W. N., 433. See also Reg. v. Navroji, (1871) 9 Bom. H. C., 354.

⁴ Reg. v. Pestanji Dinshaw, (1873) 10 Bom. H. C., 75.

⁵ (1891) 14 Mad., 121.

⁶ Colville v. Kristo Kishore, (1898) 3 Cal. W. N., 594; 20 Cal., 746.

⁷ Lyall, in the matter of, (1902) 29 Cal., 286.

⁸ Satapathi v. Queen, (1883) 6 Mad., 32.

⁹ Reg. v. Nabadwip Goswami, (1864) 1 B. L. R., Cr., 15.

¹⁰ Reg. v. Amrut Khan, (1871) 7 B. L. R., 240, p. 256.

The High Court may, under s. 11 of the Charter Act direct the transfer of a case under s. 145 of the Criminal Procedure Code which a Magistrate has taken cognizance of.¹

Criminal Law.

30 And We do further ordain that all persons brought for trial before the said High Court of Judicature at Fort William in Bengal, either in the exercise of its original jurisdiction, or in the exercise of its jurisdiction as a Court of appeal, reference or revision, charged with any offence for which provision is made by Act No. XXX of 1859, called the "Indian Penal Code," or by any Act amending or excluding the said Act, which may have been passed prior to the publication of these presents, shall be liable to punishment under the said Act or Act, and not otherwise.

Exercise of Jurisdiction elsewhere than at the ordinary place of sitting of the High Court

31 And We do further ordain that whenever it shall appear to the Governor-General in Council convenient that the jurisdiction and power by these Our Letters Patent, or by the recited Act, vested in the said High Court of Judicature at Fort William in Bengal, should be exercised in any place within the jurisdiction of any Court now subject to the superintendence of the said High Court, other than the usual place of sitting of the said High Court, or at several such places by way of circuit, the proceedings in cases before the said High Court at such place or places shall be regulated by any law relating thereto which has been or may be made by competent legislative authority for India.

Admiralty and Vice-Admiralty Jurisdiction.

32 And We do further ordain that the said High Court of Judicature at Fort William in Bengal, shall have and exercise all such civil and maritime jurisdiction as may now be exercised by the said High Court as a Court of Admiralty or of Vice-Admiralty, and also such jurisdiction for the trial and adjudication of prize causes, and other maritime questions arising in India, as may now be exercised by the said High Court

separate salvage
ordered by them
the promoters,

analogy.²

33 And we do further ordain that the said High Court of Judicature at Fort William in Bengal, shall have and exercise exercised by the or otherwise in

Testamentary and Intestate Jurisdiction.

34 And We do further ordain that the said High Court of Judicature at Fort William in Bengal, shall have the like power³ authority as that which may now be lawfully exercised by the said High Courts, except within the limits of

¹ Lalit Mohan v. Surjaskanta, (1881) 23 Calo., 799.

² Falls of Pittreck, in the matter of, (1895) 22 Calo., 511

jurisdiction for that purpose of any other High Court established by Her Majesty's Letters Patent, in relating to the granting of probates of last wills and testaments, and letters of administration of the goods, chattels, credits, and all other effects whatsoever of persons dying intestate, whether within or without the said Bengal Division,* subject to the order of the Governor-General in Council, as to the period when the said High Court shall cease to exercise testamentary and intestate jurisdiction in any place or places beyond the limits of the provinces or places for which it was established: Provided always that the provisions of the said Letters Patent contained shall interfere with the provisions of the said Letters Patent for India, by and letters of

administration

The High Court of Madras has no jurisdiction to grant probate of the will of a testator, or letters of administration of the estate of an intestate, who did not dwell and who did not have assets within the limits of the Presidency.¹

Matrimonial Jurisdiction.

35 And We do further ordain that the said High Court of Judicature at Fort William in Bengal, shall have jurisdiction, within the Bengal Division of the Presidency of Fort William matrimonial between Our subjects professing therein contained shall be matters matrimonial by the said Presidency lawfully

possessed thereof.

Powers of Single Judges and Division Courts.

36 And We do hereby declare that any function which is hereby directed to be performed by the said High Court of Judicature at Fort William in Bengal, in the exercise of its original or appellate jurisdiction, may be performed by any Judge constituted or constituted for such purpose under the aforesaid Act of the twenty-fourth Division Court is composed of

be equally divided, more :

The provisions of this section are modified by s. 93, ante.²

Act XXIst of 1876 — A Single Judge on the Original Side can dispose of application under this Act.³

Civil Procedure

37. And We do further ordain that it shall be lawful for the said High Court of Judicature at Fort William in Bengal, from time to time, to make rules and orders for the purpose of regulating all proceedings in civil cases which may be

* And We do further ordain that the said High Court of Judicature at Bombay shall have the like power and authority as that which may be now lawfully exercised by the said High Court in relation to the granting of probates of last wills and testaments, and letters of administration of the goods, chattels, credits, and all other effects whatsoever of persons dying intestate whether within or without the limits of the said Presidency — Madras and Bombay Letters Patent

¹ Learmonth, in the matter of, (1901) 21 Mad., 121

² Appaji v. Shivaji, (1879) 3 Bom., 291; Balaji v. Manager of State of Mohunlal, (1881) 5 Bom., 680; and compare Husaini v. Collector of Muradnagar, (1882) 11 All., 176; Queen Empress v. Parda Ana, (1891) 15 Bom., 452. See also Miller v. Barlow, (1871) 14 Moo. L. A., 209

³ Zebulosa v. Ismail, (1906) 33 Cal- 571; 10 Calc. W. N., 131; 2 Calc. L. J., 511.

brought before the said High Court, including proceedings in its Admiralty, Vice-Admiralty, Testamentary, Intestate and Matrimonial Jurisdiction, respectively: Provided always that the said High Court shall have power to make rules and orders as far as possible by the practice being an act passed by the Governor-General of 1859, and the provisions of any law making the same, by competent legislative authority for India

This section does not give the Court an uncontrolled discretion as to the costs in Civil Suits.¹

Criminal Procedure

38. And We do further ordain that the proceedings in all criminal cases which shall be brought before the said High Court of Regulation of Pro- Judicature at Fort William in Bengal, in the exercise of ceedings, its ordinary original criminal jurisdiction and also in all other criminal cases over which the said High Court had jurisdiction immediately before the publication of these presents, shall be regulated by the procedure and practice which was in use in the said High Court immediately before such publication, subject to any law which has been or may be made in relation thereto by competent legislative authority for India, and that the proceedings in all other criminal cases shall be regulated by the Code of Criminal Procedure, prescribed by an Act passed by the Governor-General in Council, and being Act No XXV of 1861, or by such further or other laws in relation to criminal procedure as may have been or may be made by such authority as aforesaid.

Appeals to Privy Council.

39 And We do further ordain that any person or persons may appeal to Us, Our heirs and successors, in Our or Their Privy Power to appeal. Council, in any matter not being of criminal jurisdiction

value of not less than Rupees 10,000, or that such judgment, decree, or order shall involve, directly or indirectly, some claim, demand, or question to or respecting property amounting to or of the value of not less than Rupees 10,000; or from any other final judgment, decree, or order made either on appeal or otherwise

hereby varied, and subject also to such further rules and orders as We may with the advice of Our Privy Council, hereafter make in that behalf.

The High Court has no power to grant leave to appeal to the Privy Council from an order of the Court remanding a suit for retrial;² but an appeal lies to the Privy Council from an order of the High Court rejecting an application for review of judgment.³

25 Vict., C. 104, and power which it gives to the Court on its appeal the first part of s. 9 of

¹ Subapati v. Narayanswami, (1862) 1 Mad. H. C., 115

² Teiley v. Jai Shunkar, (1876) 1 All., 726.

³ Nazeer Ali v. Ojoodhyaram, (1864) 1 W. R., 12; Ameeromiss Indurjeet, (1866) 5 W. R., 17.

⁴ Feda Hossein, in the matter of, (1896) 1 Calc., 471.

An order rejecting an application to amend a decree;¹ or an order rejecting a review of judgment,² or an order under s. 115 deciding that a certain party should be

Appel
An
High

Where the Privy Council remanded a case to be taken, an order made by a Bench of two Justices, or a final decree of a Division Bench from which a petition for the Letters Patent. An appeal therefore lay from the order of the Letters Patent, when the amount in dispute exceeded Rs. 10,000.³

40 And We do further ordain that it shall be lawful for the said High Court of Judicature at Fort William in Bengal, at its discretion on the motion, or if the said High Court be not sitting, then for any Judge of the said High Court upon the petition, of any party who considers himself aggrieved by any preliminary or interlocutory judgment, decree, or sentence of the High Court, in any such proceeding as aforesaid, not being a criminal jurisdiction, to grant permission to such party to appeal against the same to Us, Our heirs and successors, in Our or Their Privy Council, subject to the same rules, regulations, and limitations as are herein expressed respecting appeals from final judgments, decrees, order and sentences.

There is no appeal to Her Majesty against an order refusing the appointment of a Receiver in a suit. Such an order is not final within the meaning of s. 30 of the

Judges who have made such order, an appeal under cl. 15 is given directly to the Privy Council.⁴ But an appeal lies from an order of the Bombay High Court removing to itself for trial a suit instituted in the Court of the Resident at Aden.⁵

41 And We do further ordain that, from any judgment, order or sentence of the said High Court of Judicature at Fort William in Bengal, made in the exercise of original criminal jurisdiction, or in any criminal case where any point or points of law have been reserved for the opinion of the said High Court in manner hereinbefore provided, by any Court which has exercised original jurisdiction, it shall be lawful for the person aggrieved by such judgment, order, or sentence to appeal to Us, Our heirs or successors in Council, provided the said High Court shall declare that the case is a fit one for such appeal and under such conditions as the said High Court may establish or require, subject always to such rules and orders as we may, with the advice of Our Privy Council, hereafter make in that behalf.

42 And We do further ordain that, in all cases of appeal made from any judgment, order, sentence, or decree of the said High Court of Judicature at the Fort William in Bengal, to Us, Our heirs or successors, in Our or Their Privy Council, such High Court shall certify and transmit to Us, Our heirs and successors in Our or their Privy Council a true and correct copy of all evidence, proceed-

Rules as to transmission of copies of evidence and other documents.

¹ *Sunder v. Chandeshwar Prosad*, (1903) 30 Cal., 679.

² *Fraxet Hossain v. Rowshan Jehan*, (1868) 1 B. L. R., F. B. 1; 10 W. R., 17 B., 1.

³ *Babu Sakan Singh v. Gopal Chandra*, (1903) 9 Cal. W. N., 296.

⁴ *Court of Wards, in the matter of*, (1871) 7 B. L. R., 739; 16 W. R., 191; but see, *Court of Wards v. Leelanand*, (1870) 14 W. R., 298.

⁵ *Guru Piasanna Labiri v. Jotindra Mohan Labiri*, (1904) 9 Cal. W. N., 366.

⁶ *Chandi Dutt Jha v. Palmasand Singh*, (1895) 22 Cal., 928.

⁷ *Kandol v. Ahmedbhai*, (1871) 9 Bom. H. C., 298.

⁸ *Municipal Officer, Aden v. Abdul Karim*, (1904) 28 Bom., 292.

ings, judgments, decrees, and orders had or made in such cases appealed, so far as the same have relation to the matters of appeal, such copies to be certified under the seal of the said High Court, and that the said High Court shall also certify and transmit to Us, Our heirs and successors, in Our or Their Privy Council, a copy of the reasons given by the Judges of such Court, or by any such Judges, for or against the judgment or determination appealed against.

And We do further ordain that the said High Court shall, in all cases of appeal to us, Our heirs or successors, conform to and execute or cause to be executed, such judgments and orders as We, Our heirs or successors in Our or Their Privy Council, shall think fit to make in the premises in such manner as any original judgment, decree or decretal orders, or other order or rule of the said High Court should or might have been executed.

In cases of appeal under this clause the Court ought not, when it transmits the proceedings connected therewith, also to send such proceedings as applications for review of the judgment of the High Court and the orders of the Court thereupon.

The Judges of the High Court are bound to record the reasons for their decisions: these reasons should be stated publicly at the hearing, and not reserved to influence the Court of Appeal.

Calls for Records &c, by the Government

High Courts to comply with requisition from Government for records, &c.

43. And it is Our further will and pleasure that the said High Court of Judicature at Fort William in Bengal shall comply with such requisitions as may be made by the Government for records, returns, and statements in such form and manner as such Government may deem proper.

44. And We do further ordain and declare that all the provisions of these Our Letters Patent are subject to the legislative powers of the Governor-General in Council, exercised at meetings for the purpose of making Laws and Regulations, and also of the Governor General in cases of emergency under the provisions of an Act of the twenty-fourth and twenty-fifth years of Our reign, Chapter sixty-seven, and may be in all respects amended and altered thereby.

45. And it is Our further will and pleasure that these Letters Patent, shall be published by the Governor-General in Council and shall come into operation from and after the date of such publication and that from and after the date on which effect shall have been given to them, so much of the aforesaid Letters Patent granted by His Majesty, King George the Third, as was not revoked or determined by the said Letters Patent of the fourteenth of May, one thousand eight hundred and sixty-two, and is inconsistent with these Letters Patent, shall cease, determine and be utterly void, to all intents and purposes whatsoever.

Provisions of former Letters Patent inconsistent with these Letters Patent to be void.

King George the Third, as was not revoked or determined by the said Letters Patent of the fourteenth of May, one thousand eight hundred and sixty-two, and is inconsistent with these Letters Patent, shall cease, determine and be utterly void, to all intents and purposes whatsoever.

In Witness thereof We have caused these Our Letters to be made Patent. Witness Ourselves at Westminster the twentieth-eighth day of December, in the twenty-ninth year of Our reign.

(Sd.) C ROMILLY.

* *Enayet Houssein v Rowshan Jehan*, (1868) 1 B. L. R., F. B., 1; 10 W. R., F. B., 1.

* *Rungappa v. Rungappa*, (1867) 12 Moo. I. A., 495, p. 502.

* *Richer v. Voyer*, (1877) 5 L. R., P. Council.

* *Currie, in re*, (1897) 21 Bom., 405.

Judges only, the constitution of the Court should thereby be rendered illegal and the existing Judges incompetent to exercise the functions assigned to the High Court.¹

3. And We do ordain that the Chief Justice and every Judge of the said Declaration to be High Court of Judicature, for the North-Western Provinces, previously to entering upon the execution of the duties of his office, shall make and subscribe the following declaration before such authority or person as the Governor-General in Council may commission to receive it —

"I, A B, appointed Chief Justice [or a Judge] of the High Court of Judicature, for the North-Western Provinces, do solemnly declare that I will faithfully perform the duties of my office to the best of my ability, knowledge and judgement"

4 to 8. [These sections are similar to sections 6 to 10 of the Calcutta Letters Patent of 1865, pp. 1223-1224.]

A vakil of the High Court signed and sent a letter to another vakil of that Court who practised in District Courts subordinate thereto. The purport of this was that the vakil to whom it was addressed could easily send his clients cases, civil and criminal

8. S of the Letters Patent of March 17, 1866, for his suspension, to which for four years from the date of the Court's order he was subjected was added. A vakil practising in

the Court.²

Civil Jurisdiction of the High Court.

9 And We do further ordain that the said High Court of Judicature, for the North-Western Provinces, shall have power to remove Extraordinary original and to try and determine, as a Court of extraordinary original jurisdiction, any suit being or falling within the jurisdiction of any Court, subject to its superintendence, when the said High Court shall think proper to do so, either on the agreement of the parties to that effect, or for purpose of justice, the reasons for so doing being recorded on the proceedings of the said High Court.*

10, 11. [These sections are similar to s. 15 and 16 of the Calcutta Letters Patent of 1865, pp. 1234-1238]

¹ Lal Singh v. Ghansham, (1887) 9 All., 625.

² Parbati Charan Chatterji, in the matter of, (1895) 17 All., 408 L. R. 22 I. A., 193

³ Rajendro Nath Mukerji, in the matter of, (1896) 18 All., 174; 22 All., 49.

⁴ Hossaino Begum v. Collector of Muzaffurnagar, (1887) 9 All., 655.

* The Court does not possess ordinary civil jurisdiction.

Appeal.—To allow of an appeal to the High Court, against the judgment of a

appeal.² No appeal lies under
 in Court, directing the amendment
 which he had been a member;³
 an appeal for default;⁴ or from an
 order of a single Judge in revision under sec. 26, Act IX of 1887;⁵ refusing an appli-

it was brought to the notice of the Court that the plaint disclosed no cause of action
 against the defendant named therein, the Court entertained the plea and dismissed
 10 of the
 not been
 real given
 to the Full Court which is not confined to the point on which the Judges of the
 Division Court differ.⁶

In case of an unnecessary remand under O. XLI, r. 25, it is competent to the
 Judge before whom the appeal subsequently comes to disregard the finding the order
 of remand.⁷

S. 98 does not apply to an appeal under s. 16 of the Letters Patent and so when
 the two Judges hearing the appeal differ, the opinion of the senior Judge will
 prevail.⁸

Limitation—In computing the period of limitation prescribed for an appeal
 under cl. 10, the time requisite for obtaining a copy of the judgment appealed
 from cannot be deducted, such copy not being required under the rules of the Court to
 be presented with the memorandum of appeal.⁹

¹ Ghazi Ram v. Nuraj Begum, (1876) 1 All., 31.

² Umrao v. Budabun, (1875) 17 All., 475.

³ Naumullah v. Ihsanullah, (1892) 14 All., 226; foll. in Nasir Ali v. Ali Ali, (1900)
 28 All., 133, (1905) A. W. N., 218.

⁴ Mansab Ali v. Nikal Chand, (1893) 15 All., 339; Pokhar Singh v. Gopal Singh,
 (1892) 14 All., 361.

⁵ Gauri Dutt v. Parsotam Das, (1893) 15 All., 373.

⁶ Bhusdhar v. Gulab Kuar, (1891) 16 All., 413.

⁷ Braj Bhukhan v. Darg Dat, (1898) 20 All., 258.

⁸ Kari Dal v. Ram Das, (1878) 1 All., 181.

⁹ Mubarak Hussain v. Behari, (1891) 16 All., 306.

¹⁰ Lachman Singh v. Ramlogan, (1901) 26 All., 10.

¹¹ Fazal Mohommad v. Phol Kuar, (1879) 2 All., 192.

¹² Neebat Ram v. Harnam Das, (1887) 9 All., 118.

Court-fee—In an appeal under s 10 of the Letters Patent from an order of a single Judge, remanding a case under O XLI, r. 23, the proper Court-fee is Rs 2¹

12. And We do further ordain that the said High Court of Judicature, for the North Western Provinces, shall have the like power and authority with respect to the persons and estates of infants, idiots, and lunatics within the North-Western Provinces, as that which is exercised in the Bengal Division of the Presidency of Fort William, by the High Court of Judicature at Fort William in Bengal, but subject to the provisions of any laws or regulations now in force

The High Court has not, under cl. 12 of its Charter, any original jurisdiction in respect of the persons and estates of lunatics who are natives of India²

13, 14 [These sections are similar to ss 20 and 21 of the Calcutta Letters Patent of 1863, 1238 1239]

Criminal Jurisdiction

15 And We do further ordain that the said High Court of Judicature, for the North-Western Provinces, shall have ordinary original jurisdiction in respect of all such persons within the said Provinces as the High Court of Judicature at Fort William in Bengal shall have criminal jurisdiction over at the date of the publication of these presents, and the criminal jurisdiction of the said last mentioned High Court over such persons shall cease at such date. Provided, nevertheless, that criminal proceedings which shall at such date have been commenced in the said last mentioned High Court shall continue as if these presents had not been issued

16 And We do further ordain that the said High Court of Judicature, for the North Western Provinces, in the exercise of its ordinary original criminal jurisdiction, shall be empowered to try all persons brought before it in due course of law

17 And We do further ordain that the said High Court of Judicature, for the North-Western Provinces, shall have extraordinary jurisdiction over persons residing in the said Provinces, who are now subject to the jurisdiction of any Court now subject to the jurisdiction of the said High Court, and shall have authority to try at its discretion any such persons brought before it on charges preferred by any Magistrate or other Officer specially empowered by the Government in that behalf

18. [This section is similar to 25 of the Letters Patent of 1863, p 1239]

19 And We do further ordain that, on such point or points of law being so reserved as aforesaid, the said High Court shall have full power and authority to review the case, or such part of it as may be necessary, and finally determine such point or points of law, and thereupon to alter the sentence passed by the Court of original jurisdiction, and to pass such judgment and sentence as to the said High Court shall seem right

20 And We do further ordain that the said High Court of Judicature for the North-Western Provinces shall be a Court of Appeal from the Criminal Courts of the said Provinces, and from all other Courts from which there is now an appeal to the Court of Sudder Nizamut Adawlat for the said Provinces, and shall exercise appellate jurisdiction in such cases as are subject to appeal to the said Court of Sudder Adawlat by virtue of any law now in force

¹ Ballu Rao v. Mahabir Rao, (1893) 21 All. 178

² Jammudda Kuar, in the matter of, (1882) 4 All. 159.

21 And We do further ordain that the said High Court shall be a Court of reference and revision from the Criminal Court subject to its appellate jurisdiction, and shall have power to hear and determine all such cases referred to it by the Sessions Judges or by any other officers now authorised to refer cases to the Court of Sudder Nizamut Adawlut of the North-Western Provinces, and to revise all such cases tried by any Officer or Court possessing criminal jurisdiction, as are now subject to reference or to revision by the said Court of Sudder Nizamut Adawlut.

22 And We do further ordain that the said High Court shall have power to direct the transfer of any criminal case or appeal from any Court to any other Court of equal or superior jurisdiction, and also to direct the preliminary investigation or trial of any criminal case by any Officer or Court otherwise competent to investigate or try it, though such case belongs in ordinary course to the jurisdiction of some other Officer or Court.

23 [This section corresponds with 29 of the Letters Patent of 1865] p. 1240.

Exercise of Jurisdiction elsewhere, than at the ordinary place of sitting of the High Court.

24. And We do further ordain that whenever it shall appear to the Lieutenant Governor of the North-Western Provinces, subject to the control of the Governor-General in Council, convenient that the jurisdiction and power by these Our Letters Patent, or by the recited Act, vested in the said High Court, should be exercised in any place within the jurisdiction of any Court, now subject to the superintendence of any Sudder Dewany Adawlut or the Sudder Nizamut Adawlat of the North-Western Provinces, other than the usual places of sitting of the said High Court, or at several such places by way of circuit, the proceedings in cases before the said High Court, at such place or places, shall be regulated by any law relating thereto which has been or may be made by competent legislative authority for India.

Testamentary and Intestate Jurisdiction.

25 And We do further ordain that the said High Court of Judicature for the North-Western Provinces, shall have the like power and authority as that which is now lawfully exercised within the said Provinces, by the said High Court of Judicature at Fort William in Bengal, in relation to the granting of probates of last wills and testaments, and letters of administration of the goods, chattels, credits, and all other effects whatsoever of persons dying intestate; and that the jurisdiction of the said last-mentioned High Court in relation thereto shall cease from the date of the publication of these presents. Provided always that any continuation to any of the matters aforesaid in the these Letters Patent contained shall interfere with the provisions of any law which has been made by competent legislative authority for India, by which power is given to any other Court to grant such probates and letters of administration.

26, 27 [These sections correspond with 30, 31 of the Letters Patent of 1865, pp. 1239, 1240] & apply to the Court in its ordinary jurisdiction, 2 N. W. 117.

Civil Procedure

28. And We do further ordain that it shall be lawful for the said High Court of Judicature for the North-Western Provinces from time to time to make rules and orders for the purpose of adapting, as far as possible, the provisions of the Code of Civil Procedure, being an Act passed by the Governor-General in Council

and being Act No VIII of 1859, and the provisions of any law which has been or may be made, amending or altering the same, by competent legislative authority for India, to all proceedings in its testamentary, intestate, and matrimonial jurisdictions respectively.

Criminal Procedure.

29. An We do further ordain that the proceedings in all criminal cases which shall be brought before the said High Court, in the exercise of its ordinary original criminal jurisdiction shall be regulated by the procedure and practice which was in use in the High Court of Judicature for Fort William in Bengal, immediately before the publication of these presents, subject to any law which has been or may be made in relation thereto by competent legislative authority for India, criminal cases shall be regulated by the Code of Criminal Procedure of 1861, or by such further or other laws in relation to criminal procedure as may have been or may be made by such authority as aforesaid

Appeals to Privy Council.

30. And We do further ordain that any person or persons may appeal to Us Our heirs and successors, in Our or Their Privy Council in any matter not being of criminal jurisdiction, from any final judgment decree, or order of the said High Court of Judicature for the North-Western Provinces, made on appeal, and from any

issue is of amount or value of not less than 10,000 rupees, or that such judgment decree, or order shall involve, directly or indirectly, some claim, demand or question to or respecting property amounting to, or of the value of not less than 10,000 rupees or from any other final judgment, decree or order made either on appeal or otherwise as aforesaid, when the said High Court shall declare that the case is a fit one for appeal to Us, Our heirs or successors in Our or Their Privy Council subject always to such rules and orders as are now in force, or may from time to time be made, respecting appeals to ourselves in Council from the Courts of the said Provinces, except so far as the said existing rules and orders, respectively, are hereby varied and subject also to much further rules and orders, as we may, with the advice of Our Privy Council, hereafter make in that behalf.

31, 32, 33, 34, 35. [These sections are similar to sections 40, 41, 42, 43 and 44 of the Calcutta Letters Patent of 1865 *ante*, pp 1244, 1245.]

By Warrant under the Queen's Sign Manual

(Sd) C ROMILLY

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
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THE CODE OF CIVIL PROCEDURE.

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erroneous opinion on a point of law may be *res judicata*. *Waman v. Boman*, L. R., 932 ; see also 31 Bom., 128 ; but contra in 30 Mad., 4 ; even where the effect is to sanction what is illegal. *Chhagan v. Bai*, 33 Bom., 479.

decision in a former suit erroneously dismissing it under Order 11 R. 2 is *res judicata*. *Dasari v. M. Chellaya*—7 M. L. T. 84 = 5 Ind. Cas. 756.

mixed questions of Law and fact—Even if decided on a mistake would bar a subsequent trial. *Chittamur v. Gavaramma* 29 Mad., 225. former suit p. 94.

A proceeding in which an application to file an award was rejected on ground of misconduct of arbitrators is *not a suit* and the order is not *res judicata*. *Kunja v. Durga*, 7 A. L. J. 425 = 6 Ind. cas. 127.

Parties :—p. 95.

A decree in a suit by an unauthorised agent is not *resjudicata* but strong evidence of title and possession: *Trailokya v. Kali* 11 C. W. N., 380.

A representative of a judgment-debtor claiming to hold a property attached in trust, is not bound to claim under O XXI R 58 and may have a fresh suit. *Rani Indomati v. Jogeshar* 28 All, 644

A decree for ejectment against a father is not *resjudicata* against the son if the latter was not represented in the former suit. *Appa v Venkadadri* 17 M. L. J., 197.

Co-defendants p. 107.

If an adjudication between co-defendants is necessary for a decision it will operate as *resjudicata*. *Gurdeo v Chandrika* 5 C. L. J. 611; There must be conflict of interest among the defendants and a judgment defining their real rights and obligations. *Narasimma v. Srinibasa*, 33 Mad., 112.

Shebaitis.

Judgments against former shebaitis are binding upon succeeding shebait. *Gorachand v Makhan*, 11 C. W. N., 489; *Lilabaty v. Bishun* 6 C. L. J., 621.

Reversioners

Decree against a widow if fairly obtained is binding on reversioner. *Lakhmi v. Venkaya* 17 M. L. J. 160 *Madan v. Akbar* 28 All, 241; *Lilabaty v. Bishnu* 6 C. L. J., 622; so also a judgment against a Hindu widow as executrix of her husband's estate. *Shiba v. Srimati Tarangini*, 4 Ind cas 483; but a decree on a compromise or on an award of arbitrators is not. *Gobind v Khuni* (1907) A. W. N., 151.

Under whom they or any of them claim—only in respect of the interest represented by the party to the former suit *at the time of the suit*. *Sesappaya v Venkatarama*, 5 M. L. T., 37.

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The original court which tried the former suit must be competent to try the *whole of the* subsequent suit and not the particular issue only. *Sibu v. Bahan* 12 C. W. N., 359.

An order without jurisdiction or containing an illegal condition is not *resjudicata*. *Jnanula v Nakuleswar* 11 C. W. N., 236; see also *Luchmi Narain v Ramchander*, 4 A. L. J., 117.

The award of a committee of oudh Talukdars on a point outside their jurisdiction even if confirmed by the financial commissioner is not *resjudicata*. *Har Sanker v Raghuraj*, 34 I. A., 125.

Revenue Court, p. 99.

A decision of a Revenue Court as to the propriety of a pattah is *res judicata* between the same parties in the same Court; *Natesa v. Venkata*, 7 M. L. J. 518.

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A decision of a Revenue Court under Act X of 1859 is not *resjudicata* in subsequent title-suit in the Civil Court; a decision in favour of the grantee, is not *resjudicata* in favour of transferees of the heirs, the question is whether the grant contemplated a transfer; *Rameshar Meerbudhan*, 7 C. L. J., 202

A decision of the Revenue Court in a suit for arrears of revenue is *res judicata* in a subsequent suit, for annuity in the Civil Court; Dwarka Dass v. Akshay 5 A. L. J. 407, 30 All 470.

The decision of the Collector under Act III 1895 (Madras) cannot be re-agitated in the Civil Court, Balejipalli v. Balijipalli, 30 Mad, 320.

Heard and decided, p. 101.

A suit dismissed for default in serving one of the defendants, no bar to a subsequent suit on the same cause; Sitaram v. Pokhpal, 28 All, 749 F. B.

A matter may be *res judicata* although no express issue has been raised, if it has been actually fought out and a person may be bound even if he was not a party if he really controlled the case as one, Lilabati v. Bishun, 6 C. L. J., 612.

Where the main relief asked for in the former suit was the declaration that an appraisement made by the Collector under Sec 69 of the Bengal Tenancy Act was invalid, a subsequent suit to determine whether the rent is payable wholly in cash or partly in cash and partly in kind, is not barred as *res judicata*: Mir Tapur Hossein v. Gopi, 7 C. L. J., 251.

A prior order in execution will be a bar only if it was made on notice or is in respect of a matter expressly directed by the decree. Ramasami v. Ramasami, 30 Mad. 255; 17 M. L. J. 201; see also 17 M. L. J. 311; 4 A. L. J., 400.

A judgment against a dead man is not *res judicata*. Hajinoor v. Macleod, 9 Bom., L. R., 274: mere withdrawal of a petition for review of a compromise decree does not bar a suit on the same ground; Surendro Nath v. Hemangini, 34 Cal., 83.

A matter not decided by all the tribunals before whom it came is not *res judicata*. Bishnu v. Mohesh 3 Ind cas 87; so also a decision on a preliminary point. Musammat Phikua v. Rahmatulla, 2 Ind cas 622.

Ex parte decrees p. 103.

Operates as *res judicata* as to point not defended by the absent defendant, which ought to have been taken in defence. Bapin v. Harachandra, 2 Ind cas 11.

Ex parte final decree as to mesne profits in execution department is *res judicata* between the parties 5 Ind cas 387=11 C. L. J. 501.

Orders in execution proceedings—p. 104.

A decision in execution proceedings that the decree as it stood was incapable of enforcement against the ancestral property of the original debtor but could only be enforced against property in the hands of a transferee.

A question decided under sec 47 cannot be reopened because the assignee of the judgment debtor has been made a party. Umesh v. Madhu, 9 C. L. J., 556. A decision at one stage of execution proceedings cannot be questioned at a later stage. Khosal v. Ukiladdi, 3 Ind cas 47; Sarat v. Khalil 11 C. L. J. 501. Section 47 does not bar the trial of an issue in a subsequent suit if such issue has been raised at the instance of the defendant. Venkata ramanachariyar v. Meenakshisundaramaiyar 19 M. L. J.

1 Ind. cas 193; Thathu v. Kondu 32 M. 242; Chandramony v. Halijennasa 9 C. L. J., 464.

Might and ought—Expl. IV. p. 105.

If a plaintiff suing to enforce a deed does not claim damages in the alternative he will be precluded from making the same claim in a separate suit; Mammikkuti v. Puzhakkal, 29 Mad., 353.

A suit for redemption by a mortgagor on the ground that an assignment of mortgage was sham and fraudulent is barred by a decree on the mortgage obtained by an assignee of the mortgage; Amthulal v. Cursetji, 9 Bom. L. R., 466.

The word "might" presupposes that the person sought to be barred had knowledge of the matter at the time of the former suit and could have made it a ground of defence or attack; Manikbhoi v. Vichand 9 Bom., L. R., 1020; Solemonnisa v. Sheikh Jonab Ali 1 Ind. cas, 808.

A tenant who in a former suit could have pleaded that the claim for certain fees were improper, but did not, cannot plead the same in a subsequent suit; Sellappa v. Venkayatha, 17 M. L. J., 433.

A tenant not pleading a title in himself in a suit for ejectment in the Revenue Court under Act II of 1901 (U. P.) cannot plead such title in a subsequent suit in the Civil Court; Behari v. Sheobalak, 29 All., 601.

A suit for recovery of possession as a reversioner, after the death of a widow is not barred by the dismissal of a suit for pre-emption in the life time of the widow; Deputy Commissioner v. Keanjan, 34 I. A., 72; 29 All., 331; 5 C. L. J., 344.

No suit for damages against a mortgagee for retention of the mortgaged property after tender, will lie, if the claim was not made in a previous suit for redemption; Satyabadi v. Harabatu, 34 Cal., 223; 5 C. L. J., 192; Rukhmim v. Venkatesh, 31 Bom., 527.

A ground of defence not taken in a former suit although it ought to have been taken, will not attract the principle of *res judicata* if it was not finally decided in consequence of the suit being decided on a preliminary ground; Abdullah Khan v. Khanmya, 10 Bom. L. R., 380; 32 Bom., 315. Even if a matter might be pleaded and was not, it will not be *res judicata* unless it was one that the party in fault was bound to plead; Mohabir v. Purbhoo, 7 C. L. J., 504; 12 C. W. N., 292.

Former decisions not relied on before the District Judge as the basis of *res judicata* cannot be urged in second appeal; Abdul Rashid v. Abdul Latif, 5 A. L. J., 117.

A suit for assessment of additional rent on the same additional area which formed the subject-matter of a previous suit is barred; Moharaja v. Umed, 12 C. W. N., 904.

A person who has lost a suit claiming as a reversionary heir under one relationship cannot bring a fresh suit upon a different relationship; Masilmania v. Thiruvengadam, 31 Mad., 385.

When a suit for redemption by a part owner is decreed *ex parte*, the heirs of another part-owner being parties, the latter are not barred from bringing a fresh suit for redemption of their shares; Kallu v. Faiyaz, 30 All., 394.

A plea that certain suits decreed *ex parte*, by this Expl; Jamada . . . former . . . is barred . . . 13 C. W. N., 862.

Manager of a trust property in an ejectment suit failing to set out his title which he might and ought to have done in that suit is barred from bringing a second suit on the basis of his title. *Hargovin v Mulji*—11 Bom., L. R. 921.

An objection by a judgment debtor to an attachment in which certain property was left by mistake does not bar a second objection with regard to the latter before sale. *Jala v Seth*, 2 Ind., cas 105.

A plea of consent by reversioner validating an alienation by a widow not taken in a suit by the reversioner for declaration that the alienation was invalid cannot be allowed in a subsequent suit by the reversioner for possession after death of the widow—*Chinaman v Ajudhia*, 3 Ind cas. 117.

Explanation V p 110.

A mortgagee who having brought a suit on his security takes a mere money decree by compromise cannot bring a subsequent suit on his security; *Shibu Bera v. Chandra*, 33 Calc., 849.

Section 12.

A record of rights not considered in a previous rent suit may be considered in a suit for rent for a subsequent period. *Sharifunnisa v. Sasadhar* 14 C. W. N., 364

Section 15 (15).

Scope—refers to procedure only and does not affect the jurisdiction of courts of higher grade. *Tangore v. Jaladhari* 14 C. W. N., 322=5 Ind cas. 691.

Section 16.

Election—A plaintiff who has been returned a plaint for presentation in a proper Court must elect whether he will appeal against the order or obey it; he cannot do both; *Beni Madhab v. Jotindra*, 5 C. L. J., 580; 11 C. W. N., 765 If there is no inherent jurisdiction mere waiver or acquiescence will not give it, but in doubtful cases the question will not be allowed to prevail in the appellate Court; *Abdulla v Ashraf*, 7 C. L. J., 152.

Section 17. (19)

Cause of action—A decree obtained by fraud must be set aside in the District in which the fraud was committed; *Umrao v. Hardeo*, (1907) A. W. N., 112; 4 A. L. J., 392.

Section 20. (17)

Leave may be given after suit is instituted; *Narain v Secretary of State*, 30 Bom., 570; suit on a demand hand-note must be brought at the place of execution unless it is shewn that repayment was agreed to be made some where else; *Raman v. Gopal*, 31 Mad., 223.

Cause of action—In a contract by correspondence the cause of action arises at a place where the final letter of acceptance is posted. *Baroda v. Parat*. 6 A. L. J., 213=1 Ind., cas. 77.

Section 23

The Court of Subordinate Judge is Subordinate to District Court irrespective of the forum of appeal *Umatul v. Kulsom* 10 C. L. J., 208.

Munsif's Court is Subordinate to High Court; *Hari v. Debendra* 11 C. L. J., 218=5 Ind. cas. 771.

1 Ind. cas 193; Thathu v. Kondu 32 M. 242; Chandramony v. Halijennasa 9 C. L. J., 464.

Might and ought—Expl. IV. p. 105.

If a plaintiff suing to enforce a deed does not claim damages in the alternative he will be precluded from making the same claim in a separate suit; Mammikkuti v. Puzhakkal, 29 Mad., 353.

A suit for redemption by a mortgagor on the ground that an assignment of mortgage was sham and fraudulent is barred by a decree on the mortgage obtained by an assignee of the mortgage; Amthulal v. Cursetji, 9 Bom. L. R., 466.

The word "might" presupposes that the person sought to be barred had knowledge of the matter at the time of the former suit and could have made it a ground of defence or attack; Manikbhoi v. Virachand 9 Bom., L. R., 1020; Solemonnisa v. Sheikh Jonab Ali 1 Ind. cas, 808.

A tenant who in a former suit could have pleaded that the claim for certain fees were improper, but did not, cannot plead the same in a subsequent suit; Sellappa v. Venkayatha, 17 M. L. J., 433.

A tenant not pleading a title in himself in a suit for ejectment in the Revenue Court under Act II of 1901 (U. P.) cannot plead such title in a subsequent suit in the Civil Court; Behari v. Sheobalak, 29 All., 601.

A suit for recovery of possession as a reversioner, after the death of a widow is not barred by the dismissal of a suit for pre-emption in the life time of the widow; Deputy Commissioner v. Kearnjan, 34 I. A., 72; 29 All., 331; 5 C. L. J., 344.

No suit for damages against a mortgagee for retention of the mortgaged property after tender, will lie, if the claim was not made in a previous suit for redemption; Satyabadi v. Harabati, 34 Cal., 223; 5 C. L. J., 192; Lukhmini v. Venkatesh, 31 Bom., 527.

A ground of defence not taken in a former suit although it ought to have been taken, will not attract the principle of *res judicata* if it was not finally decided in consequence of the suit being decided on a preliminary point; Abdulla Khan v. Khanmya, 10 Bom. L. R., 380; 32 Bom., 315. If a matter might be pleaded and was not, it will not be *res judicata* as it was one that the party in fault was bound to plead; Mohabir v. Shoo, 7 C. L. J., 504; 12 C. W. N., 292.

Former decisions not relied on before the District Judge as the basis of a suit cannot be urged in second appeal; Abdul Rashid v. Abdul A. L. J., 117.

In a suit for assessment of additional rent on the same additional area held by the same person as the subject-matter of a previous suit is barred; Moharaja v. Gaur, 12 C. W. N., 904.

A person who has lost a suit claiming as a reversionary heir under one person cannot bring a fresh suit upon a different relationship; Thiruvengadam, 31 Mad., 385.

A suit for redemption by a part owner is decreed *ex parte*, the other part-owner being parties, the latter are not barred from bringing a fresh suit for redemption of their shares; Kallu v. Faiyaz, 30 All., 394.

A plea that certain sums paid in excess of the real rent before a former suit decreed *ex parte*, should be set off in a subsequent suit for rent is barred by this Expl.; Jamadar Singh v. Serajuddin, 12 C. W. N., 862.

Section 47. (244).

Questions within the section—A question that a sale should be set aside on the ground that the decree was set aside before sale is : *Ramyad v. Bandeswari*, 6 C. L. J., 102 : objections to the decree by one who was a party to the suit are not : *Chinnaswamy v. Sabapathy*, 30 Mad., 26 : questions of adjustment after decree-absolute for sale are : *Harish v. Jagabandhu*, 12 C. W. N., 282, proceedings for restitution of property taken in execution of a decree subsequently reversed are not : *Motiram v. Ramkumar* 35 Cal., 265 : objection by the judgment-debtor that mortgaged property going to be sold belongs to a stranger is not : *Shib Lakshan v. Srimoti* 8 C. L. J., 20 : contests between the holder of a decree for an undivided share of joint property and an auction-purchaser *pendente lite* are not : *Wilayat v. Nund*, 30 All., 231. If one property is sold and two are included in the sale-certificate the Court can amend under this section as well as by its inherent power ; *Gobindo v. Abhoy*, 12 C. W. N., 1027. A *Mitakshara* son succeeding by survivorship can in execution take the same objections that he could take in a regular suit, *Chandra Prasad v. Sham Koeni*, 3 C. L. J., 131 : 33 Cal., 676. Questions raised by the representatives of a judgment-debtor as to whether property attached is assets of the deceased debtor must be determined in execution ; *Kali Churn v. Jewat*, 28 All., 51.

A claim preferred by legal representative of defendant should be properly investigated under the section *Suoramania v. Manika*, 2 Ind., cas. 432.

Mitakshara sons brought in as representatives of their father whether before or after decree must fight out their charge of immorality under this section ; *Shibaram v. Sakharan*, 10 Bom. L. R., 939=33 B. 39.

Parties—A person against whom a claim has been abandoned is not a party to the suit : *Venkata v. Subbara*, 17 M. L. J., 416. When the *Karnavan* is sued in a representative capacity the members of the *Tarwad* are parties. *Mathu v. Kunnat*, 30 Mad., 215, a third party auction purchaser is not, *Amir Roy v. Basdeo*, 5 C. L. J., 204. Persons against whom there is no decree to be executed are not parties. *Sheo v. Nawal* 32 A. 321.

Representative :—An auction purchaser under a puisne mortgage is a representative of the mortgagee *Radha v. Hem*, 11 C. W. N., 495.

A mortgagee from judgment debtor after attachment is : *Narain v. Seshappan*, 17 M. L. J., 311 ; Transferee of the interest of decree-holder or judgment-debtor is ; infant member of a joint *Mitakshara* family is, of his father. *Ajodhya v. Hardwar* 9 C. L. J., 485 ; *Mussammat Bhagwati v. Banwari*, 32 All., 82. A person attaching a decree is : *Braja v. Gaya*, 6 C. L. J., 141. An executor is *Hridoy Kanto v. Behary*, 11 C. W. N., 239. The beneficial owner is a representative of his *benamdar*—*Shibkumar v. Maidhor Gazi* 7 C. L. J., 299 ; an auction purchaser of the judgment-debtor is : *Ananda v. Ajodhia* 30 All., 379. The auction purchaser of the rights of an unregistered transferee of an occupancy holding is *Haradhan v. Grish* 8 C. L. J., 13 C. W. N., 98. An unregistered purchaser of a part of an occupancy holding is a representative of the judgment debtor within this section *Nath v. Sujani Kanta*, 10 C. W. N., 240.

A judgment debtor as representative of their father is a decree in their representative capacity ; *Kasi v. Baji*, 11 Bom., L. 1.

Estoppel.—A party who has defeated the appeal of his opponent in execution on the ground that sec. 47 cannot apply is estopped from pleading a bar to a regular suit under this section; *Haradhan v. Purna*, 11 C. W. N., 145.

Scope of the section.

After the decree is satisfied this section does not apply. *Gurdhari v. Khusholi* 31 A 364. Payment not duly certified under O. XXI r. 2 cannot be proved under this section *Srimati Kamini v. Aghore*. 4 Ind., cas 402.

Section 48. (230)

Steps in aid of execution.—An application under O.X.X.I. r. 15 is *Raj Behary v. Kalihar* 3 Ind. cas., 336; but an application to a court to reconstruct a lost decree is not: *Raj Gsi v. Iswardhari*, 11 C. L. J. 243. An application to realize costs from some only of the judgment debtors is an application in accordance with law. *Barada v. Nobin*, 11 C. L. J., 83.

Limitation.—The twelve years run from the date of a valid decree for mesne profits and not from the date of the decree fixing liability; *Harmanoje v. Ramprosad* 6 C. L. J., 461. When the appellate decree does not affirm the decree of the first court the date of the former is the starting point: *Bella v. Mohini*, 34 Cal., 874; Judgment-debtor's conduct in prosecuting a frivolous case under O. IX. r. 13 (108) is fraud, and may save limitation, *Sham Kissan v. Damar*; 11 C. W. N., 440.

Application for execution presented more than twelve years after the date of the decree but within three years of the last application is not barred. *Bent v. Kashi* 6 A. L. J., 401.

This section should not be construed so as to conflict with provisions of art 180 (limitation act XV. 1877) and the former can not be taken to limit the latter. *Jogendra v. Sham* 36 Cal., 543 where an appeal abates, limitation runs from the decree of the appellate court; *Mahammad v. Karbalal* 32 All., 136.

Application for execution of a decree made before twelve years is not barred though the order on it may be made after twelve years. *Sivaswamy v. Sivalingam* 5 Ind. cas., 474. Limitation as to a decree for sale upon a mortgage passed before 1908 is governed by this section. *Kounsilla v. Isri Sing*, 7 A. L. J., 420.

Section 49. (233)

A transferee of a money decree from a decree-holder who also holds a mortgage, is precluded from selling the mortgaged property, *Jivaratan v. Srinivasa*, 17 M. L. J., 503.

Section 50 (234)

A mortgage decree against a *Mitakshara* father can be executed against his joint son succeeding by survivorship: *Chandra v. Sham*, 33, Cal., 676: 3 C. L. J., 131; but see, 3 A. L. J., 663 holding that the father's properties are not assets in the hands of the sons. If one joint decree-holder certifies full payment the order may proceed either against the judgment debtor or against the co-decree-holder; *Somasundaram v. Krishna*, 29 Mad., 183.

For debts of the last holder the impartible State in the hands of his son is liable. A custom to the contrary can be raised not in execution but in a separate suit. *Sriman Mahamandaleswar v. Sreemohant*. 2 Ind. cas., 78. Death of judgment debtor pending execution does not necessitate fresh application for execution; *Purshottam v. Raj Bhai*, 11 Bom. L. R., 1358;

Section 52. (252)

Execution against surety, see *Narayan v Timmaya*, 31 Bom., 50.

A decree obtained against a legal representative who was defendant in the suit can be executed against him or his or her legal representative. *Kalliappan v. Varadarajalu*, 33 Mad., 75.

Section 54 (265)

A decree of a Civil Court for partition is subject to the provisions of sec. 107 of the United Provinces Land Revenue Act and cannot be executed until the decree-holder's name is recorded in the Revenue-papers; *Tulsi v Sheo*, 28 All., 375

Section 55 (336)

The surety must be sued in a separate suit but he can waive the objection; *Kaqtuuddi v Fauzdar*, 10 C. W. N., 830; 4 C. L. J., 311.

Section 60 (266)

Maintenance:—A hereditary right to maintenance out of the melawaram of certain lands not within this sec.; *Naidyanatha v Eggia*, 30 Mad., 279.

Decree for maintenance can not be attached; *Nonammal v. The Collectors*, 20 M. L. J., 97.

A mere right to receive profits not yet due cannot be attached; *Phul Chand v Chandmal*, A. W. N., 1908, p. 105; 30 All., 252; see also *Sher Sing v Sreeram*, 30 All., 246.

Purely personal right to receive certain sums of money as maintenance can not be attached but where the intention of the donor was to create an interest in property it can be attached; *Tara v. Sarada*, 12 C. L. J., 146.

Political pensions:—Immovable property granted in lieu of a pension as a hereditary holding which the members of the family had treated as an ordinary Zemindari property is liable to attachment. *Amna v. Najmunnisa*, 31 All., 382.

Unearned salary of a private servant is not liable to attachment. *Debi v. Lewis*, 31 All., 304.

Section 63. (685)

Court of Highest grade:—Court of District Judge is superior to that of Subordinate judge; *Mussammatt Najmunnisa v. Lal Jamma*. 1 Ind. cas., 78.

Claim:—An application for rateable distribution is not; *Ramjash v. Guru*, 13 C. W. N., 346—11 C. L. J., 69

Sale by an inferior Court:—A property attached before judgment by a Subjudge can not be sold by a Munsiff and such sale is a nullity. *Durpati v. Ram rach*, 6 A. L. J., 703.

Section 64 (276)

Alienation before attachment or under a certificate under O. XXI. r. 83 (305) after attachment good; *Shiblinga v. Chambasappa*, 30 Bom., 337.

Release of an easement is an alienation within this section, *Krishna-dhone v. Nundranee*, 12 C. W. N., 969

Where a decree was mortgaged on the same date on which it was attached by a creditor of decree-holder, the mortgage can not be said

have been made during attachment. Venkatarama v. Esumsa, 20 M. L. J., 330.

Section 65 (316)

Confirmation of sale does not bar a suit if it is not barred by sec. 47. Chandramani v. Halijennasa, 9 C. L. J., 464. The sale certificate does not create a title but is an evidence of title. Braja v. Joggeswar, 9 C. L. J., 346.

Section 66 (317)

This section does not apply where the purchase was made in the name of one of the members of a Hindu family, and it was alleged that the purchase was on behalf of the family. Hari v. Sher, 31 All., 282.

Section 73 (295)

Decree holder applying for rateable distribution must apply for execution to the court holding assets but need not attach such assets. Indra v. Ghanashyam, 9 C. L. J., 210.

Same judgment debtor p. 267. It does not include judgment debtor of a judgment creditor against whose property rateable distribution is claimed. Ellusa v. Rupp, 18 M. L. J., 562.

Discretion of court:—A judge can not refuse rateable distribution because there is other property of judgment debtor available for satisfaction of petitioner's debt. Srikrishna v. H. Chandook, 32 Mad., 334.

Application of the section:—It does not apply where there are immovable and movable assets attached before attachment in one court in one of the suits. Butloo v. Goman, 13 C. W. N., 1177.

Before the receipt of such assets:—Not after such receipt. Ramjas v. Guru, 13 C. W. N. 396=11 C. L. J., 69. Assets should have been realised in execution of the decree by the person attaching it, and not by any subsequent attachment by another person. Venkatarama v. Esumsa, 20 M. L. J., 330; Seeni v. Karuppan, 5 Ind., Cas. 145; T. Ranganathan v. Sutharam, 7 M. L. T., 110; 5 Ind., Cas. 820.

Appeal:—order not ordinarily appealable under O XLIII, r. 1; and as order under this section cannot come within sec. 47, no appeal lies to district judge. Jagadis v. Kripa, 35 Cal., 130.

Revision:—High Court can interfere in revision, Krishna v. H. Chandook, 32 Mad., 334; Indra v. Ghanashyam, 9 C. L. J., 210.

Section 80. (424)

The notice can be waived or a claim to it lost by estoppel; Manindra v. Secretary of State, 5 C. L. J., 148. Notice is not necessary when public officers are sued as private trespassers; Ganoda v. Nalini, 12 C. W. N. 1065; also when public officer exceeds his right as assaulting and abusing. Mumtaz v. A. E. Lewis, 7 A. L. J., 301.

Section 89. (506)

An award once made cannot be set aside because all the parties did not join in the reference, Lal Mohan v. Surya Kumar, 11 C. W. N., 1152; but see Ramji v. Swami, 17 M. L. J., 394. A reference by a pleader for party who has not given him a vakalatnama is bad, Kadhu v. Baljit, 1907 A. W. N., 147. A reference by a pleader under a vakalatnama in general terms

is bad, but may be acquiesced in, *Ranjiban v. Kalli*, 29 All., 429. A written application may be dispensed with, if the parties apply orally and the Judge reduces their statements to writing; *Abdul v. Riyaz* 30 All., 32.

A guardian *ad litem* should take the leave of the Court for making a reference, *Annada v. Jogendro*, 8 C. L. J., 291.

Section 91.

Advocate general's special power extends only to public nuisance in fact, but not to constructive public nuisance i. e. public nuisance in law. The advocate general of Bombay *v. Haji Ismail*, 12 Bom., L. R. 274.

Section 92. (539)

If one person brings a suit with the consent of the Advocate General, the plaint cannot be amended by adding another person with similar consent, *Darves v. Jainadin* 30 Bom., 603, but a plaint filed with the consent on the ground of fraud, may be amended without such consent, by adding particulars of the fraud, *Dhanjebhoy v. Meherali*, 9 Bom., L. R. 901.

A suit is not maintainable without the consent of the advocate general *H. A. D'cruz v. J. L. D'silva*, 32 Mad., 131; but such consent is not necessary for striking off a prayer for relief *Ramrup v. Mohunt* 14 C. W. N., 932.

Mahomedan law :—A *sijjad-nashin* can not be removed *Ishtiaq v. Sayad* 6 A. L. J. 632.

Such further or other relief.—As appears to the Court to be appropriate in such a suit. *Sir Dinsaw v. Sir Jamsetji* 33 Bom., 509 (decision binds not only parties but every one affected by it).

In order to bring a suit within this section one of two conditions must exist: a breach of trust express or implied or a necessity for the direction of the Court. *Amritram v. Ramji*, 10 Bom., L. R., 87.

In settling a scheme due attention must be paid to the established practice of the institution. *Baldapur v. Gopal Das*, 8 Bom., L. R., 756. The Court can order the outgoing trustees to make over charge, *Guzaffer v. Yavar*, 28 All., 112.

If the suit is dismissed and the Advocate General who brought the suit at the instance of the relators refuses to appeal, the relators cannot appeal; *Jan Mahomed v. S. Nurudin*, 9 Bom., L. R., 996; 32 Bom., 155.

Section 93. (539)

This section does not confer on the High Court in its original jurisdiction, power to entertain suits in the *mofussil*. The Advocate General *v. A. L. A. R. Annachelam* 7 M. L. T., 292.

Sections 97.

After a final decree there can be no appeal against the preliminary decree without appealing against the final decree. *M. H. Mackenzie v. Lala Narsing* 36 Cal., 762.

Section 98. (578)

Mere irregularity.—When a suit on behalf of a minor is decreed after his next friend is dead and without the appointment of a new next friend it is a mere irregularity; *Bholai v. Ajudhia*, 3 A. L. J., 81.

Disposing of a case on a Sunday, *Sheoram v. Thacoor Prosad*, 29 All., 562; remanding a case not strictly according to O. XLI, r. 23; *Trailokya v.*

Kali, 11 C. W. N., 380, 386, Debendra v. Prosonna, 5 C. L. J., 328, are mere irregularities; is not a mere irregularity. Patni v. ... ded to one Court cannot be tried by 9, All., 660. If the judgment only states the points and the findings thereon and not the reasons, the defect is not cured by this section, Shaharulla v. Bangoo, 13 C. W. N., 143.

If the judgment is not pronounced in open court the defect is within the mischief of this section; Baidahi v. Hargovan, 30 Bom., 455.

Misjoinder.—Of causes of action can not be dealt with on appeal. Rup v. Musammat 36 Cal. 780 (P. C.); so also of parties if it has not affected merits *etc.* Durson v. Dubhjoy 9 C. L. J., 623.

Misjoinder includes non-joinder; Ekkanath v. Manakkat, 20 M. L. J., 344.

Appeal.—A party not appealing after an order of remand is not barred from appealing after the final decree. K. S. Banerjee v. Raj Chandra, 11 C. L. J., 577.

Section 100 (584)

Finding of fact: if there is some evidence to support it; Dwarka v. Mukanda 5 C. L. J., 55; mere opinion based on no evidence is not; Jasimudin v. Bhurban, 34 Cal., 456; Tralokya v. Kali 11 C. W. N., 380 whether a building is unfit for the purpose of the tenancy, Harimohan v. Surendro, 34 I. A., 133; 34 Cal., 718; 6 C. L. J., 19; 11 C. W. N., 794 a question as to the weight to be given to certain documents or to a local investigation by the first Court are questions of fact; Benode v. Pashupati, 13 C. W. N., 105.

The question as to amount of damages is a finding of fact. Mussammat v. Syed, 31 All., 333.

Grounds of second Appeal—What are:—If the appellate judgment only states the points and does not state the reasons for the findings it is a defective judgment and amenable to second appeal, Shaharulla v. Bangoo, 13 C. W. N., 143. Total omission to consider an important part of the evidence. Narain v. Addoita 3 Ind. cas., 173.

What are not:—A mistake as to the meaning of some portion of the evidence which is in the form of a document. Braja v. Thakur 10 C. L. J., 593, misreading or misconception of evidence; a question of acquiescence or waiver, Ananda v. Parbati, 4 C. L. J., 198; but see *idem*, per Mookerji J., as to erroneous inference of law from facts found; Kisen Kunwar v. Fatehchand 29 All., 203. Ananta v. Peary 3 Ind., cas., 101.

A contention depending on a question of fact not raised in lower courts. Krishnama v. Kuppamal, 31 Mad., 540.

Objection as to defect of parties taken in first court but given up in the appellate court. Shyama v. Mahomed, 9 C. L. J., 91. Objection as to want of stamp not taken in lower courts. Jadu v. Kailash 20 C. L. J., 41.

Questions of Law:—whether a sale found to be beneficial to a minor was binding on him is Mafazzal v. Basid, 4 C. L. J., 485. The question as to whether a custom, entitling tenants to sell the materials and sites of houses so long as the houses are standing, prevails or not is Girraj v. Hargobind, 32 All., 125. Finding of lower appellate court that a certain decree is not fraudulent is a conclusion of law. Deo Nagar v. Ram Sewak, 5 Ind. cas., 398.

Point abandoned When the judgment of the appellate Court stated that a point had been abandoned but the statement was challenged the Judicial Committee held, the point had not been abandoned, *Kalka v. Mathura*, 8 C. L. J., 447; 13 C. W. N., 1.

Procedure—Omission to decide a material issue. *Kailas Chandra v. Kunja Behari*, 4 C. L. J., 86; want of evidence to justify a finding of fact: *Peary v. Jote*, 4 C. L. J., 566; 11 C. W. N., 83.

Amendment of plaint. was allowed in second appeal when the original plaint which was correctly framed had been wrongly amended on an unfounded objection. *Thacoor Prosad v Sambhoonarain*, 8 C. L. J., 485.

Section 102 (586)

This section contemplates the original character of the suit and not the character it may subsequently assume, *Lakshman v. Anna*, 32 Bom., 356.

When one judgment-debtor is compelled to pay the whole costs of a suit his suit for contribution is a suit of a small cause nature, *Roshantal v. Ramlal*, 4 A. L. J., 543; see also *Mavula v Mavula*, 30 Mad., 212.

If a question of title is raised by both parties in a suit for damages it is not a Small Cause Court, suit, *Sitab v Dubal*, 6 C. L. J., 218; but a suit for rent below Rs. 500 on a declaration that a potta tendered is a good potta is *Ram Chandra Yar v. Nurulla* 30 Mad., 101 F. B. If a Small cause Court decree is sent to an ordinary court for execution a first appeal lies under sec 47 but no second appeal; *Peary v. Radha*, 11 C. W. N., 861. But a second appeal lies against an order of remand, *Agandh v Khajah*, 11 C. W. N., 862; *Krishna v. Protap*, 3 C. L. J., 276.

A suit, to recover value of the plaintiff's share of the produce of lands the title to which is claimed by defendant, is a suit of a small cause nature, *Kesrisang v Naransang*, 10 Bom., L. R. 733.

Suit for damages alleging wrongful entrance with Police and strangers into plaintiff's house is cognizable by small cause court, and where the value is less than 500 rupees there is no second appeal. *Bhola v. Krishnalal*, 10 C. L. J., 198.

Section 103.

Evidence on any point raised in grounds of appeal but not considered by the lower appellate court may be considered in second appeal. *Chella v. Jeviputhol*, 5 M. L. T., 288.

Section 105. (591).

The dismissal of defendants' application to set aside an *ex parte* preliminary decree under O. IX, r. 13 for default is no bar to the appellate court setting it aside on the ground that the suit should not have been tried on a date on which it was not fixed for hearing. *Golap v. Indra*, 13 C. W. N., 493=9 C. L. J. 367.

Decree means a decree passed by the court which made the order which is alleged to be erroneous, defective or irregular. *Jammala r.*

Section 107. (582).

When an appeal abates, the appellant cannot attack the judgment of the lower court to get rid of costs. *Josiam v. Sami*, 7 M. L. T. 195=5 Ind. Cas. 937.

Section 109. (595)

An order refusing to admit an appeal after time is not a decree passed on appeal; *Karsondas v. Gangabai*, 9 Bom., L. R. 566. An order of remand is if it finally decides a cardinal point in a suit *Ananda v. Naffar*, 12 C. W. N., 545; 35 Cal., 618; *Ramsaroop v. Ramdei*, 5 A. L. J. 57; *Sarat v. Batakrisna* 10 C. L. J., 336.

.. .. . d when High Court was closed but offices to the benefit of section 5 of Limitation J., 118.

Section 110 (596)

Limitation.—Secs. 5 and 12 of the Limitation Act do not apply to applications under this sec., *Shub v. Gandharp*, 28 All., 391.

V. e land Acquisition no leave granted Rai Bhara Dirgaj 34 Cal., 400.

In a suit for recovery of immovable property with mesne profits, the value of subject matter includes mesne profits until delivery of possession or three years from the date of suit, *Kumar Basanta v. The Secretary of State for India*, 14 C. W. N., 872

A decision indirectly involving a claim or question to or respecting a property of the value of Rs. 10000 or upwards is appealable. *Srinath v. Girindra*, 14 C. W. N., 651; not where only a small amount is at issue, *L. O. Clarke v. Brajendra*, 13 C. W. N., 1127.

Section 113. (617)

Reference—can be made only if a reasonable doubt is entertained and if the rulings in the province are not clear, *Bhanaji v. Joseph*, 30 Bom., 226; a reference is not bad merely because it arises out of the action taken by a third person not a party to the suit; *Purshottam v. Balvant*, 10 Bom. L. R. 13.

Section 114. (623)

Review—lies if appeal is withdrawn, but not, if it is dismissed under s 551. O. XLI, r 11; *Ramappa v. Bharna*, 30 Bom., 625, a fraudulent compromise, a mistake in copying the petition of compromise are good grounds; *Rasik v. Rajani*, 10 C. W. N., 286; but if the decree was correctly obtained a fresh suit must be brought; *Barhamdeo v. Banarsi* 3 C. L. J., 119.

The result of granting a review is a new decree and if an appeal is pending simultaneously against the original decree the latter is delunct; *Kanhaya v. Baldeo*, 28 All., 240; see also *Vidilal v. Fulchand*, 30 Bom., 56.

Second appeal—When an order granting a review has been set aside on appeal there is no second appeal; *Jamal Bibi v. Abdul*, 6 C. L. J., 225.

Appellate Court—when the trial Judge refused review on the ground of the discovery of new evidence, the appellate court was held precluded from ordering the admission of the further evidence before hearing the appeal; *Kessonji v. G. I. P. Ry.*, 34 L. A., 115 P. C., 31 Bom. 381; 6 C. L. J., 5; 11 C. W. N., 721. The sufficiency or otherwise of the "any other ground" is not a good ground of appeal; *Gopala v. Ramaswami*, 17 M. L. J., 603.

Section 115. (622)

The High Court can interfere of its own motion without an application *Janokey v Brojo*, 33 Cal., 757. 3 C. L. J., 450; 10 C. W. N., 609, F B Erroneous view of the scope of a section and its application where it does not apply. *Brajabala v Gurudas*, 3 C. L. J. 293; an order passed without jurisdiction; *Shekh v. Mathoo*, 11 C W N., 740, also *Bhagabati v. Nanda*, 12 C W N., 835; an order by a civil court under sec. 195 Cr P. Code; *Saligram v Ramji*, 28 All., 554, F B : failing to set aside an *ex parte* decree on an erroneous view of law; *Sidharat Rai v. Anantram*, 8 Bom. L. R., 569; are good grounds for revision.

When an important document could not be produced notwithstanding all reasonable effort, a judgment without reference to that document, was set aside; *Mohant Gobind v. Lakhan*, 11 C. W. N., 112, 8 C. L. J., 43; a Judge refused to file an award on a ground not raised in the issues; order set aside 8 Bom L. R., 575.

Lower court dismissing a suit for rent in its entirety because plaintiff co-sharer landlord did not comply with the requirement of sec 15 of the Bengal Tenancy Act can be revised, *Tarini v. Chandra*, 14 C. W. N., 788.

Mere error of law is not a subject for revision, *Subramanya v. Munuswamy*, 3 M L T., 262

It is doubtful whether criminal proceedings initiated by a District Judge under sec. 476 Cr. P. Code can be stayed by a Civil Bench of the High Court; *Hem. v. Atal*, 35 Cal., 909

An order under sec. 30 of the Religious Endowment Act can not be revised, *Ramanath v. Anath*, 7 M. L. T., 121; 5 Ind. Cas. 291.

Another remedy.—The High Court does not generally interfere where there is another remedy open but it may interfere; *Umatul Mehdi v. Kulsoom*, 12 C. W. N., 16. See also *Franjibvan Das v. Bhabani Sankar*, 11 Bom., L. R. 754.

Jurisdiction :—Order of a district judge on appeal on an order against which no appeal lies is without jurisdiction and may be revised. *Jagadish v. Kripa*, 36 Cal., 130

Failed to exercise jurisdiction and can be revised. Order refusing rateable distribution under sec 73 *Srikrishna v. H. Chandook*, 32 Mad., 334; *Indra v. Ghanashyam*, 9 C. L. J., 210. A judge rejecting an insolvency application without entering into merits. *Kedar v. Maharani*, 2 Ind. Cas., 856. An order dismissing summarily a petition of claim by an assignee of a decreeholder. *Chillakore v. Patanji*, 4 Ind Cas., 125. An order asking payment of ad valorem court fee in a suit relating to public charities, as the court fee is rupees 10 only. *Ramrup v. Mohunt*, 14 C. W. N., 932.

Material irregularity :—A District Munsiff appointing a guardian without his consent and refusing to remove him when he informed the court that his interest was opposed to that of a minor is: *Mahammad Abdul v. Mekkunda*, 5 M. L. T., 162.

An irregularity set right on review can not be revised: *Bokaprogoda v. Bolkaprogoda*, 31 Mad., 414.

An improper order refusing addition of parties may be revised. *Dwarka v. Kishori*, 11 C. L. J., 426. *Promotha v. Rakhal*, 11 C. L. J., 420. An irregular or improper order as to withdrawal may be revised.

Khorda v. Durga, 11 C. L. J., 45; but a formal defect in an order can not be revised, Nagendro v. Nobin, 36 Cal., 189.

Lower appellate court rejecting a document, allowed by first court, put in at a later stage is an illegal and irregular order. Mewa v. Kumerji, 13 C. W. N., 797.

Subordination:—Resident's court at Bombay is subordinate to Bombay High Court. Rhimbai v. Mariam, 34 Bom., 267.

Section 135. (642).

Where judgment debtor returned from Court to Dak Bangalow and thence proceeded to the station to start for his usual residence he can not be said to be returning from a tribunal. Ardleshar v. Kalyan, 32 All., 3.

Section 141. (647).

The section deals with procedure and does not empower the District Judge to refer a dispute about the guardianship of a minor, to arbitration Mahadeo v. Bindsari, 5 A. L. J., 101.

It applies to an application under section 47 and O XXI, r. 90. Abdur v. Khorban, a Ind. Cas., 156.

Section 144 (583).

When the High Court dismisses an application for leave to appeal to the Privy Council and gives costs, the decree for costs should be executed in the lower Court, Jogendro v. Wazidunnissa, 34 Cal., 860; 11 C. W. N., 856. It is not necessary that the party seeking for restitution should have been a party to the successful appeal: the parties must be placed in *statu quo ante*; Ganga v. Brojo, 12 C. W. N., 642; Sec. 47 does not fully apply to proceedings under this section; Moiram v. Ramkumar, 35 Cal., 265. Refund of money realized in execution of a decree afterwards reversed can be had either by a suit or by an application, Bithal v. Jamna, 30 All., 476.

A sale under an *ex parte* decree and the decree itself having been set aside, a subsequent contested decree can not be availed of to set aside the order setting aside sale. Raghunandan v. Jagdis, 14 C. W. N., 182.

A suit to recover possession of a property from a decreeholder purchaser at a sale under an *ex parte* decree the latter having been set aside and a subsequent contested decree having been satisfied, is not barred by this section. Girdhari v. Khusali, 31 All., 364.

Mesne profits:—Representative in title of a judgment debtor can claim mesne profit from decree holder who was in possession as purchaser under a sale in execution of a decree the sale having been subsequently set aside. The decreeholder can not claim interest on the purchase money. Munshi Pragnarain v. Thakur Kamakhia Shigh, (P.C.) 11 Bom., L. R., 1200=10 C. L. J., 257.

Where a decree for redemption was modified on appeal to the High Court and the mortgagor failed to redeem with respect to the excess amount allowed by the High Court the subordinate judge in an application for restitution could assess mesne profits and allow restitution. Parbhu Dayal v. Ali Ahmed, 7 A. L. J., 1.

Application for mesne profits is chargeable with court fee. Gangadhar v. Lachman, 11 C. L. J., 541.

Section 145. (253)

A surety coming in after decree must be proceeded against in a separate suit; *Lakshman v. Gopal*, 30 Bom., 506; a decree against the surety is not a joint decree within art 182 (179) of the Limitation Act 8 Bom. L. R., 807.

Section 148.

First court can not modify a decree extending time for executing a kabulijat when an appeal has been preferred against the decree. *Mohunt v. Kripasindu*, 14 C W N., 584. = 37 Cal., 548 A court can extend time for payment of additional court fees after the time originally allowed expired. *Amir v. Nanak*, 12 C L J., 62.

Section 151.

Inherent power may be exercised against a stranger if necessary *Radhika v. Gyan*, 14 C W. N., 836

High Court in second appeal can allow the appellant to withdraw the appeal when a new document has been discovered which the High Court can not consider, in order that the appellant may make an application for review in the lower appellate court. *Nand v. Anwar*, 32 All., 71.

The inherent power to be exercised must be for the ends of justice or to prevent the abuse of the process of the court. *Ganesh v. Purshottam*, 34 Bom., 135.

A court may rehear a matter before an order passed at a previous hearing is perfected *Padmabati v. Rasik*, 37 Cal., 259. Every Court has inherent power to correct its own proceedings where it has been misled, *Basangowda v. Churchigitigowda*, 34 Bom., 408.

Section 152. (206)

A decree cannot be amended to make it conform with facts not alleged in plaint, if it is in conformity with the judgment. *Kabul v. Syed Mahammad* 2 Ind cas. 551.

Decree can not be amended by the court which passed it when an appeal against it was dismissed. The proper court is the court of appeal. *Kumar Rameswar v. Bhabasundari*, 11 C. L. J., 81; *Brij Narain v. Tejbal*, (P. C) 32 All., 295; *Abbas Khan v. Nibarani*, 11 C. L. J., 159; but the High Court can amend a decree an appeal against which has been preferred to his majesty in council. *Aghore v. Mahommed Musa*, 12 C L. J., 155.

The operation of this section is not restricted by O. XLV, r. 13. *Aghore v. Mohammad*, 11 C. L. J., 155.

THE FIRST SCHEDULE.

ORDER I.

Rule 1. (26)

In a partition suit unknown persons and heirs should be made parties
Srinath v Probodh, 11 C. L. J., 580.

Rule 2 (28)

An alternative claim either against A or against B involving some common question of law or fact can be made; *Mauji v Kuverji*, 31 Bom., 516.

"Same" in this rule governs "series of acts and transactions." *Umabai v. Bhanu*, 11 Bom. L. R., 499=34 Bom. 358.

All persons.—In a suit for possession, alienees of different portions of the same estate claiming under the same alienor may be joined even though the land may be in different villages, provided the venue of the trial is the same—*Umbai v Vithal*, 33 Bom., 203. In a suit for ejectment against a mortgagee alleged to be purchaser of a nontransferable holding, the original tenant or the transferor is a necessary party, *Dwarka v Kisori*, 11 C. L. J., 426.

Alternative reliefs.—Relief laid in the alternative against two sets of defendants is not bad for misjoinder of causes of action and parties. *Yerukola v Mudiya*, 6 M. L. T., 282.

A suit against two defendants to determine who is entitled to a charge for the use of water is not bad. *Komarappan v. Venkata-Chelam*, 4 Ind. Cas. 312.

Rule 4. (28)

A suit by a ward for declaration that certain alienations by his guardian were not binding on him, impleading all the different alienees and the guardian, is not bad for misjoinder of parties or causes, *Dorasami v Angamal*, 18 M. L. J., 484.

Rule 6.; (29)

Misjoinder—A suit against a promisor and the widow of the original payee who had taken a renewed note, on the ground that the note belonged to the plaintiff, is not bad for misjoinder, *Ramakrishna v Katta*, 29 Mad., 87; nor is an ejectment suit against tenant and co-owner, *Sri Raja v. Pratipatti*, 29 Mad., 29.

Rule 8. (30)

Scope—This rule does not debar some of the members of a committee from maintaining a suit in their own right. *Gulba v Basanta*, 32 All., 284.

Parties.—In an administration suit, individual creditor can not be brought in, as party unless he shows some strong reason for it *Vasanji v. Ismailbhai*, 11 Bom. L. R., 1054.

It is the duty of the court to cause service of the notices or advertisements as required by this rule; *Mukh Lall v. Jugdeo*, 35 Cal., 1021.

A defendant setting up a common right need not get leave; *Sitab v. Dubal*, 6 C. L. J., 218.

A person who is not a tenant cannot maintain a suit on behalf of tenants Robert v. Nagappa, 33 Mad., 258.

Rule 10 (5). (32)

A party added by the court *suo motu* is not barred from pleading limitation, Damodar v. Nainsukh, 8 Bom L R, 942

The addition of a party after the expiry of the period of limitation against him would not save limitation—Ramkinkar v. Akhil, 11 C. W. N., 350; 5 C. L. J., 242; F. B., 35 Cal., 519

Receiver a necessary party to a rent suit; leave of court which appointed the receiver should be taken before making him a party. A court is not bound nor competent to add him of its own motion. Joindra v. Sarfarai, 14 C. W. N., 653.

At any stage—Even in second appeal—Subbaraya v. Vaithinatha, 33 Mad., 115.

Rule 13. (34)

Defendant's objection to non-joinder should be made at the earliest opportunity, otherwise it will not be heard; Hazarimal v. Bhawani, 5 A. L. J., 554.

Objection as to want of parties waived if not raised, Muhammed v. Muzharai, 3 A. L. J., 474; Durson v. Durbijoy, 9 C. L. J., 623 Sheikh Mohammad v. Sheikh Abdul, 4 Ind. Cas., 488. (Objection should be raised as soon as a right to it exists.)

Persons added as parties under order O. I rule 10 without any objection by plaintiff constitutes waiver and it can not be allowed in second appeal, Must Kanla v. Chaju, 2 Ind. Cas., 848.

ORDER II.

Rule 2. (43)

Suit for partition of property in one District being withdrawn without leave, suit for partition of property in another District held barred by this rule and O. XXIII, r. 1; Niazahmed v. Abdul, 5 A. L. J., 278; 30 All., 279,

The dismissal of a suit for the redemption of some property from a certain mortgagee does not bar a suit for the redemption of the same property from another mortgagee; Raman v. Krishnan, 29 Mad., 153; suit for one instalment when two are due would bar a suit on the second; Narayan v. Nimba, 8 Bom., L. R., 547.

Hindu reversioner who sued to set aside a deed of gift by widow is not barred from maintaining a suit for recovery of possession after her death. Kanhari v. Amri, 32 All., 189. A suit for damages for breach of contract, on one stipulation bars a second such suit for breach of other stipulations. Raja Bahadur v. Rajeevappa, 11 Bom. L. R., 46.

"In respect of" means "founded on." Subbarya v. Rathnavelu, 32 Mad., 330.

Prior suit erroneously dismissed under this rule operates as *resjudicata*. Desari v. M. Chellaya, 7 M. L. T., 84.

Cause of action—Specific performance of a contract to reconvey a plot of land after its breach and mesoe profits for the period during which plaintiff was refused possession in consequence of the breach are based on the same cause of action. Ganesh v. Mahesh, 13 C. W. N. 669.

Different suits in respect of different parcels of land on different causes of action are maintainable though there is an alternative claim common to all. *Must Ketki v. Dinabandhu*, 10 C. L. J., 83.

Prior suit on the alleged entrustment for safe custody does not bar a subsequent suit for rent. *Kadir v. Arunachelane*, 19 M. L. J., 737. First suit alleging interference with possession does not bar a second suit alleging dispossession. *Gadulula v. Yadiki*, 6 M. L. T., 375=4 Ind. Cas. 97.

A suit for possession of land is no bar under this rule to a subsequent suit for mesne profits of such land accruing prior to the institution of the former suit; *Gutta Sarma v. Maganti Raminadu*, 31 Mad., 405.

Relinquishment—Of a claim by plaintiff is no bar to its being set up as defence. *Shiv Sankar v. Soni Ram*, 6 A. L. J., 391.

An objection by a judgment debtor, leaving away certain property by mistake, to an attachment is no bar to a second objection on the relinquished property before sale. *Lala Har Prosad v. Seth Radha Kishen*, 2 Ind. Cas., 105.

Clerical error in describing a land for which a suit was dismissed is no bar to a fresh suit. *Tha Ka v. Ki Subramaniya*, 1 Ind. Cas., 806.

A suit dismissed on the ground that the cause of action has not accrued is no bar to a second suit when it accrues. *Raja Bahadur v. Rajeevappa*, 11 Bom. L. R., 46.

A mortgagee can bring two different suits on two independent mortgages on the same property. *Dwarka v. Mritunjoy* 3 Ind. cas. 175.

When in a suit on a first mortgage, the second mortgagee was not impleaded, a second suit against the latter is not barred; *Mussammat v. Bakit*, 32 All., 119.

Payment by mortgagee under sec 74 of the transfer of property act not claimed in the mortgage suit is relinquished and a separate suit is barred; *Hari v. Shama*, 11 C. L. J., 551. See also *Hari v. Kusum*, 37 Cal. 589.

Rule 3. (45)

Persons claiming title paramount to that of the mortgagor cannot be joined in a suit on the mortgage; *Jaineswar v. Bhuban*, 33 Cal., 425; 3 C. L. J., 205. One suit will lie for rent of a holding and money due for a fishery attached to the holding; *Shib v. Vakai*, 33 Cal., 601.

The fact that the defendants set up different titles to the various portions held by them would not make the suit of the plaintiffs to recover their father's estate from different persons, bad for multifariousness; *Parbat v. Mahmud*, 29 All., 267.

Defendants must have a joint interest in the main question raised by the litigation. Every defendant need not be interested as to all the reliefs claimed in the suit; *Umabai v. Bhanu*, 11 Bom. L. R., 499—34 Bom., 358.

Rule 4. (44)

A claim for damages cannot be combined with a suit for recovery of immovable property or for a declaration of title thereto; 17 M. L. J. 135.

Defendant may by his conduct waive the benefit of this rule; *Satish v. Asraff*, 8 C. L. J., 196.

Immovable property includes right of way; *Bejoy v. Banku* 13 C. W. N., 451—9 C. L. J. 336.

Rule 5. (44)

Executor, administrator or heir as such include legatees and next of kin; *Hafizaboo v. Mohomad*, 8 Bom. L. R., 734.

ORDER III.

Rule 2. (37)

Resident—A party ordinarily residing within jurisdiction but absent for a time may be not resident, *Damodar v. Inayet*; 28 All., 135

Omission of the name of a Mukhtear by mistake in the power of attorney may be validated by subsequent amendment and such amendment takes effect from the date when the power of attorney was originally filed. *Chhayemunnesa v. Basirar* 37 Cal., 399.

Rule 4. (39)

Revocation of Attorney's authority is to be done as laid down here. *Atul v. Lakshman*, 36 Cal., 609=13 C. W. N., 1172. (Attorney's authority continues after judgment, covers taxation of costs and is at an end on the issue of the allocators)

ORDER V.

Rule 17 (80)

Affixing a notice to the outer door of the office in which a person works is not good service, *Annada v. Jogendro*, 8 C. L. J., 294.

Rule 19. (82)

Omission of express declaration under the rule does not invalidate an order of arrest. *Srikrishna Das in re*—19 M. L. J., 31.

Rule 20. (82)

Temporary absence no ground for substituted service unless the defendant is avoiding service; *Abraham v. Donald Smith*, 29 Mad., 324.

Service of summons to be made as under this rule on owners unascertained whether dead or alive. *Srinath v. Probodh*, 11 C. L. J., 580.

Rule 27. (422)

The rule passed by the High Court that service on railway servant should be through officers has the force of law and service on him personally is no service. *Wazir v. Naqui* 6 A. L. J., 45.

ORDER VI

Rule 14. (51)

Signature of
Government and
v. Secretary of St.

Rule 17. (53)

Where six members of the Calcutta Police jointly sued the editor of a certain newspaper for damages it was held that the plaintiffs might be put to their election which one of them should proceed with the suit, *Aldridge v. Barrow*, 34 Cal., 662.

Amendment allowed:—Even in second appeal when the High Court thinks it fit. *Gangadhar v. Khaja Abdul* a Ind. Cas. 77; but there should be no injustice to the other side. *Kisandas v. Rachappa* 33 Bom., 614. To bring a case within the jurisdiction of a Munsiff, who rejected the former plaint on the ground that the subject matter of a suit exceeds pecuniary jurisdiction, by striking off some of the properties. *Karum v. Authimoola*, 6 M. L. T., 261.=33 Mad., 261. In a suit for declaration

plaint may be amended when the defendant was found subsequently in possession. *Ananda v. Daiji*, 36 Cal., 726.

Amendment not allowed—In second appeal when the effect would be to create a new case; *Eresson v. Rao Bahadoor*, 7 M. L. T., 225.

The Court refused to amend a plaint of a Mitakshara son who sought to set aside a mortgage effected by his father and grandfather prior to his birth, by adding to it a prayer for redemption, *Bholanath v. Kartik*, 11 C. W. N., 462; 34 Calc., 372.

Rule 18. (54)

Order of assistant collector rejecting plaint is not a decree within the meaning of Sec. 177 of the Agra Tenancy Act. *Moulvi Mahammad Abdul Agiz v. Maulvi Mohammad Abdul Zahir*, 5 Ind. cas., 371.

ORDER VII.

Rule 1. (50)

Amendment of a plaint referring to a document not included in the list annexed to the plaint, does not make the suit of a different and inconsistent character. *Gunnaji v. Makanji* 34 Bom., 250.

Rule 11. (53, 54)

A suit filed on the last day for limitation on insufficient court-fee is badly filed; *Ramtahal v. Dubri*, 28 All., 310.

A plaint can be rejected even after admission and registration, *Pudmanand Singh v. Anant*, 4 C. L. J., 421 F. B.; 11 C. W. N., 38.

The deficiency of stamp made good within the time allowed but after limitation does not bar the suit *Ganarang v. Botokrishna* (F. B.) 32 Mad., 305; See also *Amir v. Nanak* 12 C. L. J., 62 (Court is not bound to reject plaint in all cases)

Rule 14. (59)

There may be cases where it will be imperative to order the plaintiff to produce and give inspection to the defendant of a document which he may not have mentioned in the plaint or in the list of documents annexed thereto; *Khetsidass v. Narotum Das*, 32 Bom., 152.

ORDER VIII.

Rule 6. (111)

Set off—This rule does not take away any right of set off which parties would have independently of its provisions; *Rash Behary Dey v. Bhawani Charan*, 34 Calc. 97; *Mungie Chand v. Gopal Ram*, 34 Calc., 101.

Limitation—No question of limitation arises; the remedy may have been barred but the right to the debt is not extinguished, *Gajadhar v. Raghubar*, 12 C. W. N., 60.

Ascertained sum and not the sum admitted by plaintiff but a sum of money the amount of which is known. *Edward v. Ramdin* 14 C. W. N., 170; liquidated debts claimed to be set off by both parties can be allowed when they can be readily ascertained *Goswami v. Durgapada*, 7 A. L. J., 105.

Set off can not be allowed when the defendant could not have sued plaintiff without making another person party; *Uma v. Mansur*, 11 C. L. J., 406—14 C. W. N., 786.

ORDER IX.

Rule 6. (100)

An order on an adjourned date after taking evidence from plaintiff comes under this rule read with O XVII R 2 Nagen v Nobin 36 Cal, 189.

This rule does not apply where the order is an *ex parte* order absolute for foreclosure. Kadir v. Abdur, 2 Ind. Cas, 67.

Rule 8 (101)

Applies to proceedings under the Land Acquisition Act, Bhondi v. Ramadhin 10 C. W. N., 991, where on an adjourned hearing, on the pleader intimating that he had no further instruction after an issue of warrant on witnesses was refused, the suit was dismissed this rule applies—Ganga v. Gudar. 5 Ind. Cas. 499.

Application for rehearing of execution proceedings is maintainable under this rule and not barred under OXXI R 103 Saifdar v. Kishan 12 C. L. J., 6

But not where the plaintiff is present in court; Esmail v. Haji Jan, 33 Bom., 475. nor where a portion of the claim is abandoned and the rest dismissed on the merits. Kanbaya v The National Bank (P. C.) 14 C. W. N., 594-37 Cal., 426.

Res Judicata:—The dismissal of a suit under this rule though it precludes a fresh suit in respect of the same cause of action is not intended to operate in favour of the defendant as *res judicata*, Kunja Behari Dutt v. Khand Prosad Narayan Singh, 6 C. L. J., 362, At; 367. Dismissal of a redemption suit under this rule does not amount to *res judicata*; Fateh Chand v. Jagannath 2 Ind. case, 630.

Rule 9. (103)

Application:—When a pleader having filed a petition for warrant which was rejected says he has no further instruction, there is no appearance for his client from that moment and this rule would apply; Marlan v, Ramkulpa, 34 Cal., 235; 5 C. L. J. 260.; not when the plaintiff is present, Esmail v Haji Jan 33 Bom., 475; not where plaintiff in former suit was not plaintiff in later. Ottappurakkal v. Cherichil 33 Mad., 31.

Executor applying for probate can not be a plaintiff suing in respect of a cause of action and this rule does not apply. Ramani v. Kumud, 14 C. W. N., 924.

Scope:—An application to set a dismissal aside under this rule is necessary before a fresh application can be allowed where the application was under section 47 and O. XXI, R. 90. Abdur v. Khorban 2 Ind. Cas., 156

Rule 13. (108)

Application:—An application under this rule may be heard pending an appeal against the *ex parte* decree, Sarat v Damodur 12 C. W. N., 885.

This rule applies to an *ex parte* decree against a defendant who after filing written statement failed to appear at any adjourned hearing Muniapa v Balayan 19 M. L. J. 222; also to an order passed under O. IX, R. 6 read with O. XVII, R. 2. Nagen v Nobin 36 Cal., 189; and also to an application for rehearing an *ex parte* decision on an application for substitution. Khushalgi v. Gobindgi 6 A. L. J. 760

At an adjourned hearing of a part heard suit, the plaintiff having closed his case; the case of the defendant having been partially entered into, counsel for the defendant applied for a further adjournment which was

refused and he withdrew from the case. In his absence the Court passed the judgment on the merits. An application to have the decree set aside as an *ex parte* decree was dismissed on the ground that under the circumstances application under this rule does not lie, *Kader Khan v. Joggeswar Prasad Sing*, 35 Calc., 1023.

This rule does not apply to an application to set aside an *ex parte* order absolute for foreclosure *Kadin v. Abdul* 2 Ind., Cas., 67.

Execution Proceedings:—An order granting an application under this rule cannot be set aside in an appeal from the decree, after a rule questioning the propriety of the order has been discharged by the High Court; *Must Kariman v. Forbes*, 8 C. L. J. 308.

In a suit to set aside a decree upon the ground of fraud, the sole fraud alleged was with respect to service of summons on the defendant; the question had already been gone into and decided by two Courts against the defendants under this rule. *Held*, that the suit was not maintainable, *Puran Chand v. Sheo Dat*, 29 All., 212.

When a decree is passed against more defendants than one and the decree is executed against some of the defendants only, that is not a process for enforcing the judgment against other defendants within the meaning of art 164 of the Limitation Act; *Hanumant Raghubendra v. Shanker Ravji Apte*, 31 Bom., 303.

Where the question is whether the liability of the defendants is joint or several and in such case the *ex parte* decree is set aside on the application of some of the defendants, the entire decree is set aside and the trial *de novo* ought to be a trial of the whole case, *In re Hari Dass Karmokar*; 5 C. L. J., 202.

An *ex parte* decree set aside can not be taken to be revived by any subsequent decree, and a sale under the *ex parte* decree must be set aside. A new decree after such setting aside necessitates fresh sale; *Raghunandan v. Jagdis*, 14 C. W. N., 182.

First court has no jurisdiction to set aside an *ex parte* proceeding or revive a suit after decree by the appellate court *Biswambhar v. Sarup* 1 Ind., Cas. 136; *Dhona v. Tarak* 12 C. L. J. 53.

Decree:—Means the whole decree and it cannot be set aside in part, *Samodh v. Bhuladhar* 5 Ind. Cas., 284.

Scope:—Setting aside a decree at the instance of one defendant does not necessarily revive the suit as regards other defendants, *Kunj v. Durga*, 3 C. L. J. 160.

The dismissal of an application under this rule to set aside an *ex parte* preliminary decree for default is no bar to the decree being questioned in an appeal preferred against the final decree. *Golap v. Indra* 9. C. L. J. 367=13 C. W. N. 493.

Revision:—The dismissal of an application can be interfered with by the High court in revision. *Waxlr v. Naqui*, 6 A. L. J., 45.

ORDER XI.

Rule 14 (130).

Production of documents can be ordered even before issues are framed. Such documents alone as relate to matters in question in suit and such as are necessary to establish the cause of action of the party requiring pro

duction. The time and place of inspection should be specified in the order. Right to inspection includes right to have copy of the documents. *Gobind v. Kunja*, 10 C. L. J., 407. *Fatmabai v. Haji Kasem*, 11 Bom., L. R., 402.

ORDER XIII.

Rule 1. (1). (138, 140)

This is enacted to prevent fraud by the tardy production of suspicious documents and not to shut out formal evidence beyond suspicion, such as certified copies of public documents. *Lalabai v. Bishnu Chobay*, 6 C. L. J., 621.

The Court has discretion under O. XIII, r. 1 (1), to receive or reject documents produced at the trial though not mentioned in the list; *Talewar Sing v. Bhagwan Dass*, 12 C. W. N., 312.

ORDER XIV.

Rule 1 (146).

Issues may be settled whether there was a written statement or not; *Rustur Kazi v. Tara Prosonno Chowdry*, 11 C. W. N., 871.

ORDER XVII.

Rule 1. (156).

An adjournment ought to be made to a subsequent date and the hearing on that date made conditional upon payment of costs. An order making an adjournment conditional upon immediate payment of costs is not proper. *Duan Ram v. Murlu*, 13 C. W. N., 525 = 36 Cal., 566.

Rule 2. (157)

Application:—When plaintiff is present but his counsel is not present this rule applies. *Esmail v. Haji Jan*, 33 Bom., 475; so also where a suit is decided *ex parte* on an adjourned date after taking evidence; *Nagen v. Naun*, 36 Cal., 189.

This rule should be read exclusively of the following one. It deals only with failure to appear. *Chandramati v. C. S. Narainsami*, 19 M. L. J., 760 = 33 Mad., 241.

Rule 3 (158)

This rule should be read exclusively of the former one. It applies only when parties appear but have failed to perform something for which time was allowed. *Chandra Mathu v. C. S. Narayan Sami*, 19 M. L. J., 760 = 33 Mad., 241.

ORDER XIX.

Rule 3. (196)

An affidavit should clearly state how much is a statement of deponent's knowledge and how much of his belief and the grounds of his belief with sufficient particularity. *Padmabati v. Rasik*, 37 Cal., 259. *Gobindo v. Kunjo* 10 C. L. J., 414 (Scandalous matter to be avoided in pleadings).

ORDER XX.

Rule 3. (202).

First judgment deciding a case but deferring passing decree till succession certificate filed is inconsistent with a second judgment deciding

otherwise and a decree must be passed in accordance with the first judgment. *Kishori v. Ganga*, 31 All., 153.

Rule 4 (203)

A Small Cause Court Judge is not bound to fully set out the reasons for his findings, *Dinonath Banikya v. Rajkumar Chuckerbutty*, 6 C. L. J., 527.

A judgment is not defective merely because no specific issues are framed where the points have in fact been determined. *Hussain v. The Asiatic Petroleum*, 5 M. L. T., 215.

Rule 11. (210).

Court may stay execution at the time of passing the decree; *Palaniappa v. Velayutha*, 7 M. L. T., 151 Discretion to make a decree payable in instalments must be judicially exercised and not arbitrarily. *Balgobindaram v. Chhedilal*, 11 C. L. J., 431.

Rule 12. (211, 212)

Interest on mesne profits is a part of the claim and court-fee must be paid for it; *Dwarka v. Debendra*, 33 Cal., 1232.

Interest should be allowed up to date of payment even if the decree is silent; *Grish v. Sekhaheswar*, 33 Cal., 329.

A successful plaintiff in a suit for possession and mesne-profits is not entitled to claim mesne-profits accrued after the institution of the suit for more than three years from the date of the decree, if that event occurred before the actual delivery of possession; *Trailokya Nath Chowdry v. Jogendra Nath Roy*, 35 Cal., 1017.

Where a decree declares that the plaintiff is entitled to mesne-profits and says nothing about interest, if the mesne-profits is left for determination by the Court of execution the decree-holder is entitled to interest. But if the Court which ascertains mesne-profits has omitted to allow interest it is not open to the executing Court to allow it. The Court which executes a decree must execute it as it stands; *Harmonoje v. Ramprosad* 6 C. L. J., 463.

In determining the amount of mesne-profits payable in respect of *khamar* lands 5 p. c. on the value of the actual produce was held to be sufficient allowance to meet the costs of supervision and any other incidental charges, for which a proprietor, who is not an ordinary cultivator of his *khamar* land, may be liable, *Ijtullah Bhuyan v. Chandramohan Banerjee*, 12 C. W. N., 185.

Mesne-profits should be allowed from the date of institution of suit up to the date of delivery of possession or the expiration of three years from the date of the decree which ever occurs first with interest deducting the expenses and government revenue paid by judgment debtor. 6 A. L. J., 327.

Rule 15. (215)

No decree can be passed in favour of a defendant except under O.XX, r. 19 *Mistilal v. Benarsi*, 3 A. L. J., 233.

ORDER XXI.

Rule 1. (257)

Death of decree-holder does not relieve judgment debtor from payment if the latter delays in paying an instalment decree in proper time he is liable for interest, *Narendra v. Charu*, 14 C. W. N., 146.

Rule 2 (258)

An uncertified adjustment even by a new contract cannot be pleaded *Sitharam v. Chinnna*, 29 Mad., 312; but a suit will lie, *Gendo v. Nihal*, 30 All., 464.

Judgment-debtor includes persons claiming through the judgment-debtor or in his right, *Panduranga v. Vithalinga*, 30 Mad., 537.

An endorsement certifying part satisfaction of a decree is not a step in aid of execution *Mohan v. Bapuji*, 11 Bom., L. R., 729.

An application under this rule serves to keep the decree alive although there might have been no application for execution actually pending; *Chhote Sing v. Ishwari*, 32 All., 57.

A creditor of a decree-holder trying to attach a decree of the latter cannot be allowed to show, on the decree-holder certifying the decree to be satisfied the fraudulent character of the satisfaction, *Subba v. Alliar*, 5 M. L. T., 72.

This rule applies to execution proceedings under mortgage decree *Nistarini v. Karim*, 12 C. L. J., 65 but not to a case where the parties agreed between themselves that their debts were to be privately adjusted; *Gauri v. Gajadhar*, 6 A. L. J., 403.

Rule 4 (223)

The Court to which the decree is transmitted is to issue the notice under Rule 22; *Raja Steenath Roy v. Romesh Chandra Acharyya*, 12 C. W. N., 897.

Appeal—as to objections overruled by a Munsiff to whose court a decree passed by a Small Cause Court was sent for execution under the rule lies to the District Judge. *Atwari v. Maiku*, 31 All., 1.

Rule 5. (223)

A decree was obtained in the Sub-Judge's Court at Muzaffarpur, then the District of Durbhunga was formed out of it and the assignee applied for
Id., that the Court at Durbhunga
Udit Narayan Chowdry v.

Order of transfer signed by Sheristadar as "by order" of the District Judge is a valid endorsement. 5 Ind., Cas 155=7 M. L. T., 132. After the decree is retransferred to the original court it can decide a question as to whether the decree-holder could execute the decree against the legal representative of the judgment-debtor, *Durga v. Umatul*, 9 C. L. J., 139.

Rule 7. (225)

The executing court cannot question the jurisdiction of the decree court; *Trimbak v. Balwant*, 30 Bom., 101; nor the validity of the decree; *Rash v. Thacoar*, 4 C. L. J., 475.

Rule 8. (226)

The jurisdiction of a Munsiff in regard to the execution of a decree transferred to him for the purpose is not subject to any pecuniary limit. *Tlazorath v. Syed Ghulam* 5 Ind. Cas. 155=7 M. L. T., 132.

Rule 10. (230)

One additional Sub-judge passes a decree and is succeeded by another; the application must be made to the permanent Sub-judge; *Tarachand v. Ramnath*, 4 C. L. J., 473.

Rule 13. (237)

Omission to verify the inventory is a mere irregularity and may be cured by s. 99 (578); *Nasirunnissa v. Ghafur*, 28 All., 244.

Rule 14 (238)

This rule does not apply to proceedings in execution of a mortgage decree; *Keshab v. Rajendra* 5 Ind. Cas. 101.

Rule 15. (231)

One of several decree-holders may execute for himself and as assignee of the others; *Krishna v. Sukha*, 10 C. W. N., 1000.

An application under this rule is a step in aid of execution; 3 Ind. Cas. 335

Rule 16 (232)

The dismissal of an application to execute under this rule would bar a regular suit, *Amanat v. Sardha*, 28 All., 613: his remedy is by appeal; *Kunhamad v. Amad*, 16 M. L. J., 27.

The sale of property for the possession of which the vendor has obtained a decree, does not, necessarily, carry with it the right to execute the decree. *Hansari Pal v. Mukhrari*, 30 All., 28.

Notice must be given to both judgment debtor and transferor before the decree can be executed, *Sreenath v. Achutananda*, 21 C. L. J., 354.

Transfer:—is complete when there is an assignment in writing and does not depend upon any sanction of the Court. *Subba v. Sāminath Iyer*, 5 M. L. T., 260. *Sadagepachariar v. Raghunath* 33 Mad., 62; of a portion of a decree may be recognised if the court thinks it proper—Assignment of a maintenance decree in respect of arrears due was valid—*Venkataramani v. Venkateshimula*, 6 M. L. T., 242.

Pledge of decree seems to be recognised as valid under this rule and as such the sale of property pledged must also be within the competency of the court. *Subburaya v. Kuppasawny*, 5 M. L. T., 278.

Substitution:—There is no express provision for actual substitution of legal representatives or assignee of decree-holder. This rule merely requires that legal representatives or assignee should apply for execution and be brought on the record, *Jogendro v. Sham* 9 C. L. J., 271=36 Cal., 232 *Manmatha v. Kikhal*, 10 C. L. J., 396.

Proviso 1 does not prevent an attached decree from being executed by judgment debtor against others; attachment of a decree and its enforcement are different. *Kahan v. Damber* 6 A. L. J., 564.

Rule 17. (245)

A court executing a decree can only construe it properly but can not

Maha v. Surendra, 9 C. L. J., 288. *Radhika v. Brojendra* 14

Rule 18 (246)

When set off is claimed in respect of cross decrees, both the decrees must be before the court. *Pernusami v. Dorasami*, 32 Mad., 336.

Rule 21. (230)

Where a judgment debtor evaded arrest and put in false objections which were overruled, he is not entitled to the benefit of this rule *Beni v. Kashi*, 6 A. L. J., 401.

Rule 22 (248)

Step in aid of execution:—An application by an assignee of a mortgagee decree-holder to be brought on the record and to issue notice on the judgment debtor is an application in accordance with law and a step in aid of execution *Sreekakulam v. Lavam*, 2 Ind. Cas., 433; *Jamna v. Bishnu*, 6 A. L. J., 401. Time to adduce evidence to prove service of notice of sale. *W. N.*, 486; but an affidavit of service of notice. *Bom. L. R.*, 729; nor an order for execution after one year without issue of notice; *Desoo v. Srinibasa*, 33 Mad., 187.

Notice:—The mere issue of notice is not an adjudication that the application is not barred by limitation. *Khosal v. Ukiladdi*, 3 Ind. Cas., 47.

It is court's duty to issue notice. *E. H. Stephens v. Kamta Prashad* 10 C. L. J., 19; but a sale without notice is not a nullity but it is a serious irregularity and can be set aside under sec. 47 or O. XXI, R. 90. *Mrs Levina v. Madhab Moni*, 14 C. W. N., 560.

Scope:—This rule is not extended to the execution of mortgage decrees, *Keshab v. Rajendra*, 5 Ind. Cas., 101.

Rule 23. (249)

Application for execution was barred, yet if the judgment sale is a good sale. *Fazar v. Uzir*,

Rule 24. (250, 251)

See *Sheik Nasser v. The Emperor*, 37 Cal., 122.

Rule 26. (239)

Stay of execution can only be effected upon a proper application presented in court in due course; *Kali v. Debendro*, 10 C. L. J., 456.

Rule 32 (260)

When a perpetual injunction has been granted the decree-holder can execute under this section, on every breach, within three years, *Venkata v. Veerappa*, 29 Mad., 314.

This rule applies where a party is directed to carry out or abstain from some thing. *Velu v. Peekawoor*, 6 Ind. Cas., 289—7 M. L. T., 227.

Rule 36. (264)

Symbolical possession when referred to as possession recognised by law it must have reference to possession under this rule. *Bhaichand v. Bala*, 11 Bom., L. R., 1344.

Rule 46. (268)

Direction of court to the disbursor of allowances to pay the allowance money of judgment debtor is not attachment *Suni v. Karuppan*, 5 Ind. Cas., 145; *T. Ranganath v. T. Sutharam*, 7 M. L. T., 110=5 Ind. Cas., 820.

Rule 52. (272)

Where an assignee of a decree applies for execution of the latter, the decree itself being attached before judgment in another court, the execution must be stayed until the attachment is cancelled. *Sadagopachariar v. Raghunath*, 33 Mad., 62.

Rule 53. (273)

Attachment of a decree does not vest ownership *Kalyan v. Damber*, 6 A. L. J., 564.

Sale of a money decree in execution is not altogether invalid under this rule—*Subbaraya v. Kuppusami*, 5 M. L. T., 278—1 Ind. Cas., 535.

Mortgage decree is not a money decree *Macnaghten v. Surja Prasad* 11 C. L. J., 78.

Rule 58. (278)

Section 278, 281, 283 must be read together; *Morshia v. Elahi*, 3 C. L. J., 381.

When the Court without any enquiry dismissed the application under this rule for default Art 11 of the sch. I. Limitation Act has no application, *Kunj Behary Lal v. Kand Prasad*, 6 C. L. J., p. 362.

A claim preferred by legal representative of a defendant should not be summarily disposed of but properly investigated under sec. 47. *T. Subramania v. Manik*, 2 Ind. Cas., 432.

A claim on holdings attached in execution of arrears of rent on two holdings may be preferred under this rule. *Bisra v. Rajaram*, 36 Cal., 705.

Rule 61. (281)

An order under this rule is not binding on the judgment-debtor unless he was a party to the proceeding; *Vaddapalle v. Drona*, 18 M. L. J., 26; 31 Mad., 163.

Rule 62. (282)

A purchaser of property sold subject to mortgage after enquiry under this section purchases only the right to redeem, but a purchaser of property simply proclaimed as subject to a mortgage under O. XXI, r. 66 can challenge the validity of the mortgage; *Shib Kumar v. Sheoprasad*, 28 All., 418.

Rule 63. (283)

The "right which the plaintiff claims" is not the right or title to the property, but the right to have it sold or released; *Morshia v. Elahi*, 3 C. L. J., 381; a release by the decree-holder without notice to the judgment-debtor after the dismissal of a claim does not bar a suit for possession, against the judgment debtor, *idem*.

Parties.—This section is not controlled by the provisions of sec. 42 of the Specific Relief Act; *Krishnam v. Pathma*, 29 Mad., 151.

The attaching creditor, judgment-debtor, and the alleged transferee are only proper parties *Surendra v. Kiran*, 1 Ind. Cas. 428.

Where a claim was allowed but the order set aside in a subsequent regular suit, the lien of the attaching creditor dates from the attachment *Ali Ahmed v. Banshi Dhar*, 31 All., 367.

The suit is in the form of appeal though not actually so, from the order passed upon the claim to attached property and plaintiff can not ask for a declaration that he has charge or mortgage lien on such property. *Veer v. Karuppa*, 6 M. L. T., 154-2 Ind., cas., 980, *Surendro v. Kiran* 1 Ind. cas, 428.

Rule 64. (284)

A certificate issued under the public demands recovery act against 'all the maliks' but stating that realisation may be from one of the maliks is not invalid because this rule allows execution against a portion of the state. *Thittar v. Ramdhany*, 3 Ind cas 81.

Rule 66. (287).

The mention of an encumbrance in the sale proclamation does not estop the purchaser from challenging the validity of the encumbrance; *Shib v. Sheo*, 28 All., 418. See also *Gonesh v. Purshottam*, 33 Bom., 311.

Rule 69. (291)

The auction-purchaser is a representative of the judgment-debtor second mortgagee, within the meaning of sec. 47 and is entitled to make a deposit under this rule, *Radha Kissen Marowary v. Hem Ch. Bose*, 11 C. W. N., 495.

The purchaser of an equity of redemption in a property can save the same by payment into court at any time before sale; *Mistri v. Mithu*, 28 All., 28.

Rule 71. (273).

Default in payment of no deposit under High Court rules and circular property was resold comes 115.

Rule 72. (294)

Decree-holders bidding under permission may be ordered to pay cash price; *Hazarilal v. Namdeb*, 32 Bom., 379, 10 Bom. L. R., 296.

Decree-holder purchasing without permission makes the sale voidable not void *Mohi v. Ramdoyal*, 1 Ind. cas, 645.

Rule 83. (305)

A permission under this rule is not sufficient for a guardian who must have the sanction of district judge in spite of such permission. *Sarju v. District Judge of Benares*, 31 All., 378. Where an application under the rule was refused and the sale took place, an application to set aside the sale is maintainable under sec. 47 and O. XXI R. 90. *Enamuddin v. Abdul*, 5 Ind. cas, 489.

Rule 84. (306)

The non-payment of the earnest money is a mere irregularity and will not vitiate the sale unless the judgment-debtor is prejudiced; *Ahmed Baksh v. Lalta*, 28 All., 238.

Default in payment of poundage fee under High Court rules and circular orders Chap. V Rule 5 and 6 is not default under this rule. *Madhu v. Purna* 9 C. L. J., 115.

Rule 89. (310A)

The beneficial owner, can apply if a sale takes place in execution of a decree against his *Benamdar*, *Baburam v. Ramsahai*, 8 C. L. J., 305.

A purchaser after sale in execution of a decree but before the expiration of 30 days from the date of sale and before confirmation, is entitled to have the sale set aside under this rule, *Appaya Shetti v. Kunhat Behari*, 30 Mad., 214.

An *under-raiyat* in Bengal proper cannot after the passing of the Amending Act I of 1907 B. C. apply to have the sale set aside under this rule.

The question whether the purchaser of a portion of an *occupancy holding* is entitled to come in, under this rule to make a deposit, to have a sale held for its own arrears set aside, is one that comes under sec 47. An appeal and a second appeal lie; *Omar Ali Majhi v. Bussituddin Ahmed*, 7 C. L. J., 282.

When a decree is attached by two decree-holders and the sale under the attached decree is set aside under this rule, both the decree-holders are entitled to the deposit; *Upendra v. Hari Das*, 12 C. W. N., 800.

There is no right to recover money erroneously deposited under rule 89 by a third person, when his property was sold in execution of a decree against a stranger, *Kunja v. Bhupendra*, 12 C. W. N., 151.

This rule applies to a sale in East Bengal under Bengal Tenancy Act, *Ali v. Ramjan*, 13 C. W. N., 224; also to a sale under sec. 89 of the Transfer of Property Act. *Than Chand v. Jagannath*, 31 All., 346.

An order by revenue court on an application under this rule cannot be entertained by Civil Court. *Chhikouri v. Pir Baksh*, 31 All., 279.

A stranger paying in the name of judgment-debtor in virtue of a private contract to set aside sale under this rule can withdraw his money when the sale was made absolute on appeal; the decree-holder cannot attach the deposit as judgment-debtor's money. *Sobha v. Moheshwara*, 13 C. W. N., 100.

Auction purchaser is entitled to notice before sale set aside and contest the validity of the application for setting aside. *Kripali v. Pairoo* 11 C. L. J. 86.

Appeal.—An order refusing to accept a deposit under this rule is appealable under sec 47. cl (3) *Imtiaz Begum v. Dhamun Begum*, 29 All., 275.

But the auction purchaser cannot appeal if the judgment-debtor's application is allowed; *Anandi v. Ajuhia*, 30 All., 379.

An appeal lies from an order rejecting an application under this rule by the transferee of the judgment-debtor's interest after the Court sale; 17 M. L. J., 291.

On the appellate Court setting aside the order under this rule and confirming the sale, it is not open to the decree-holder, to attach the money deposited, as the property of the judgment-debtor, when on the findings, the money had been deposited in the name of the judgment-debtor by a third person, who was to have purchased the property, after the sale had been set aside; *Subba Ram Dass v. Moheswar Sarma*, 13 C. W. N., 100.

An appeal lies from an order under this rule when it also comes within sec 47. *Harihar v Ram* 11 Bom., L. R. 1113.

Rule 90. (311)

Who may apply:—Purchaser of an occupancy holding not transferable by custom or usage cannot apply to set aside a sale of the holding for arrears of rent *Prosanna v. Bama*, 13 C. W. N., 652; but a purchaser at an auction sale can do so on the ground of fraud. *Haradhan v. Grish* 13 C. W. N., 98

Irregularity:—The statement in the sale-proclamation of an inadequate value is not a material irregularity. The fact that processes were not served in each of the villages is not an infringement of this rule; *Moulvi Abdul Kasem v. Benode Lal Dhone*, 12 C. W. N., 758.

Sale at a place different from that fixed in sale-proclamation is not an irregularity to make the sale void. *Krishnaji v. Bomanji*, 33 Bom., 657.

Stay of sale:—By appellate courts is effective when the order is communicated and a sale before communication is valid and cannot be set aside; *Muthu v. Kuppusawmy*, 33 Mad., 74.

Fraud:—Gross under-statement of value can not amount to fraud if the property was sold at a fair value; *Tambala v. Monilal*, 1 Ind. cas., 246.

Waiver of fresh proclamation is not the waiver of objections about attachment and previous proclamation; nor does the waiver of objection as to inadequacy constitute a waiver of the right to object to the inadequacy as the result of fraud; *Dhanuk Dhari v. Nathuni*, 6 C. L. J., 62: 11 C. W. N., 848.

A combination among intending purchasers does not always amount to fraud. The test in each case, is what is the object; if the object be to obtain the property at a sacrifice by artifice, the combination is fraudulent; if the object be to make a fair bargain, it is not fraudulent; *Ambika v. Whitewell*, 6 C. L. J., 111.

When the parties agreed that if the judgment-debtors pay a certain sum to the decree-holder within one month, the execution sale shall be set aside; *held*, that the intention of the parties was that performance within the prescribed time was essential; *Harakh Sing v. Saheb Sing*, 6 C. L. J., 176

A question of jurisdiction cannot be raised in an application under this rule; *Behari Sing v. Makat Sing*, 3 A. L. J., 146.

Appeal—When the judgment-debtor seeks to set aside a sale on grounds which if valid can be advanced only under sec. 47—a second appeal lies; *Ramyad Sahu v. Bindeswari Kumar Upadhyaya*, 6 C. L. J., 102.

An application on the ground of material irregularity and collusion between the opposite party and the amin falls under this rule and sec. 47 and a second appeal lies, *Lachman v. Ram* 2 Ind cas., 983.

An order dismissing an application for default is appealable *Broja v. Moti* 14 C. W. N., 573.

Rule 91. (313)

This rule does not apply when the judgment debtor has saleable interest however small it may be. *Makhanchore v. Nishind*, 10 C. L. J. 492.

Rule 92 (312)

This rule does not apply to execution-proceedings under the Public Demands Recovery Act; *Girish v. Golam*, 3 C. L. J., 235 : 10 C. W. N. 327.

Suit to recover purchase money is maintainable after the sale is set aside under O XXI, R. 91, *Ramkumar v. Ram Gour*, 13 C. W. N. 1080.

An auction-purchaser may have equitable rights, arising out of his purchase, before the date of confirmation of the sale. A purchaser in execution of a money decree takes the property as it stood at the date of attachment; if in execution of a mortgage-decree, he takes the property as it stood on the date of the creation of the mortgage; *Bhawani Koer v. Mathura Prasad*, 7 C. L. J., 1.

Rule 93. (315)

There must be total failure of consideration, otherwise the purchaser will not be relieved, *Sumer Chand v. Wahid*, 3 A. L. J., 819.

Rule 94. (316)

A party not barred by section 47 is not affected by the grant of a sale certificate under this rule; *Chandramani v. Halijinnasa*, 9 C. L. J., 464.

Rule 95 (318)

An application under this rule would be barred if made after three years from the date of the certificate of sale *i. e.*, the date of confirmation; *Ranjit v. Baldeo*, 30 All., 390.

No appeal lies merely because the judgment debtor puts in an objection when the assignee of the decree-holder purchaser applies for an order under this rule; *Md. Mossruf v. Habi Mia*, 6 C. L. J., 749.

A suit under sec. 9 of the Specific Relief Act is maintainable by a tenant of the judgment-debtor dispossessed in execution of decree by a decree-holder-purchaser who took delivery under r. 95; *Muluk Patonil v. Bharat Chandra*, 12 C. W. N., 694.

A judgment debtor who was unsuccessful in an application under sec. 47 and O. XXI, R. 90 cannot resist auction purchaser's claim for possession. 6 A. L. J., 799.

No appeal lies from an order under this rule. *Mussammat Bhagwati v. Banwari* (F. B.) 31 All 82.

Rule 96. (319)

A decree-holder auction purchaser can apply under this rule and the previous one; *Mussammat Bhagwati v. Banwari* (F. B.) 31 All., 82.

An application under this rule is a step in aid of execution, *Prem v. Juvant* 13 C. W. N. 694.

Rule 97. (335)

Possession means not only tangible possession but constructive possession by receipt of rent; *Urajabala v. Gurudas*, 33 Cal., 487; 3 C. L. J., 293.

Dismissal of the application on the preliminary point of limitation has the same force as a decree *Baranagore v. Rajkumar* 13 C. W. N. 724.

Rule 99. (331, 335)

When a person is held entitled to possession of a share in a property after partition and the commissioner put him in possession of the property, resistance to such commissioner is a "resistance or obstruction" within the meaning of this rule; *Kali Kumar Mukherji v. Bramhanundo Mukerji*, 7 C. L. J., 98.

This rule applies when a party to a suit against whom no decree has been passed, obstructs; *Jathavedan v. Kunchu*, 30 Mad., 72.

It does not apply to an application by the decree-holder; a third party may apply under Rule 100; *Sukan* 15.

Rule 103 (331, 335)

This rule provides for a suit against persons in whose favour the order for possession was made and if the suit is brought in time against such persons the addition of other persons after time will not vitiate the suit; *Aiyam Chetti v. Poongavanam*, 18 M. L. J., 464.

If the application is withdrawn the limitation of one year for a suit does not apply; the test is whether there has been an enquiry by the court, *Sarat v. Tarini*, 34 Cal., 491; 11 C. W. N., 487. There must be an enquiry before an order is made under this rule, *Gourt v. Sita*, 14 C. W. N., 346.

Suit brought within one year from date of an order under this rule is not barred, *Gumbappa v. Srinivasa*, 7 M. L. T., 306.

ORDER XXII.

This order is not applicable to the power of the High court as to a suit pending in appeal to the Privy Council, *Jadunandan v. Ramjiban* 10 C. L. J., 331.

Rule 1. (361)

A suit by a Hindu mother for a share at a partition, among her sons under the Dayabhaga School, abates on her death; *Tripura v. Dakshina*, 5 C. L. J., 310; 11 C. W. N., 698.

When one of the plaintiffs respondents died and his heirs were not substituted in time, the appeal was dismissed for defect of parties; *Tarip v. Khotaja*, 10 C. W. N., 981.

A suit for personal injunction abates when the person against whom the suit is brought dies. *Joslam v. Sami*, 7 M. L. T., 195=5 Ind. Cas., 937.

Right to sue means right to bring a suit asserting a right to the same relief which the deceased plaintiff asserted at the time of his death. Right to obtain probate is distinct from right to obtain letters of administration. *Sarat v. Noni*, 36 Cal., 799.

Rule 2. (362)

Already parties:—If the representatives are already on the record this rule applies, and the limitation is 3 years, *Syamanand v. Raja Narain*, 4 C. L. J., 568; 11 C. W. N., 186.

ORDER XXVI.

Rule 7. (389).

Evidence taken on commission shall subject to Rule 8, form part of the record in the suit and any party is entitled to refer to such evidence as a matter of record; *Man Gobindo Chowdry v. Shashindra Chandra Chowdry*, 35 Cal., 28

The practice in Mofussil Courts using deposition of witness as evidence though not formally tendered is perfectly consistent; *Dhaniram v. Murli Lal*, 36 Cal., 566 = 13 C. W. N., 525.

Rule 8 (390).

Where the circumstances mentioned in the rule do not exist, the deposition need not be tendered in evidence *Dhaniram v. Murli Lal*, 36 Cal., 566 = 13 C. W. N., 525.

Rule 14. (390).

When after the preliminary decree plaintiff resisted the commissioner issued to prepare a plan, a fresh application by plaintiff to reissue commission should not be rejected and the previous decree set aside. *Masamunnisa v. Latifan*, 32 All., 319.

Issue of commission is not essential in every case; Court has discretion as to such order. *Krishnama v. Kuppamal*, 31 Mad., 540.

ORDER XXX.

Rule 3.

The words 'may direct' do not indicate express permission. *Akhoy v. Nagendra* 13 C. W. N., 490.

ORDER XXXI.

Rule 1. (437).

Mutualies are trustees and all of them should be brought on the record, *Syed Abdul Rab Chowdry v. Eggar*, 12 C. W. N., 160.

An order allowing a new trustee to be brought on record is in effect *disallowing objection to the continuance of the suit by the new trustee* and as such is appealable. *Suppiah v. M. Krishnarao*, 6 M. L. T., 240.

ORDER XXXII.

Rule 1. (440).

When a mother is allowed to act for her minor son it may be inferred she was appointed guardian *ad litem*, even if there be no formal order: it must be assumed the court did its duty. *Midnapore Zamindari Co. v. Gobindo*, 8 C. L. J., 31.

Rule 3. (443, 416).

Where there is a certificated guardian and yet a separate guardian *ad litem* is appointed it is a mere irregularity. *Midnapore Zemindari Co. v. Gobindo*, 8 C. L. J., 31.

Death of guardian ad litem having occurred pending appeal and judgment passed without a new guardian is a mere irregularity Ramdayal v Ajudhia, (1906) A. W. N., 40

Absence of *affidavit* does not render the proceedings illegal and void as against the minors as not being properly represented Munnoo v. Gholam (P. C.) 32 All., 287.

Rule 4 (1) (445).

Representation by a married woman or by one having adverse interest is no representation, Mussammat Rashidunnisa v Mussammat Ismail Khan, (P. C.) 13 C. W. N., 1182.

Rule 4 (2). (443, 440).

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Rule 7. (462).

Benefit.—The court should record an order that the compromise is for the benefit of the minor, Gobindaswami v. Alagiriswami, 29 Mad. 104.

The leave of the court must be obtained either expressly or in a manner not open to doubt, Manohar v. Jadunath, 33 f. A. 20: 28 All., 585; 4 C. L. J., 8; Krishen v. Romesh, 13 C. W. N., 163.

After decree: adjustment after decree also must have the sanction of the Court; Aruna v. Ramanathan, 29 Mad., 309.

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A person entitled to surplus sale proceeds amounting to more than 100 Rs, claiming to set aside the sale is a pauper if he has no other property; Fatma v. D. R. Umrigarh, 12 Bom. L. R., 102.

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Rule 1. (471).

Plaintiff giving two *kabuliyats* to two sets of landlords cannot bring an interpleader suit against the latter to settle the nature and extent of their right in the land. K. S. Bonnerjee v. Raj Chandra, 11 C. L. J., 577=14 C. W. N., 784.

Rule 5. (474).

A tenant can maintain an interpleader suit against a landlord and another person when the latter alleges that the landlord only acted as trustee in granting such lease, R. G. Orr v. Chidambaram, 33 Mad., 220.

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Rule 5 (483, 484).

This rule does not apply to the joint property of a partnership of which the judgment-debtor is a member. A receiver ought to be appointed in such cases, Damodar v. Panahal, 9 Bom. L. R., 540.

Attachment on insufficient ground enables the party aggrieved to demand general and special damages, *Palani v. Udayar* 32 Mad., 170.

This rule and the following one do not apply to divorce proceedings. *Phillips v. Phillips*, 37 Cal., 61.

Rule 8. (487).

An assignee of a decree which is attached before judgment in another Court may prefer a claim to the latter for withdrawal of the attachment and the Court ought to withdraw it. *Sadagopachariar v. Raghunatha* 33 Mad., 62.

Rule 9 (488)

Assignee of a decree which is attached before judgment by a third person, may present a claim to the attaching court, have the attachment withdrawn and then apply for execution. *Sadagopachariar v. Raghunatha* 33 Mad., 62.

Rule 11. (490)

Reattachment of property is not necessary after decree if it has been attached before. *Darpati v. Ramrathb*, 6 A. L. J., 703.

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Rule 1. (492)

Civil Court:—has no right to issue an injunction which would have the effect of staying proceedings in a *Criminal Court*. *Nawab v. Seth Doolichand*, 2 Ind. Cas., 266.

Decree by a *Revenue Court* when transferred for execution to a *Civil Court* should be treated as if the decree was passed by the latter and an injunction staying execution may be granted. *Ram v. Kumar*, 36 Cal., 252.

ORDER XL.

Rule 1. (503).

A receiver may be appointed even when no case of waste has been established on the ground that a co-owner is entirely excluded from possession and profits. *Ramji v. Sahigram*, 14 C. W. N., 248; *Srimati v. Shid-doyal*, 14 C. W. N., 252.

Appeal:—An order authorising a receiver appointed by the court to remove any person in possession of property is appealable. *Rowland v. John*, 36 Cal., 713.

ORDER XLI.

Rule 4. (544)

Decree:—not the decision or judgment appealed against. *Kalipada v. Moulal*, 9 C. L. J., 461; (appellate court can modify the decision even with respect to those not appealing). See also *Kishori v. Ramcharan*, 5 Ind. Cas., 388.

The appeal must be against the whole decree and not a part of it. *Sri Raja Venkata v. Sri Raja Malaraju*, 7 M. L. T., 296.

Rule 11. (551)

A dismissal under this rule is a decree and supersedes the decree appealed against; the court dismissing the appeal is the court competent to amend the decree of the lower court, *Asma v Ahmad*, 30 All., 290; 5 A. L. J., 584.

Discretion as to sending for record can not be limited; whether a judgment is in accordance with law can only be decided from circumstances of each case. *Pach v Bala*, 13 C. W. N., 1031.

Rule 17 (556)

When Pleader for appellant is unable to argue for want of instruction but does not withdraw, the appeal should not be dismissed for default. *Madan v. Gobardhan*, 2 Ind. Cas., 621.

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It is the duty of pleaders engaged to be present and to proceed with the appeal when called on for hearing *Shambhu v. Secretary of State for India*, 5 Ind. Cas., 120.

Rule 20 (559)

Respondents :—Persons may be added as respondents even after the period of limitation. *Judhistir v. Sonnu*, 1 Ind. Cas., 518; *Bhaneswar v. Ramkhelawan*, 12 C. L. J., 137.

Non-joinder :—In a suit for partition no relief can be given when all the co-sharers are not parties. *Sammanath v. Devasikamony*, 20 M. L. J., 364.

Rule 22. (561)

As soon as a cross objection is filed although unstamped and no one moved, the court can take notice of it and give costs; *Palani Kumarasawm v. Sudaya*, 18 M. L. J., 490.

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An appeal lies from an order of remand even after the suit has been decided in compliance with the order of remand, *Uman v. Jarbandhan* 5 A. L. J., 447 F. B; 30 All., 479.

An erroneous order of remand does not affect the jurisdiction of a court and can be cured by consent, *Baikunta Nath Dey v. Nabab Sulimulla Bahadur*, 6 C. L. J., 548.

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Remand order is illegal when it directs a new plan to be prepared, *Palni v. Rangiadass*, 32 Mad., 83.

Shutting out evidence is not disposing of a suit on a preliminary point and no remand order should be made but additional evidence taken in appellate court. *Kachi v. Vajjals*, 6 M. L. T., 273.

Rule 25 (566)

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Rule 27. (568)

Additional evidence:—may be taken only when there is defect; fresh evidence which has been discovered since should not be admitted without recording reasons for it, *Moniruddin v. Mochabin*, 2 Ind. Cas. 995; *Kachi v. Vajjala*, 6 M. L. T., 273.

Fresh evidence taken by appellate court without objection by parties can not be objected on appeal to the privy council, *Jagarnath v. Hanooman*, (P. C., 36 Cal., 833.

Rule 31. (574)

Second appeal:—A finding of fact on an important question not dealt with fully by lower appellate court may be reversed on second appeal as not complying with this rule. *Pertap v. Maigh* 36 Cal., 927; *Shaharoola v. Bangoo*, 13 C. W. N., 143.

A judgment of lower appellate court reversing that of first court not in accordance with this rule is a good ground for remand in second appeal. *Kuppasamy v. Seshadri*, 7 M. L. T., 120.

ORDER XLIII.

Rule 1. (588)

Every order in an execution proceeding need not be appealed against but may be challenged in an appeal from the final order. *Chandanbala v. Probodh*, 9 C. L. J., 251; 36 Cal., 422.

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ORDER XLV.

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High court has no jurisdiction to entertain an application for appointing receiver where special leave to appeal was granted by judicial committee after refusal by High Court. *Toga v. Bichitra*, 10 C. L. J., 326.

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A reversal on appeal of a case cognizable by a Small Cause Court but tried by the Munsiff on the original side must be set aside by High Court as having been passed without jurisdiction, *Collipara v. Kankipat*, (F. B.), 6 M. L. T., 121.

ORDER XLVII.

Rule 1. (623)

After Appellate court's decree first court can not review, *Biswambhar v. Sarup*, 1 Ind. Cas., 136.

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Appeal.—No Appeal lies against an order of review which is not in contravention to rules 2 and 4 of this order, *Golam v. Abdul*, 11 C. L. J., 27; 14 C. W. N., 244.

Subsequent filing of an appeal does not bar the previous application for review, but the power should be cautiously exercised. *Chenna v. Pedda*, (F. B.) 6 M. L. T., 155; see however, *Biswambhar v. Sarupa*, 1 Ind. Cas., 136.

Consent decree —Can be reviewed on the ground of fraud, misrepresentation etc, *Mussammat Golap v. Badsah Bahadoor*, 13 C. W. N., 1197.

Rule 7. (629)

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THE SECOND SCHEDULE.

(506) An award once made cannot be set aside because all the parties did not concur in the reference, *Lalmohan v. Surja*, 11 C. W. N., 1152.

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(508) (r) Omission to fix a time, is a mere irregularity. *Luchmandas v. Aprakash*, 30 I. A., 160.

(510) (1) (b) Having once selected one arbitrator a party cannot ask for the appointment of another, *Syamsundar v. Bhairon*, 3 A. L. J., 185.

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(518) Appeal lies from an order of amendment. *Jani v. Jani*, 2 Ind. Cas. 858.

(520) Court when invited to enforce an award is not bound by this rule and the following one. *Raicharan v. Amrita*, 11 C. L. J., 131.

(521) No appeal lies against an order setting aside an award under this paragraph, *Ganga v. Kura*, 28 All., 408.

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